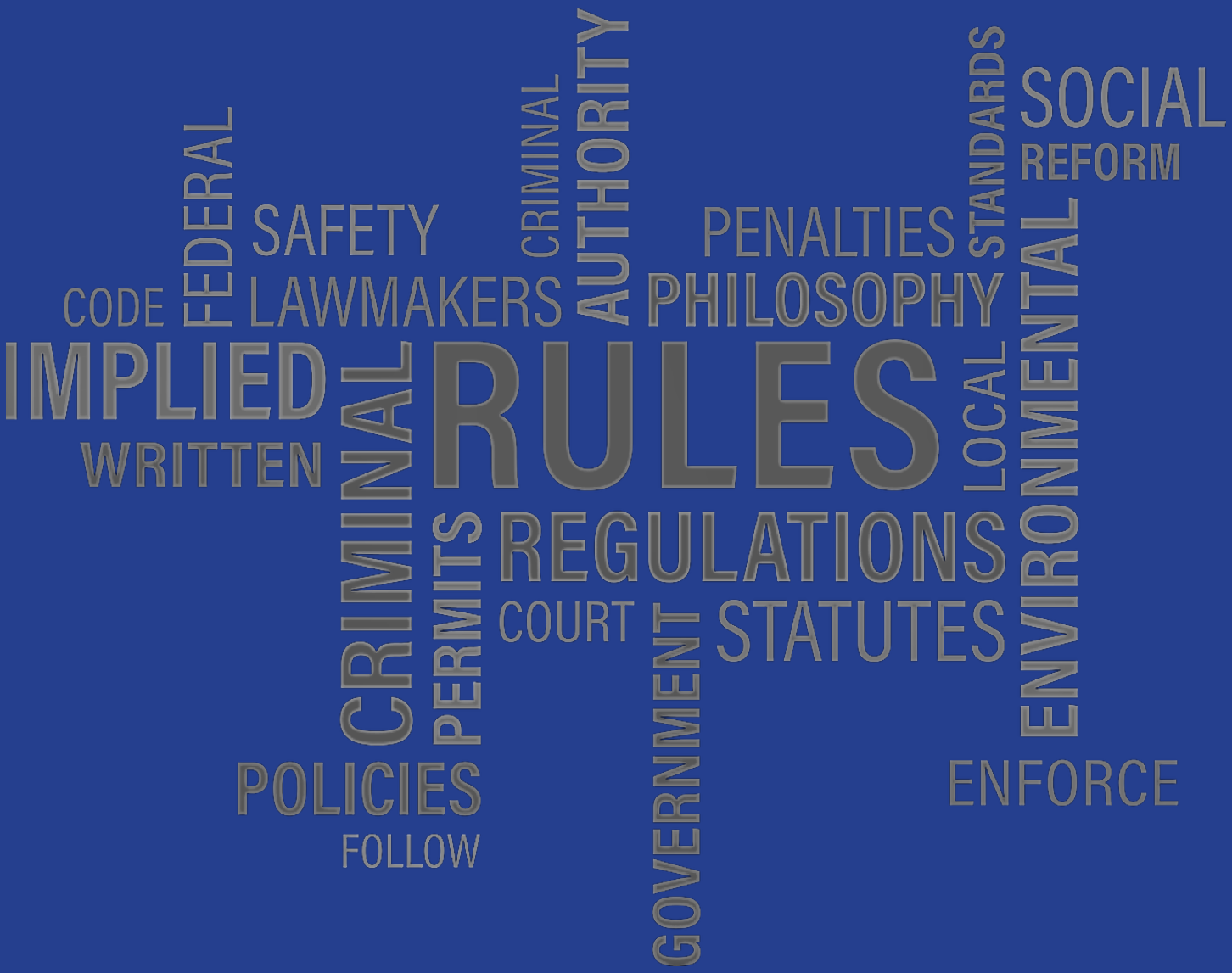
A GUIDE TO EFFECTIVE ENFORCEMENT

Investigating and Enforcing Code and Land Use Violations



NEW HAMPSHIRE MUNICIPAL ASSOCIATION
DRUMMOND WOODSUM, ATTORNEYS AT LAW

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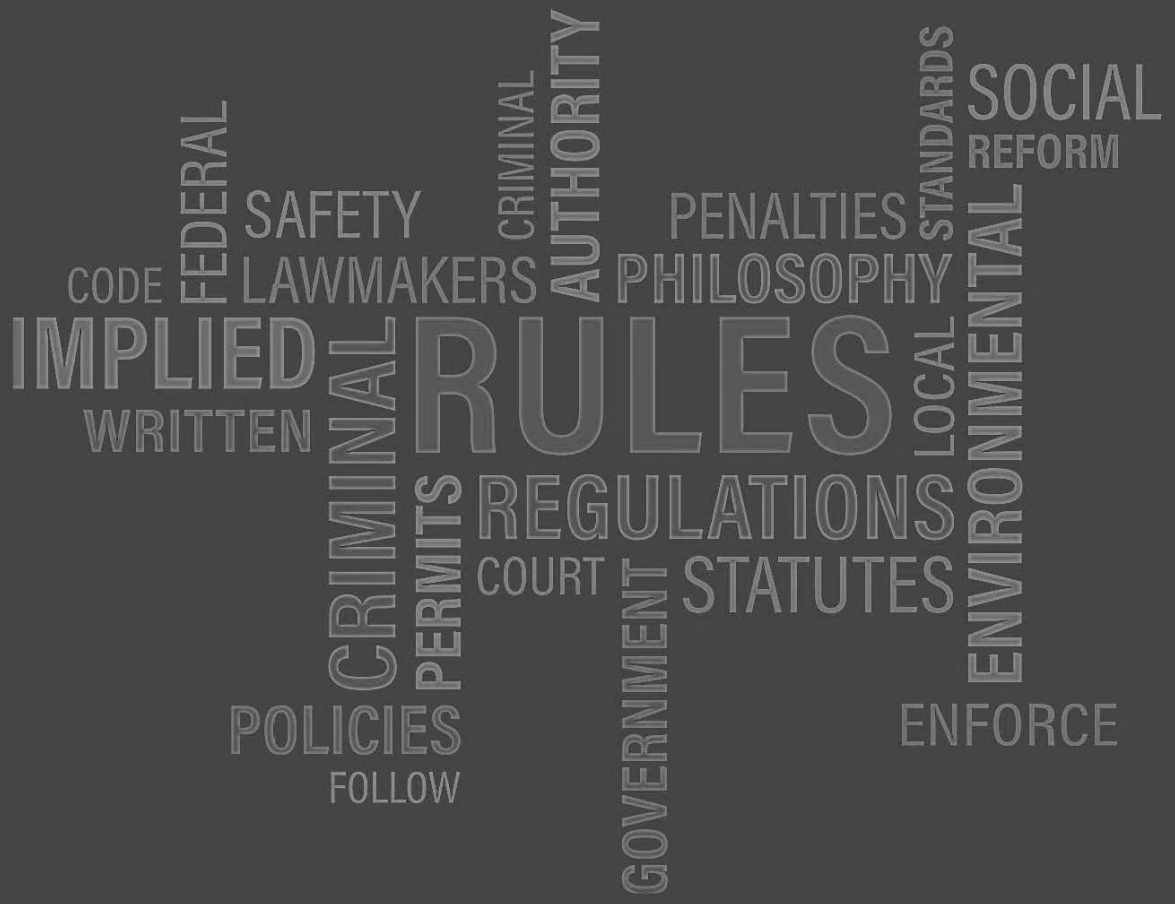

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— 2018 Edition —

Introduction

A variety of municipal officials are in a position to receive complaints about conditions on private property that may violate any number of state or local laws. The purpose of this book is to give those officials an overview of how to investigate and remedy potential violations.

Section One of this book, *Investigation and Remedying Land Use Violations*, walks you through the basic process, from receiving the initial notice of a potential violation to taking the violator to court and enforcing a court's order. Although much of Section One is focused on zoning ordinance violations and violations of land use board approvals, much of the guidance also applies to investigating and handling other types of unlawful conditions on property as well.

Section Two, *Beyond Zoning: Remedying Other Violations*, focuses on several particular areas that create enforcement issues: State building and fire code; junkyards; health, safety, and welfare issues; and excavations.

This book would not have been possible without the time and resources of DrummondWoodsum, particularly Attorney Matthew R. Serge. We hope the *Guide to Effective Enforcement* will become your handbook "in the field" to assist you in identifying, investigating, and enforcing violations in your municipality.

Stephen C. Buckley, Esq.

Margaret M.L. Byrnes, Esq.

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Part One: Investigating and Remedying Land Use Violations

CHAPTER ONE: *IS THERE A ZONING VIOLATION?*

I. Complaints

As one may suspect, before examining how to enforce the zoning ordinance in a particular matter, we must first determine whether a violation has occurred, or is continuing to occur. This will more often than not begin with a citizen/abutter complaint.

Citizen/abutter complaints are probably the most common way that a community receives notice of a possible zoning violation. Complaints can of course come in many forms (e.g. telephone call, personal visit to town hall, e-mail). If possible, the community should try to get any complaints in writing so that there is record that can be relied upon at a later date. The community could consider creating a simple complaint form that can be used to report potential violations. As early as the compliant stage you should be thinking about the question "what if this winds up in court?" Having written complaints will not only assist the community in court when establishing when violations were reported, but also to show that the Town was acting in good faith in pursuing a potential violation.

The other manner in which zoning violations are sometimes detected is when it is observed by a public official or employee during the course of day-to-day activities (e.g an employee driving into town hall or the highway agent working on a local road). As with citizen complaints, the official or employee who observes a possible violation should write down what it is he/she observed, and when the observation took place, and be as specific as possible.

Please note that generally a written complaint or report will be considered a "governmental record" for purposes of the New Hampshire Right to Know law (RSA chapter 91-A) and will be subject to disclosure. RSA 91-A:1-a, III (defining "governmental record"). Similarly, if the quorum of a board of selectmen or similar body meets to discuss a complaint, that meeting should be open to public under RSA 91-A:2. Until the complaint can be corroborated in some way, however, boards should avoid public discussions of the complaint. Rather, allow the designated code enforcement official or other agent to follow-up the complaint and, once corroborated or disproved, report back to the board of selectmen or similar body with findings.

II. Investigating the Potential Violation

After receiving the complaint or report concerning a potential zoning violation, the community is advised to carefully investigate the situation before taking action against the landowner. How the investigation proceeds depends on a number of factors, including the nature and location of the alleged violation. Depending upon whether or not the code enforcement official needs to immediately access the land where the alleged violation is occurring will determine how efficiently an inspection can occur. In preparation of a case, it is recommended that local officials keep written records of the times of any and all inspections, with detailed observations of the circumstances constituting the violation.

A. Is the violation visible from a public place?

Can the violation be observed from the public right of way? If so, then the code official should drive by the area for a preliminary examination and take photographs and otherwise document what can be observed from the public area.

Can the violation be seen from the air? Depending upon the nature of your case, aerial

photographs can come in handy in trying to establish a violation. Google Earth® and similar programs actually have satellite images of properties from different periods of time. It may also be possible for a code official to get a lift in a small aircraft to observe the property from the air. This information is also very helpful if the community is faced with a defense that the property use is grandfathered because you can show the "before and after" shots of the property.

B. What if the violation cannot be observed from the public way?

If it turns out that the alleged violation is not visible from the public way, the official should first seek permission to observe the alleged violation(s) from an abutting property, assuming it would be capable of observation from that vantage point. Often the abutter is the one filing the complaint so he or she is more than happy to allow the official to make observations from the property.

If the official needs to enter onto the alleged violator's property to inspect, the official should first seek consent from that landowner. "Our State Constitution protects all people, their papers, their possessions and their homes from unreasonable searches and seizures. We have recognized that an expectation of privacy plays a role in the protection afforded under Part I, Article 19 of the New Hampshire Constitution." *State v. Orde*, 161 N.H. 260, 264 (2010). "A voluntary consent free of duress and coercion is a recognized exception to the need of both a warrant and probable cause." *State v. Socci*, 166 N.H. 464, 473 (2014). If consent is given freely and voluntarily, be sure to get the consent in writing to protect the possible court record.

If the landowner will not provide consent, the code enforcement official will need to apply to the court for an administrative inspection warrant under RSA chapter 595-B. RSA 595-B:1 defines an "administrative inspection warrant" as

> An inspection warrant shall be a written order in the name of the state, signed by a justice, associate justice or special justice of any municipal, district or superior court, directed to an official or employee of a state agency, municipality, or other political subdivision, commanding him to conduct any inspection, testing or sampling required or specifically authorized by state law or administrative rule, or municipal ordinance, code or regulation.

RSA 595-B:2 sets forth the requirements that must be satisfied in order to receive an administrative inspection warrant. The Court will not issue a warrant unless the official can demonstrate "probable cause" that a nuisance is present, supported by an affidavit. Under RSA 595-B:2, II, "probable cause" exists for purposes of an administrative inspection warrant if the inspection official is conducting a "routine inspection," and such a lesser standard of "probable cause" is constitutionally permissible. *See Davy v. Dover,* 111 N.H. 1, 3 (1971) (citing *Camera v. Municipal Court of San Francisco*, 387 U.S. 523, 532 (1967)). Nevertheless it is recommended that if the true reason for the inspection is a belief that a violation exists, the official should meet the same standard as for search warrants, since any lesser standard may be constitutionally suspect. *See State v. Turmelle*, 132 N.H. 148 (1989). DO NOT enter upon the landowner's property for purposes of inspection without consent, administrative warrant or court order. If someone enters the property without permission he or she could be charged with trespassing, and any evidence obtained during that inspection could be disregarded.

The affidavit accompanying the warrant application must describe the place, dwelling, structure, premises, vehicle or records to be inspected and the purpose for your inspection. In addition, if testing or sampling is requested, the affidavit shall describe the time and manner of such testing or sampling. Finally, you must state in your affidavit that you sought consent to inspect the premises but were refused, or that facts or circumstances exist that reasonably justify your failure to seek such consent.

Assuming an administrative warrant is issued, the warrant must be acted upon and returned to the court no later than seven (7) days from the date of its issuance, unless extended or renewed by the court. RSA 595-B:4. When executing the warrant, please keep in mind that the official cannot inspect or conduct testing between 6:00 p.m. of any day and 8:00 a.m. of the succeeding day, unless specifically authorized by the person issuing the warrant after demonstrating that such act is necessary to the law, ordinance or regulation being enforced. Further, the use of force to gain entry to a property is not permitted unless the person issuing the warrant expressly authorizes the use of force. The use of force may be allowed if you can show that a probable violation of a state law or rule, or municipal ordinance, code, or regulation, would present an immediate threat to public health or safety, or when facts are shown which establish that reasonable attempts to serve a previous warrant have been unsuccessful. RSA 595-B:5.

When the warrant is executed, you are permitted to have with you a police officer or other law enforcement official from the sheriff's department. RSA 595-B:5. It is advisable to have a police officer accompany the code official who is executing the warrant, as this provides not only protection for the official, but also a witness to what transpires during the inspection. If the Administrative Inspection Warrant is to be used, the official should recognize that there is no standard form for such a warrant, and that it will have to be "custom-designed" to specify the exact scope of the allowed inspection (RSA 595-B:3).

During any site inspection, it is very important that the code official document his or her observations through both photographs/video recording, and a written report. If the violation involves something that can be quantified such as a building setback encroachment or a junkyard, the official should write down the measurements, or identify the type and location of junk items etc. This information will be necessary for later court action and to help the official refresh his recollection when he is testifying at some point about the violations.

CHAPTER TWO: *IT APPEARS THERE IS A ZONING VIOLATION. NOW WHAT?*

I. Remedies

It goes without saying that if the community has discovered what appears to be a zoning or any other regulatory violation, the first call should be to that community's attorney to discuss the situation and confirm that there is a good basis for the pursuing the violation. Assuming that the violation is credible, the landowner faces what could be severe consequences. Below are the primary statutes that address the various remedies available to a community with respect to a zoning violation.

A. Injunctive Relief (RSA 676:15)

Often one of the remedies sought is to obtain an order from a court requiring the landowner to cease a particular violation, and perhaps take certain steps to correct the violation (e.g. removing junk from property, removing certain structures from a setback). The community's ability to seek such relief is found in RSA 676:15, which provides:

> In case any building or structure or part thereof is or is proposed to be erected, constructed, altered, or reconstructed, or any land is or is proposed to be used in violation of this title or of any local ordinance, code, or regulation adopted under this title, or of any provision or specification of an application, plat, or plan approved by, or any requirement or condition of a permit or decision issued by, any local administrator or land use board acting under the authority of this title, the building inspector or other official with authority to enforce the provisions of this title or any local ordinance, code, or regulation adopted under this title, or the owner of any adjacent or neighboring property who would be specially damaged by such violation may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove such unlawful erection, construction, alteration, or reconstruction.

As will be discussed below, if a community chooses to seek relief under this statute, it will need to file its action in superior court since that is the body with broad powers of equity jurisdiction. *See Blagbrough Family Realty Trust v. A & T Forest Products, Inc.*, 155 N.H. 29, 46 (2007). Importantly, RSA 676:15 is very broad and authorizes a community to seek relief for not only zoning ordinance violations, but also violations of other rules and regulations, as well as the terms and conditions of an approved plat or permit. Further, an abutting property owner who can show that he or she would be specially damaged by the violation may also file suit under RSA 676:15.

B. Civil Fines and Penalties (RSA 676:17, I)

In addition to seeking equitable relief in the form of an injunction, the community may also seek civil fines for the violation under RSA 676:17, I. This statute, in part, states:

> Any person who violates any of the provisions of this title, or any local ordinance, code, or regulation adopted under this title, or any provision or specification of any application, plat, or plan approved by, or any requirement or condition of a permit or decision issued by, any local administrator or land use board acting under the authority of this title shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person; and shall be subject to a civil penalty of $275 for the first offense, and $550 for subsequent offenses, for each day that such violation is found to continue after the conviction date or after the date on which the violator receives written notice from the municipality that the violator is in violation, whichever is earlier. Each day that a violation continues shall be a separate offense.

Please note that the court will interpret the clause "shall be subject to" as granting the trial court the authority to impose the statutory penalties set forth in RSA 676:17, I (b) rather than the obligation to impose such penalties. Thus, RSA 676:17, I(b) grants the trial court the authority to determine whether or not to impose a penalty and the amount of the penalty should it choose to impose one. *City of Rochester v. Corpening*, 153 N.H. 571, 575 (2006). Further, a word of caution: Despite the statutory penalty, many times zoning ordinances contain a penalty provision that sets forth a monetary fine that is lower than that allowed by RSA 676:17, I. Communities with those provisions are encouraged to amend their ordinances to coincide with the statute because they will be bound by the penalty amounts set forth in their zoning ordinance.

C. Legal Fees (RSA 676:17, II)

In addition to the potential recovery of civil fines, the community will also receive an award of attorney's fees and costs if it is successful in its zoning enforcement action. RSA 676:17, II provides:

> In any legal action brought by a municipality to enforce, by way of injunctive relief as provided by RSA 676:15 or otherwise, any local ordinance, code or regulation adopted under this title, or to enforce any planning board, zoning board of adjustment or building code board of appeals decision made pursuant to this title, or to seek the payment of any fine levied under paragraph I, the municipality shall recover its costs and reasonable attorney's fees actually expended in pursuing the legal action if it is found to be a prevailing party in the action. For the purposes of this paragraph, recoverable costs shall include all out-of-pocket expenses actually incurred, including but not limited to, inspection fees, expert fees and investigatory expenses.

Unlike civil fines, attorney's fees are automatically awarded if the community is successful in enforcing its zoning ordinance. *Bennett v. Town of Hampstead*, 157 N.H. 477 (2008) ("RSA 676:17, II now mandates that in any legal action brought by a municipality to enforce an ordinance, code, regulation, or zoning board decision in which the municipality "is found to be a prevailing party in the action, the municipality is entitled to recover reasonable attorney's fees actually expended in pursuing that action."). That said, the amount of fees awarded is still discretionary as only reasonable fees and costs are recoverable. Typically

what will occur is that the community's attorney will submit an affidavit of attorney's fees explaining the legal costs incurred in the case, and attach a copy of the invoices that were submitted to the community to validate the expenses.

II. Informal Enforcement

Assuming that the violation is not an emergency situation (i.e. something that poses an imminent threat to the public safety, health or welfare), the community should provide the landowner with at least one notice of the problem, in the form of a warning, and provide an opportunity to cure prior to assessing fines and threatening to file a lawsuit. This step is up to the discretion of the local official, depending on the seriousness of the violation, and how likely the violator is to respond. It may include telephone calls, personal visits, etc. The enforcement official should use this process to lay the groundwork for a possible prosecution by: (1) developing a complete, good faith response to any defenses the alleged violator raises, and (2) keeping careful written records of any conversations or correspondence with the alleged violator for use as admissions or proof of facts.

If informal discussions with the landowner do not solve the problem, the code enforcement official should send a written notice of warning, informing the landowner of the particular violation and what needs to be done to remedy the problem. A reasonable period of time should also be given for the landowner to cure. Although the letter should not assess fines, it should inform the landowner of the possibility that fines will begin to accrue under RSA 676:17 should the violation not be cured in a timely manner.

As with any formal notices, the community should send its letter certified return receipt requested and first class. The first class mailing is used because people frequently will not sign for certified letters, which can jeopardize notice. If a first class letter does not get returned for a wrong address it is presumptive evidence that the landowner received notice of the violation. *See In re City of Concord*, 161 N.H. 169, 173-74 (2010). The key here is that notice, reasonably calculated to reach the defendant landowner, is provided concerning the violation, and the landowner is given the opportunity to resolve the problem. *See id*.

If the landowner, despite receiving a warning of the zoning violation, elects not to cure the problem and come into compliance, the community should then send a second notice that formally finds the landowner in violation of the ordinance, and assesses civil fines running from the date of the letter (remember that under RSA 676:17, I each day a violation continues is considered a separate offense and subject to a larger fine). Under RSA 676:17, I (b) the potential for a civil penalty begins to accrue "after the day on which the violator receives written notice from the municipality that he is in violation..." As with the first "warning letter" this notice should be sent via certified and first class mail. If this type of service does not work, personal delivery may have to be made, and proved. Further, depending upon the court that the community chooses to utilize for prosecuting the lawsuit, this second letter can be captioned as a *Cease and Desist* order or *Notice of Violation*. It is recommended that in order to avoid confusion, the term "Cease and Desist Order" should not be used on this formal unless the procedure under RSA 676:17-a is intended to be used (See Chapter Three, Section I, below). However, the use of this term does not constitute a legal defect.

III. Administrative Enforcement of Ordinances (RSA 31:39-c)

Two lesser-known options for enforcing local ordinances can be found at RSA 31:39-c and RSA 31:39-d. Both these statutes are designed to assist municipalities in enforcing their

regulations efficiently with minimal procedural hurdles.

RSA 31:39-c, entitled "Administrative Enforcement of Ordinances" provides:

> Notwithstanding any other provision of law, a town may use the following provisions in the enforcement of its ordinances and regulations:
>
> I. Any town may establish, by ordinance adopted by the legislative body, a system for the administrative enforcement of violations of any municipal code, ordinance, bylaw, or regulation and for the collection of penalties, to be used prior to the service of a formal summons and complaint. Such a system may be administered by a police department or other municipal agency. The system may include opportunities for persons who do not wish to contest violations to pay such penalties by mail. The system may also provide for a schedule of
> enhanced penalties the longer such penalties remain unpaid; provided, however, that the penalty for any separate offense shall in no case exceed the maximum penalty for a violation as set forth in RSA 31:39, III.
>
> II. A written notice of violation containing a description of the offense and any applicable schedule of penalties, delivered in person or by first-class mail to the last-known address of the offender, shall be deemed adequate service of process for purposes of any administrative enforcement system established under paragraph I.
>
> III. If the administrative enforcement system established under paragraph I is unsuccessful at resolving alleged violations, or in the case of a town that has not established such a system, a summons may be issued as otherwise provided by law, including use of the procedure for plea by mail set forth in RSA 31:39-d.

Importantly, this enforcement tool cannot be utilized until it is first adopted by the local legislative body at town meeting. Once adopted, this system allows for what would hopefully be a fairly straightforward enforcement action where it is believed the violator will concede the violation and pay the requisite fine. Indeed, many municipalities already use this method without realizing it as they often will send a landowner a letter captioned "notice of violation" or similar title, and in that letter the municipality will explain the violation(s) and assess a monetary penalty, and also warn that failure to cure the violation and pay the penalty will result in formal legal action. Regardless, if a municipality intends to utilize a local enforcement system, it is advised to formally adopt RSA 31:39-c in order to avoid a later defense that the municipality's actions are invalid.

IV. Administrative Appeals to the Zoning Board of Adjustment

The landowner does have the right to file an administrative appeal with the local Zoning Board of Adjustment to challenge any "administrative decision" interpreting and enforcing the zoning ordinance. *See* RSA 676:5.

> I. Appeals to the board of adjustment concerning any matter within the board's powers as set forth in RSA 674:33 may be taken by any

person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

II. For the purposes of this section:

(a) The "administrative officer'' means any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility.

(b) A "decision of the administrative officer'' includes any decision involving construction, interpretation or application of the terms of the ordinance. It does not include a discretionary decision to commence formal or informal enforcement proceedings, but does include any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings.

In cases where the notice of violation constitutes a "decision of the administrative officer" which can be appealed to the Board of Adjustment under RSA 676:5, it is recommended that the notice apprise the alleged violator of such right to appeal, and of the procedure and amount of time, under local rules, within which he or she can make such an appeal. The omission of such information does not constitute a defect in the Notice (at least with respect to fines under RSA 676:17). Nevertheless the fact that a defendant has been given such information may later help to demonstrate the willfulness of the violation. Regardless, if such an administrative appeal is not made within the time provided by local rules adopted by the zoning board of adjustment or building code board of appeals under RSA 676:17, it cannot be made later (for example after the complaint is filed with the Court) in an attempt to challenge the official's interpretation and application of the zoning ordinance. *See Daniel v. B & J Realty*, 134 N.H. 174 (1991).

CHAPTER THREE: *TIME FOR COURT, BUT WHERE TO FILE?*

So the landowner (now a defendant) has failed to comply with the zoning ordinance after the community's attempts at informal enforcement. At this point the viable option is to head to court. The question remains, however, which court the community should use. As stated above, the community has options when it comes to selecting which court to file its zoning enforcement case.

Most local code or land use enforcement actions can be brought in either the circuit court-district division or the superior court. When choosing which court is the best option, the community should consider these three questions:

- **What type of relief does the community seek?**

  The main advantage of the superior court is the judge's broad powers of equity, including the granting of restraining orders and injunctive relief (remember RSA 676:15). The circuit court has no such power.

- **How complex are the facts?**

  The main advantage of the circuit court is its ready availability, and the likely quicker disposition of a case. Thus, factually straightforward violations (i.e. a motor home is being stored within a setback) should be commenced in the district court. On the other hand, for cases involving complex claims of grandfathered rights, the legality of an ordinance, or other esoteric issues that will involve lengthy proof, the superior court is more appropriate.

- **How much does the community want to spend to prosecute the case?**

  Another advantage of the circuit court, as set forth below, is that a code enforcement official may, if properly prepared, prosecute a case without the assistance of the municipal attorney. Of course, acting as both prosecutor and witness can be difficult; especially if there will be testimony of prior troubling encounters with the defendant. Such circumstances may tilt the decision in favor of using assistance of counsel and/or choosing the superior court, where there will probably be more time allotted.

I. The Circuit Court-District Division Route (RSA 676:17-a)

The types of regulations enforceable under RSA 676:17-a include zoning ordinances, building codes, historic district ordinances, excavation regulations by virtue of RSA 155-E:10, as well as "any provision or specification of any application, plat, or plan approved, by, or any requirement or condition of a permit or decision issued by any local administrator or land use board" acting under the planning, zoning, building code, subdivision, site plan or historic district statutes. Choosing the circuit court route means that the community will precipitate its action with issuing a formal Cease and Desist order under RSA 676:17-a.

A. The Formal Cease and Desist Order (RSA 676:17-a).

1. The Contents

If the community elects to file a Cease and Desist order with the district court, the complaint must contain the following elements:

(a) The precise regulation, provision, specification or condition which is being violated.

(b) The facts constituting the violation, including the date of any inspection from which these facts were ascertained.

(c) The corrective action required, including a reasonable time within which such action shall be taken.

(d) A statement that a motion for summary enforcement of the order shall be made to the court of the district in which the property is situated unless such corrective action is taken within the time provided, or unless an answer is filed within 20 days, as provided in paragraph V.

(e) A statement that failure to either take the corrective action, or to file an answer, may result in corrective action being taken by the municipality, and that if this occurs the municipality's costs shall constitute a lien against the real estate, enforceable in the same manner as real estate taxes, including possible loss of the property if not paid.

Other important aspects of the cease and desist process are:

- The order shall be served upon the record owner of the property or the record owner's agent, and upon the person to whom taxes are assessed for the property, if other than the owner, and upon any occupying tenant of the property, and upon any other person known by the enforcing officer to exercise control over the premises in violation, and upon all persons holding mortgages upon such property as recorded in the office of the register of deeds, in the same manner provided for service of a summons in a civil action in district court. Personal service may be made by a sheriff, deputy sheriff, local police officer, or constable. If the owner is unknown or cannot be found, the order shall be served by posting it upon the property and by 4 weeks' publication in a newspaper in general circulation in the municipality.

- A copy of the cease and desist order with proof of service shall be filed with clerk of the district court of the district in which the property is located not fewer than 5 days prior to the filing of a motion to enforce (see below).

- The party accused of violating the zoning ordinance has 20 days after the date of service to serve an answer in the manner provided for the service of an answer in a civil action, specifically denying such facts in the order as are in dispute.

- If no answer is served, the enforcement official may file a motion with the court for the enforcement of the order. If such a motion is made the court may, upon the presentation of such evidence as it may require, affirm or modify the order and enter judgment accordingly, fixing a time after which the governing body may proceed with the enforcement of the order. The clerk of the court shall mail a copy of the judgment to all persons upon whom the original order was served.

- If an answer is filed and served in accordance with the rules, a trial will be held in the district court. If the order is sustained following trial, the court shall enter judgment and shall fix a time within which the corrective action shall be taken, in compliance with the order as originally filed, or as modified by the court. If the order is not sustained, it shall be annulled and set aside. [NOTE: If it appears to the court that the order was frivolous, was commenced in bad faith, or was not based upon information and belief formed after reasonable inquiry or was not well-grounded in fact, then the court shall order the defendant's costs and reasonable attorney's fees to be paid by the municipality.]

- A party aggrieved by the judgment of the district court may appeal, within 15 days after the rendering of such judgment, to the superior court.

2. Recovering Expenses

RSA 676:17-a provides a mechanism for the community to recover not only its attorney's fees and court costs, but also other expenses incurred in carrying out the enforcement of the zoning ordinance. Specifically, RSA 676:17-a, IX states:

> The municipality shall keep an accurate account of the expenses incurred in carrying out the order and of all other expenses in connection with its enforcement, including but not limited to filing fees, service fees, publication fees, the expense of searching the registry of deeds to identify mortgages, witness and expert fees, attorney's fees and traveling expenses. The court shall examine, correct if necessary, and allow the expense account. The municipal governing body, by majority vote, may commit the expense account to the collector of taxes, in which case the mayor, as defined by RSA 672:9, shall direct the expense account, together with a warrant under the mayor's hand and seal, to the municipal tax collector, requiring the tax collector to collect the same from the person to whom real estate taxes are assessed for the premises upon which such corrective action was taken, and

to pay the amount so collected to the municipal treasurer. Within 30 days after the receipt of such warrant, the collector shall send a bill as provided in RSA 76:11. Interest as provided in RSA 76:13 shall be charged on any amount not paid within 30 days after the bill is mailed. The collector shall have the same rights and remedies as in the collection of taxes, as provided in RSA 80.

Accordingly, the investigating official should keep detailed notes of his or her time and expenses incurred in investigating and prosecuting a zoning enforcement matter since the district court has the authority to permit the recovery of those costs.

B. Local Ordinance Citations and Pleas by Mail

If local enforcement under RSA 31:39-c proves unsuccessful, but the municipality is not interested in pursuing a formal superior court action, it may use the procedure set forth in RSA 31:39-d to issue a local ordinance citation by mail. This statutes provides:

> In addition to any other enforcement procedure authorized by law, and regardless of whether a town has adopted an administrative enforcement procedure under RSA 31:39-c, a local official with authority to prosecute an offense under any municipal code, ordinance, bylaw, or regulation, if such offense is classified as a violation under applicable law, may issue and serve upon the defendant, in addition to a summons to appear in the district court, a local ordinance citation as set forth in this section. The defendant receiving such a citation may plead guilty or nolo contendere by mail by entering that plea as provided herein. If such a plea is accepted by the district court and the prescribed fine is paid with the plea by mail, the defendant shall not be required to appear personally or by counsel; otherwise the defendant shall appear as directed by the court. The following procedure shall be used:
>
> I. Notwithstanding any other provision of law, a complaint and summons may be served upon the defendant by postpaid certified mail, return receipt requested. Return receipt showing that the defendant has received the complaint and summons shall constitute an essential part of the service. If service cannot be effected by certified mail, then the court may direct that service on the defendant be completed as in other violation complaints.
>
> II. The local ordinance citation shall contain:
>
> (a) The caption: "Local Ordinance Citation, Town (City) of _____".
>
> (b) The name of the offender, and address if known to the prosecuting official.
>
> (c) The code, ordinance, bylaw, or regulation the offender is charged with violating.
>
> (d) The act or circumstances constituting the violation.
>
> (e) The place of the violation.
>
> (f) The date, if any, upon which the offender received written notice of the violation by the municipality.
>
> (g) The time and date, if any, upon which any further violation or continuing violation was witnessed subsequent to such written notice.
>
> (h) The amount of the penalty that is payable by the offender. If the offense is a continuing one for which a penalty is assessed for each day the offense

continues, the amount of the penalty shall be based on the number of days the violation has continued since the time notice was given to the offender, up to a maximum of 10 days' violation charged in one citation.

(i) Instructions informing the defendant that the defendant may answer the citation by mail or may personally appear in court upon the date on the summons, and instructing the defendant how to enter a plea by mail, together with either the amount of the penalty specified in the citation, or a request for a trial.

(j) The address of the clerk of the district court where the plea by mail may be entered.

(k) A warning to the defendant that failure to respond to the citation on or before the date on the summons may result in the defendant's arrest as provided in paragraph V.

(l) The signature of the prosecuting official.

III. Defendants who are issued a summons and local ordinance citation and who wish to plead guilty or nolo contendere shall enter their plea on the summons and return it with payment of the civil penalty, as set forth in the citation, to the clerk of the court prior to the arraignment date, or shall appear in court on the date of arraignment.

IV. Civil penalties collected by the district court under this section shall be remitted to the municipality issuing the citation. Whenever a defendant (a) does not enter a plea by mail prior to the arraignment day and does not appear personally or by counsel on or before that date or move for a continuance; or (b) otherwise fails to appear for a scheduled court appearance in connection with a summons for any offense, the defendant shall be defaulted and the court shall determine what the civil penalty would be upon a plea of guilty or nolo contendere and shall impose an administrative processing fee in addition to the civil penalty. Such fee shall be the same as the administrative processing fee under RSA 502-A:19-b, and shall be retained by the court for the benefit of the state.

V. The court may, in its discretion, issue a bench warrant for the arrest of any defendant who:

(a) Is defaulted in accordance with the provisions of paragraph IV of this section;

(b) Fails to pay a fine or other penalty imposed in connection with a conviction for a violation of a local code, ordinance, bylaw, or regulation which a court has determined the defendant is able to pay, or issues a bad check in payment of a fine or other penalty; or

(c) Fails to comply with a similar order on any matter within the court's discretion.

VI. For cause, the court in its discretion may refuse to accept a plea by mail and may impose a fine or penalty other than that stated in the local ordinance citation. The court may order the defendant to appear personally in court for the disposition of the defendant's case.

VII. The prosecuting official may serve additional local ordinance citations, without giving additional written notice or appeal opportunity under paragraph I, if the facts or circumstances constituting the violation continue beyond the date or dates of any prior citation. A plea of guilty or nolo contendere to the prior citation shall not affect the rights of the defendant with respect to a subsequent citation.

VIII. Forms and rules for the local ordinance citation and summons shall be developed and adopted by the New Hampshire supreme court.

IX. This section is not intended in any way to abrogate other enforcement actions or remedies in the district or superior court, nor to require written notice as a prerequisite to other types of actions or remedies for violations of local codes, ordinances, bylaws, or regulations.

IX-a. For any offense that is subject to enforcement under RSA 676:17, a person who fails to respond to a citation under this section within the time stated in the citation shall be subject to the subsequent offense penalties of RSA 676:17.

X. This section shall not apply to violations of the New Hampshire building code as defined in RSA 155-A:1, IV, or to motor vehicle offenses under title XXI or any local law enacted thereunder.

RSA 31:39-d is designed to create an efficient way to prosecute local ordinance violations, but still involving the district court in the process. It is important to recognize also that this statute is intended to address those regulatory offenses labeled as violations, under RSA 651:2 of the criminal code. This is why the statute goes on to discuss arraignment and conviction. Typically then, these offenses will be pursued by a local police prosecutor. This is distinct from the formal cease and desist process under RSA 676:17-a. 15 P. Loughlin, *New Hampshire Practice, Land Use Planning and Zoning*, §7.05 (2010). "The citation process may be more attractive to municipalities in that it is a cost-effective way to prosecute certain violations without involving town counsel or starting a lengthy superior court action." *Id*.

II. The Superior Court Route

A. The Verified Petition

Unlike the strict statutory components of RSA 676:17-a, a petition filed in superior court does not have to follow any specific format. That said, it should be considered standard to incorporate certain basic elements into a superior court petition:

- Identify the parties involved, including addresses
- Identify the property by physical address (and map and lot number, if possible)
- State all of the relevant facts that form the basis for the alleged violation
- Explain the specific provisions of the zoning ordinance (or other regulations)
- Set out the specific requests for relief sought (as will be discussed in detail toward the conclusion of this section, the community is advised to set out all forms of relief that it seeks in its initial petition. This not only preserves the requests for trial purposes, but it also puts the defendant on warning of

what exactly the community is looking to gain from the lawsuit).

Typically, a petition filed in superior court will be prepared by the community's attorney, but it should normally be "verified" in that the local code official should be signing the petition and verifying that all of the facts set forth in the petition are true and accurate to the best of his/her belief. In addition, the community may, but is not required to, attach exhibits to the petition such as photographs, tax cards, and correspondence.

B. Temporary Relief

One of the more important distinctions between district court and superior court prosecution is that the latter can grant temporary equitable relief. This is usually in the form of a temporary injunction / restraining order to prevent the defendant from continuing to violate the ordinance during the pendency of the case. By way of example, a typical temporary order would be to prevent a defendant from continuing to build a structure into a setback, or possibly prevent a defendant from bringing additional junk items to a property.

In addition to obtaining the temporary injunction / restraining order, the community can also obtain a court order allowing a thorough inspection of the defendant's property, which is very helpful for preparing for an eventual trial.

Finally, under RSA 676:17,

> The superior court may, upon a petition filed by a municipality and after notice and a preliminary hearing as in the case of prejudgment attachments under RSA 511-A, require an alleged violator to post a bond with the court to secure payment of any penalty or remedy or the performance of any injunctive relief which may be ordered or both. At the hearing, the burden shall be on the municipality to show that there is a strong likelihood that it will prevail on the merits, that the penalties or remedies sought are reasonably likely to be awarded by the court in an amount consistent with the bond sought, and that the bond represents the amount of the projected expense of compliance with the injunctive relief sought.

Although the statute calls for the court to require the posting of a bond, it is recommended that the community give the court the option of granting a lien against the defendant's real estate as an alternate form of security. The courts are more likely to grant liens than require posting of bonds, in my experience. Assuming the court grants a lien, the community's attorney can assist with preparing a recording the lien.

If the community requests temporary relief as described above, the court will expedite the hearing, and will usually schedule something within a month or so of the petition filing. At the hearing, the community should present the court with any exhibits it believes will support its claims, and it should also provide the court with a proposed order outlining the temporary relief sought.

C. Response to the Petition: Defenses

Like district court actions, superior court cases allow for the defendant to file an answer to the verified petition. The answer must comply with the New Hampshire Superior Court Rules and be filed within 30 days of service. *See Super. Ct. R.* 9 (a). Often a defendant (normally acting through legal counsel) will raise one or more defenses to the zoning

enforcement claim. Below is a list of the more common defenses the community will likely encounter in a zoning enforcement matter:

1. Grandfathered / Non-Conforming Uses

"Generally, the right to continue a previously lawful use of one's property after enactment of a zoning ordinance that prohibits such use is a vested right recognized by the New Hampshire Constitution and our New Hampshire statutes." *New London Land Use Assoc. v. New London Zoning Board,* 130 N.H. 510, 516 (1988). Nonconforming uses relate to conditions which exist prior to the time a zoning ordinance is passed. *Id*. (citing RSA 674:19). A nonconforming use is a use in fact existing on the land at the time of adoption of the ordinance. The right to maintain nonconforming uses is meant to protect property owners from a retrospective application of zoning ordinances, so that property owners may continue using and enjoying their property when their uses were lawful prior to the enactment of a zoning ordinance or amendment thereto. *Id*.

It is suggested that if there is *no* evidence of any vested right, it is not the burden of the prosecuting official, as part of the *prima facie* case, to disprove such a possibility. However if the defendant produces enough evidence to raise question about whether a vested right might prevent the regulation from being fully effective as to the property, the burden will be on the prosecuting official to overcome that question.

2. Evidence of Other Violations in the Community / Equal Protection Challenges

A defendant's common response to a community's zoning enforcement action is that other citizens are also violating the same zoning ordinance provision(s) and that the defendant is being singled-out. Evidence of other violations in the community is not normally relevant to the issue of the defendant's own liability for violating a zoning ordinance. The issue becomes relevant only if the defendant is able to show such consistent, intentional non-enforcement as to raise an inference of discrimination, or where the municipality has so far affirmatively ratified a pattern of non-enforcement concerning a provision of the zoning ordinance that it becomes an "administrative gloss." *See Tessier v. Town of Hudson*, 135 N.H. 168, 170 (1991); *Alexander v. Town of Hampstead,* 129 N.H. 278, 283-84 (1987). In order for the defendant to show that the enforcement of the ordinance was discriminatory, she must show more than that it was merely historically lax. Instead, "the [defendant] must show that the selective enforcement of the ordinance against [her] was a conscious intentional discrimination." In addition, the defendant must assert and demonstrate that the "[town] impermissibly established classifications and, therefore, treated similarly situated individuals in a different manner" in order to set forth an equal protection claim. *Bacon v. Town of Enfield,* 150 N.H. 468, 474 (2004). Thus, evidence of the existence of other violations should not be admitted as relevant unless the defendant first makes an offer of proof on one of these latter theories.

Related to selective enforcement is the theory that the particular ordinance violates the defendant's right to equal protection under the law. "[A]n equal protection challenge to an ordinance is an assertion that the government impermissibly established classifications and, therefore, treated similarly-situated individuals in a different manner." *Dow v. Town Effingham*, 148 N.H. 121, 124 (2002). The New Hampshire Supreme Court has explained that to be upheld as constitutional, the challenged

legislation must be substantially related to an important governmental objective. *Community Resources for Justice, Inc. v. City of Manchester,* 154 N.H. 748, 762 (2007). The government carries the burden of proving that the challenged legislation satisfies this intermediate scrutiny test. *Id*. "The doctrine of equal protection demands that all persons similarly situated should be treated alike and therefore the first question in an equal protection analysis is whether the … action in question treats similarly situated persons differently." *Appeal of Marmac*, 130 N.H. 53, 58 (1987). If the defendant can establish that indeed similarly situated individuals are not being treated the same, the burden will shift to the community to establish how the classification established in the ordinance is substantially related to an important governmental objective.

3. Challenging the Validity of the Ordinance

a. Enactment Procedure

When a municipal ordinance is challenged, there is a presumption that the ordinance is valid and, consequently, not lightly to be overturned. *See Carbonneau v. Town of Exeter*, 119 N.H. 259, 265 (1979); *Rochester v. Barcomb*, 103 N.H. 247, 253 (1961); 6 E. McQuillin, *The Law of Municipal Corporations* § 22.34 (3d ed.rev.1980). The party attacking the validity of a town zoning ordinance or subdivision regulation has the burden of proving the invalidity of the ordinance or regulation. *Carbonneau*, 119 N.H. at 265. From an enactment standpoint, the court has also held that minor deviations from the procedure set forth in the enabling legislation will not invalidate an ordinance if there was "substantial compliance" with the legislation. *Bourgeois v. Town of Bedford*, 120 N.H. 145, 148 (1980). Moreover, RSA 31:126 provides:

> Municipal legislation, after 5 years following its enactment, shall, without further curative act of the legislature, be entitled to a conclusive presumption of compliance with statutory enactment procedure. Any claim that municipal legislation is invalid for failure to follow statutory enactment procedure, whether that claim is asserted as part of a cause of action or as a defense to any action, may be asserted within 5 years of the enactment of the legislation and not afterward.

This is a very important statute to remember since it is essentially a statute of limitations on challenging the enactment process for the zoning ordinance.

b. Constitutional Challenges

i. Substantive Due Process

The burden of proving local legislation is unconstitutional is on the party attacking the validity of the ordinance. *Boulders at Strafford, LLC v. Town of Strafford,* 153 N.H. 633, 641 (2006). There is a presumption favoring the constitutionality of a zoning ordinance provision or other land use regulation, and in determining the validity of a zoning ordinance, its reasonableness will be presumed. *See Dow v. Town of Effingham*, 148 N.H. 121, 125 (2002); *see also Town of Nottingham v. Harvey*, 120 NH 889, 892 (1980) ("When a municipal ordinance is challenged, there is a presumption that the ordinance is valid and, consequently, not lightly to be overturned.")**.**

In determining whether an ordinance is a proper exercise of the town's authority,

and thus able to withstand a substantive due process challenge under the State Constitution, the Court applies the rational basis test, *Dow*, 148 N.H. at 124. In *Boulders at Strafford v. Town of Strafford*, the Supreme Court clarified the rational basis analysis, stating:

> We . . . hold that the rational basis test under the State Constitution requires that legislation be only rationally related to a legitimate governmental interest. We further hold that the rational basis test under the State Constitution contains no inquiry into whether legislation unduly restricts individual rights, and that a least-restrictive-means analysis is not part of this test.

Id. at 641. The Court "will not second-guess the Town's choice of means to accomplish its legitimate goals, so long as the means chosen is rationally related to those goals." *Caspersen v. Town of Lyme*, 139 NH 637, 642-44 (1995).

Defendants will typically challenge an ordinance facially, and as-applied. "In a facial challenge to an ordinance, [the Court] will not rule the ordinance unconstitutional unless it could not be constitutionally applied in any case. An as-applied challenge solely questions the constitutionality of the ordinance in the relationship of the particular ordinance to particular property under particular conditions existing at the time of litigation." *McKenzie v. Town of Eaton Zoning Bd. of Adjustment,* 154 N.H. 773, 778-79 (2007) (quotations omitted).

A constitutional challenge to an ordinance need not require exhaustion of administrative remedies, and therefore can be raised even where the Defendant has not made any local administrative appeal. *See Blue Jay Realty Trust v. City of Franklin*, 132 N.H. 502 (1989); *Delude v. Town of Amherst*, 137 N.H. 361 (1993).

ii. Takings

Another frequently raised defense to a zoning enforcement action is that the application of the ordinance to that person effectuates a taking of his or her property without just compensation.

The New Hampshire Constitution provides that "no part of a man's property shall be taken from him . . . without his own consent." N.H. CONST. pt. I, art. 12. The Court has recognized, however, that "[i]t is beyond question that the zoning of property to promote the health, safety and general welfare of the community is a valid exercise of the police power which the State may delegate to municipalities." *Quirk v. Town of New Boston*, 141 N.H. 124, 130 (1995). Zoning ordinances "by their very nature, restrict the use of property and adversely affect individual rights." Id. "A taking occurs when the application of a regulation to a particular parcel denies the owner an economically viable use of his or her land." *Smith v. Town of Wolfeboro,* 136 N.H. 337, 345 (1992). "[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 constitutes a taking within the meaning of our New Hampshire Constitution requiring the payment of just compensation." *Burrows v. City of Keene*, 121 N.H. 590, 598 (1981) (quotation omitted). "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." *Claridge v. N.H. Wetlands Bd*., 125 N.H. 745, 750-51 (1984) (quotation omitted). A common taking theory with respect to code enforcement is the concept of "inverse condemnation," which "occurs when a governmental body takes property in fact but does not formally exercise the power of eminent domain. When this occurs, the governmental body has committed an unconstitutional taking and the property owner has a cause of action for compensation." *J.K.S. Realty, LLC v. City of Nashua*, 164 N.H. 228, 234 (2012).

An example of a case in which the State Supreme Court rejected a taking claim was *Sanderson v. Town of Candia*, 146 N.H. 598 (2001). There the Court ruled that a zoning ordinance requiring that a property have frontage on a Class V, or better, highway did not constitute a taking. *See Sanderson*, 146 N.H. at 601-02. In denying the plaintiff's claim, the Supreme Court recognized the importance of zoning regulations restricting construction on Class VI roads. *Id*. The Court also noted that, while not dispositive, the plaintiff had purchased her property with knowledge of the zoning restriction and thus had "few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights." *Id*. at 601. Consequently, the Court held that applying the ordinance to the plaintiff's property did not constitute a taking. *Id*.

4. Municipal Estoppel

Perhaps the most commonly-raised defense to a zoning enforcement action is municipal estoppel.

The doctrine of municipal estoppel is an equitable doctrine that has been applied to municipalities "to prevent unjust enrichment and to accord fairness to those who bargain with the agents of municipalities for the promises of the municipalities." *Thomas v. Town of Hooksett*, 153 N.H. 717, 721 (2006); *City of Concord v. Tompkins*, 124 N.H. 463 (1984) ("Municipal corporations, like natural persons, are subject to estoppel."). "Governmental estoppel is appropriate when government officials are acting within their 'prescribed sphere and functions,' and are '[e]xerting no excess of authority.'" *Id*. (citations and quotations omitted). The elements of municipal estoppel are: first, a false representation or concealment of material facts made with knowledge of those facts; second, the party to whom the representation was made must have been ignorant of the truth of the matter; third, the representation must have been made with the intention of inducing the other party to rely upon it; and fourth, the other party must have been induced to rely upon the representation to his or her injury.

The party asserting estoppel bears the burden of proof. *Town of Nottingham v. Lee Homes, Inc.*, 118 N.H. 438, 442 (1978). "The reliance by the party bringing the estoppel claim on the representation or concealment must have been reasonable." *Concord*, 124 at 468. "Reliance is unreasonable when the party asserting estoppel, at the time of his or her reliance or at the time of the representation or concealment, knew or should have known that the conduct or representation was either improper, materially

incorrect or misleading." In addition, there can be no estoppel by an unauthorized statement of an official. *Turco v Barnstead*, 136 N.H. 256, 262 (1992); *see also Dumais v. Somersworth*, 101 N.H. 111, 115 (1957). Nor will a municipality's failure to enforce an ordinance constitute ratification of a policy of non-enforcement, and hence will not estop a municipality's subsequent enforcement of the ordinance. *Town of Windham v. Alfond*, 129 N.H. 24 (1986).

Assuming the particular zoning ordinance provision is unambiguous, the defendant's municipal estoppel claim will normally be defeated on the basis that he or she was on constructive notice of the requirement(s) and cannot claim to be misled by an official. *Thomas*, 153 N.H. at 722 (2006) (Holding that because statute squarely addressed the issue about which the petitioners sought to assert an estoppel claim, they were on notice that any representations by town officials to the contrary were materially incorrect, and therefore reliance was not reasonable). It could be a much closer call, however, if a landowner is relying upon statements from local officials, and the facts of the particular situation are unclear, such that reasonable diligence would not have disclosed the officials' errors. *See Turco*, 136 N.H. at 264.

5. Laches

Finally, the doctrine of laches is one other commonly-raised defense. "Laches is an equitable doctrine that bars litigation when a potential plaintiff has slept on his rights." *Benoit v. Cerasaro*, 169 N.H. 10 (2016). "Laches, unlike limitation, is not a mere matter of time, but is principally a question of the inequity of permitting the claim to be enforced - an inequity founded on some change in the conditions or relations of the parties involved." *Appeal of Prof'l Fire Fighters of Hudson*, 167 N.H. 46, 57 (2014) (quotation and ellipsis omitted). "Because it is an equitable doctrine, laches will constitute a bar to suit only if the delay was unreasonable and prejudicial." *Id*. (quotation omitted). In determining whether the doctrine should apply to bar a suit, the court should consider "the knowledge of the plaintiffs, the conduct of the defendants, the interests to be vindicated, and the resulting prejudice." *N.H. Donuts, Inc. v. Skipitaris*, 129 N.H. 774, 785 (1987) (quotation omitted).

Thankfully, laches has been allowed against government entities only in "extraordinary and compelling circumstances." *Town of Seabrook v. Vachon Management, Inc*., 144 N.H. 660, 668 (2000) (citing 4 P. Rohan, Zoning and Land Use Controls, § 52.08[4], at 85 (1996)). In addition, "[l]aches, as a general rule, cannot be imputed to a party who is ignorant of the facts creating his right." *Healey v. Town of New Durham Zoning Bd. of Adjustment*, 140 N.H. 232 (1995) (quotations and brackets omitted). "The burden is on [the party asserting laches to show that the complainant's delay in bringing a complaint was not merely a result of the lack of awareness of the nature of the conduct, but that the complainant, after becoming aware of the misconduct, slept on his rights." *Id*. (quotations and brackets omitted).

"The propriety of applying the doctrine of laches depends upon the conduct and situation of all the parties, not solely upon those of one." *Id*. at 242. Thus, a knowing and deliberate violation of a land use restriction is considered conduct that will shift the equities in the plaintiff's favor. *See id*. at 242 (declining to apply laches in favor of the defendants, who knowingly violated the site plan review ordinance). One who consciously disregards the law cannot invoke laches as a defense against its proper enforcement. *See id*.

As a result, even if a court concludes that a municipality delayed in bringing an enforcement action, the violator must still demonstrate what prejudice he or she experienced from the delay in enforcement. Oftentimes, a claim of prejudice will involve the claim of loss to the landowner's business in the form of lost revenue. Such a claim, however, is generally insufficient to support a laches defense absent evidence of capital improvements or other significant expenditures made in furtherance of the business during the delay period. The Supreme Court reached a similar conclusion in *Miner v. A & C Tire Co., Inc*., 146 N.H 631 (2001), in which it stated:

> [E]ven if the defendants had proven below the prejudice they now allege, it would have been legally insufficient to support a claim of laches. The plaintiffs purchased their properties in 1982 and 1983. Most of the business improvements to the defendants' property were completed by that time. The defendants argue that the plaintiffs should have filed suit by 1988 at the latest. Assuming that to be true, virtually all of the improvements made to the defendants' property had been finished by then. Accordingly, the defendants' out-of-pocket expenses and the further prejudice they now claim would have been essentially the same in 1988 as today. Thus, the plaintiffs' delay in filing suit after 1988 did not further prejudice the defendants. In fact, the defendants benefited by being able to operate an illegal non-conforming use in a residential zone for several more years.

Consequently, absent evidence of structural improvements or other capital expenditures to improve the property during the delay period, no demonstrable prejudice flows from the delay in enforcement. Rather, like the defendants in *Miner*, the landowner would have benefitted greatly from the delay in that he or she was able to operate an illegal operation for many years, and presumably profit from that venture. Consequently, the equities will normally not run in favor of applying laches in that situation.

CHAPTER FOUR: *THE TRIAL—WHAT DOES THE COMMUNITY NEED TO PROVE?*

I. Proving the Legal Effectiveness of the Ordinance

This is one step which makes local ordinance violations more complex than violations of state law. It is recommended that communities routinely provide to the court the most recently updated copies of the ordinances and codes in effect certified as such by the town clerk. Although the court may take what is known as judicial notice of these ordinances (See NH Rule of Evidence 201(b)), it is nonetheless recommended that the prosecuting official or attorney always be prepared to prove the proper adoption of the ordinance or code section involved.

II. Proving the Violation

The facts constituting the violation will normally be proved by personal observations of the inspecting official. Code officers or other designated enforcement officials who are also prosecuting the case should be permitted to testify as to their own observations, just as normally occurs with police officers who prosecute cases. If counsel is representing the community, he or she will have the code official (and possibly other witnesses) testify to the events in issue. In addition, the prosecuting official or attorney may introduce demonstrative exhibits such as photographs, maps or plans, deeds etc.

Prosecuting officials and attorneys should make sure that their case includes proof of (a) the defendant's ownership and/or (b) possession and control over the property where the violation exists. Of course these facts may be established by admissions and/or circumstantial evidence. Where ownership is in doubt or is not admitted to, the prosecuting official may need to use information from the community's tax map, and deeds, supplemented by an update at the registry of deeds. However, the establishment of a violation does not necessarily require proof of ownership. On the contrary, proof that the defendant had possession and exercised control over the property, even though merely as a tenant or lessee, may be more effective at showing the mental element of the offense than proof of ownership. Further, if the prosecuting official can prove that the actual owner was given written notice of the violation and an adequate time to compel the tenant to conform to the law, his or her failure to do so should establish the mental element of the offense.

If the defendant raises one or more defenses to the enforcement action, the defendant will be required to present evidence bearing on those issues by introducing witnesses or exhibits, supporting those defenses. The community will have the right to cross-examine any witnesses called by the defendant in support of his or her claims, and present its own evidence that may undermine the defenses.

III. Requested Remedies

At the conclusion of the trial the community will be asking the court to grant certain forms of relief as a consequence for the defendant's actions. Generally, the relief sought breaks down as follows:

- A finding that the defendant is in violation of the particular zoning ordinance or state law;

- That the landowner is ordered to correct the violation within a set period of time (e.g. 30 days)

- If the landowner refuses to comply, ask that the community be permitted to enter the premises and correct the violation at the landowner's expenses (keep accurate records of any self-help actions). [NOTE: This is dependent upon the nature of the violation]

- That the community be awarded civil fines under RSA 676:17 for each day of the violation (check your zoning ordinance to see if the community has already set the dollar amount for the fine); and

- That the community be awarded its reasonable attorney's fees under RSA 676:17.

- Get a written order that permits recording of the decision in favor of the community at the Registry of Deeds.

CHAPTER FIVE: *THE AFTERMATH – WHAT CAN THE COMMUNITY DO IF THE DEFENDANT FAILS TO COMPLY WITH THE COURT'S FINAL ORDER?*

Sometimes a defendant, despite having been ordered by a court to take certain actions and/or pay civil fines and attorney's fees, will refuse to comply. This can cause much consternation with a community because it is not clear what options are available to ensure compliance.

First, if the community had requested, and was granted, permission to enter upon the property of the defendant to correct the violation, the community can provide notice to the defendant of the intent to enter the property and remedy the violation. As with site inspections, the official(s) enforcing the court order should be sure to have a police officer present to not only keep the peace, but also serve as a witness. In addition, the community should keep a careful accounting of any and all expenses incurred in enforcing the court's order.

Second, if the violation is one that the community would prefer not to correct itself (or possibly cannot because of the nature of the violation), the community can file a motion for contempt against the defendant. Such motions are given priority on the court docket and a hearing will be scheduled promptly. Similar to the trial process described above, the community will be required to introduce evidence of the additional non-compliance and the defendant will have the opportunity to explain his or her lack of compliance. If the defendant also owes money to the community for civil fines, attorney's fees, or both, the court has the ability to grant additional liens against real property or order the judicial sale of property. If the amounts owed are relatively small the community should assess the benefits and burdens of pursing the money since it could end up in a years-long collection process. If a matter gets to the point of filing for contempt, the community should seek the assistance of counsel.

Part Two: Beyond Zoning- Remedying Other Violations

CHAPTER ONE: BUILDING AND FIRE CODE

I. State Building Code

A. Definition of State Building Code: The State Building Code was adopted by the Legislature in 2002 to provide building construction standards that would apply statewide based upon nationally recognized standards. The statutory definition of what is included in the State Building Code is found in RSA 155-A:1, IV. That law adopts by reference nationally recognized building codes published by the International Code Council (ICC) and National Fire Protection Association (NFPA). Both the ICC and NFPA are membership organizations that provide free public access to their codes through their respective websites as follows: ICC public access for New Hampshire: https://codes.iccsafe.org/public/collections/NH. NFPA public access: https://www.nfpa.org/NEC/About-the-NEC/Free-online-access-to-the-NEC-and-other-electrical-standards.

1. **Current NH Building Code 2018 – ICC Codes:**

   (a) The International Building Code 2009

   (b) The International Existing Building Code 2009

   (c) The International Plumbing Code 2009

   (d) The International Mechanical Code 2009

   (e) The International Energy Conservation Code 2009

2. **Current NH Building Code 2018 – NFPA Code:**

   The National Electrical Code 2017

3. **Code Amendment for the State Building Code:** The State Building Code Review Board is charged with the responsibility to review and propose amendments to the State Building Code which must be ratified by the legislature in accordance with RSA 155-A:10.

B. Statewide Building Code Compliance

1. **Universal Compliance:** All buildings, building components, and structures constructed in New Hampshire shall comply with the state building code and state fire code. In addition, the construction, design, structure, maintenance, and use of all buildings or structures to be erected and the alteration, renovation, rehabilitation, repair, removal, or demolition of all buildings and structures previously erected are also governed by the state building code. RSA 155-A:2,I.

2. **Conflicts Between the State Building Code and State Fire Code:** To the extent that there is any conflict between the State Building Code and the State Fire Code, the code creating the greater degree of life safety take precedence, subject to the review provisions contained in RSA 155-A:10. If the municipal building and fire code officials cannot agree which code creates the greater degree of life safety,

the property owner may notify the two officials in writing that if agreement is not reached within two business days of delivery of such notification, that the decision shall be made by the property owner to comply with either the applicable building code or fire code. Such decision by the property owner after proper notification shall not be grounds for the denial of a certificate of occupancy. RSA 155-A:2,II.

3. **Building Permits for State Buildings:** The state fire marshal issues permits and conduct inspections for buildings owned by the state, the community college system of New Hampshire, and the university system. The state fire marshal can contract with or authorize a local enforcement agency or other qualified third party to issue such permits and certificate of occupancy. RSA 155-A:2, IV.

4. **Permit Required:** Before starting new construction or renovation of buildings and structures the person responsible for such construction shall obtain a permit. RSA 155-A:4; RSA 676:11.

C. Building Code Compliance in Municipalities with No Local Enforcement Mechanism or Building Inspector

1. **Notice to the State Fire Marshall:** In municipalities that have not adopted a local enforcement ordinance for the State Building Code, the contractor of the building, building component, or structure must notify the state fire marshal concerning the type of construction before construction begins. However, no such notice is required for the construction of one- and two-family dwellings.

2. **Fire Marshall Fee for Permit System:** The fire marshal can establish a fee for permit system for municipalities that do not have a building inspector or other enforcement mechanism authorized in RSA 155-A:4, with approval of the commissioner of safety and by rules adopted under RSA 541-A.

3. **Contractor Liability:** The contractor of a building, building component, or structure shall be responsible for meeting the minimum requirements of the state building code and state fire code. No municipality shall be held liable for any failure on the part of a contractor to comply with the provisions of the state building code.

D. Building Code Compliance in Municipalities with a Local Enforcement Mechanism and Building Inspector.

1. **Municipality Must have a Building Inspector:** If a municipality has adopted a local enforcement mechanism for the State Building Code then it must have a building inspector. As provided in RSA 673:1,V: “Every building code adopted by a local legislative body shall include provisions for the establishment of the position of a building inspector, who shall issue building permits, and for the establishment of a building code board of appeals.” Any municipality that has adopted an enforcement mechanism under RSA 674:51 may contract with a local enforcement agency or a qualified third party for these services as an alternative to establishing the position of building inspector. RSA 155-A:2, VI.

2. **Building Permit Required:** After a municipality has adopted a local enforcement mechanism for the state building code, any person who intends to erect or remodel any building in the municipality shall submit the plans to the building inspector for the building inspector's examination and approval prior to commencement of the planned construction. RSA 676:11. This mandate to secure a building permit is also provided in the state building code under RSA 155-A:4.

3. **Building Permit Standards:** The building inspector shall not issue any building or occupancy permit for any proposed construction, remodeling, or maintenance which will not comply with any or all zoning ordinances, building codes, state building and fire codes, or planning board regulations which are in effect.

4. **Zoning & Planning Building Permit Issues**

   a. **Effect of Proposed Zoning Amendment:** The building inspector must not issue any building permit within 120 days of an annual or special town or village district meeting if there is a proposed zoning or building code that would justify refusal of the permit. This limitation only applies if the application for the permit is made after the first legal notice of proposed changes has been posted pursuant to the provisions of RSA 675:7. After the town or village district meeting the building inspector shall issue or refuse to issue a permit which has been held in abeyance. RSA 676:12

   b. **Permits for Uses on Uncompleted Streets or Utilities:** No building permit shall be denied on the grounds of uncompleted streets or utilities when the construction of such streets or utilities has been secured to the municipality by a bond or other security approved by the planning board pursuant to RSA 674:36, III or RSA 674:44, IV. However, no building on land that is part of a subdivision or site plan shall be used or occupied prior to the completion of required streets and utilities, except upon such terms as the planning board may have authorized as part of its decision approving the plat or site plan. Therefore, no certificates of occupancy could be issued unless the planning board's condition of approval for the necessary completion of streets and utilities prior to building occupation has been satisfied. RSA 676:12,V.

5. **Minimum Building Permit Procedures:** The building inspector shall adopt a form or set of standards specifying the minimum contents of a completed application for any building permit. Upon the submission of a completed application, the building inspector shall act to approve or deny a building permit within 30 days; provided, however, that nonresidential applications or residential applications encompassing more than 10 dwelling units shall be approved or denied within 60 days. RSA 676:13.

E. Enacting a Local Enforcement Process

1. **Establishing a Local Enforcement Process - RSA 674:51:** The state building code sets the minimum standards applicable in all municipalities. In addition, municipalities can design a local enforcement process, including the adoption by

reference of any code promulgated by the International Code Conference. 674:51-a. Any building code enforcement process that was in existence prior to 2002 is not preempted by the State Building Code unless it conflicts with the State Building Code or is amended or repealed by the municipality.

2. **Minimum Local Enforcement Ordinance Content:**

   - The date of first enactment of any building code regulations in the municipality and of each subsequent amendment thereto.
   - Provision for the establishment of a building code board of appeals as provided in RSA 673:1, V; 673:3, IV; and 673:5.
   - Provision for the establishment of the position of building inspector as provided in RSA 673:1, V.
   - A schedule of fees, or a provision authorizing the governing body to establish fees, to be charged for building permits, inspections, and for any certificate of occupancy.

3. **Enactment Procedure:** A local building code enforcement process is enacted in the same manner as zoning ordinance amendments using the procedures found in RSA 675:2-4. The planning board, or governing body usually propose an ordinance for adoption, or the ordinance could be proposed by citizen petition up to mid-December. At least one public hearings must be held before the planning board, preceded by posted and newspaper published notice. The ordinance would be placed on the official ballot with the recommendation of the planning board.

II. State Fire Code

A. Definition of the State Fire Code: The NH State Fire Code adopts by reference the Life Safety Code 2015 edition and the Uniform Fire Code NFPA 1, 2009 edition, as published by the National Fire Protection Association , and as amended by the State Board of Fire Control and ratified by the general court pursuant to RSA 153:5, including certain provisions incorporated into NH Admin Code Saf-C 6000. The provisions of any other national code, model code, or standard referred to within a code listed in this definition shall be included in the state fire code unless amended in accordance with RSA 153:5. RSA 153:1, VI-a.

B. Amendment of the State Fire Code: The fire marshal, with the State Board of Fire Control, may adopt rules with the approval of the commissioner of safety, to amend the state fire code. Any such amendments must be ratified by the adoption of appropriate legislation within one year of their adoption. If such amendments are not ratified, then the amendments shall expire at the end of the one-year period. RSA 153:5 (I).

C. State Fire Code Application to New Construction: The state fire marshal, and the local fire chief, in accordance with RSA 154:2, must use the State Fire Code, including

any related administrative rules adopted by the fire marshal and the State Board of Fire control, and any local codes adopted in accordance with RSA 47:22 or RSA 155-A:3, for the purposes of new construction, additions, and alterations. RSA 153:5,V.

D. Role of Fire Marshal: Under RSA 155-A:2 The state fire marshal is responsible for:

- Approval of all plans for construction or revision of all state buildings and properties, including the university system and the community college system of New Hampshire, as to compliance with the state building code and state fire code.
- Enforcement of the State Fire Code.
- Development, in consultation with the commissioner of safety and the commissioner of administrative services, of a schedule for the periodic safety inspection of all occupied public buildings owned by the state.
- When approving plans for state buildings the state fire marshal shall consider the written recommendations of the local fire chief and the local building inspector.

E. Role of the Local Fire Chief: Under RSA 154:2 fire chiefs have the following authority and duties:

- To enforce the state fire code along with any local or state laws or rules pertaining to the control of combustible or hazardous materials, or both, the design of exits, and any other fire safety measures.
- To inspect all buildings, structures, or other places in the fire chief's fire district or under the fire chief's jurisdiction, that is or may become dangerous as a fire menace or other places where the fire chief has reason to believe that combustible material of a hazardous nature has accumulated or is liable to be accumulated. If consent for such inspection is denied or not reasonably obtainable, the fire chief may obtain an administrative inspection warrant under RSA 595-B. RSA 154:2,III.
- Establish under RSA 154:18 regulations respecting the kindling, guarding, safe-keeping, prevention, and extinguishment of fires, and for the removal of combustibles from any building or place, which shall be signed by the fire chief and recorded by the town clerk and posted in two or more public places in the town 30 days before they shall take effect. Any violation of such regulations shall constitute a violation.
- Provide information on the local appeals process for local fire code ordinances and the variance process for the state fire code upon review of plans and notice of violations. RSA 154:2,II (b).

F. Relationship between Fire Marshal and Local Fire Official: State Fire Marshal can overrule a local building for fire official concerning the interpretation of the state fire code because "[t]he state fire marshal shall be responsible for supervising and enforcing all laws of the state relative to the protection of life and property from fire,

fire hazards and related matter," RSA 153:4-a,I. However, the state fire marshal must coordinate his activities with local officials: "It shall be his duty and responsibility to coordinate the activities of his office with duly authorized city, town and village district, fire and building department officials and other state and local agencies required and authorized by state statutes or local ordinances to develop or enforce fire safety regulations." RSA 153:4-a,II.

III. Building Code and Fire Code and Appeal Process

A. State Fire Code Exceptions and Variances: Under NH Admin Code Saf-C 6005.01 the state fire marshal is required to grant exceptions or variances to the state fire code to the extent that such action will provide a degree of safety substantially equivalent to that provided under the State Fire Code for which the exception or variance is granted. Any person aggrieved by a denial of an application for a variance or exception, may within 20 days following written notice, apply for a hearing with the state building code review board.

B. Appeals from Decisions by the Fire Marshall: RSA 155-A:11 allows appeals from decisions by the state fire marshal on both the building code and the fire code to be decided by the building code review board, with a final review in the superior court, RSA 155-A:12.

C. Appeals from Decisions the Building Inspector or Fire Official: Under RSA 674:34 the Building Code Board of Appeals can hear and decide appeals of orders, decisions, or determinations made by the building official or fire official relative to the application and interpretation of the state building code or state fire code. Where there is a local ordinance for the enforcement of the state building code, a building code board of appeals must also be established. RSA 674:51,III. If no separate building code board of appeals is provided for, the zoning board of adjustment shall be designated the building code board of appeals. RSA 673:1,V. When acting on an appeal concerning the state building code or state fire the follow standards shall apply:

- The application for appeal shall be based on a claim that the true intent of the code or the rules adopted thereunder have been incorrectly applied or interpreted, or
- That the provisions of the code(s) in question do not fully apply, and
- That an equally good or better form of construction is proposed.
- However, the building code board of appeals cannot waive requirements of the state building code or the state fire code.

Decisions from the local building code board of appeals, even on fire code issues, are reviewable only in superior court, RSA 677:16.

CHAPTER TWO: JUNKYARDS

Even if your municipality has not adopted local regulations pertaining to junkyards, municipalities are obligated to enforce various state laws regulating the operation of junkyards. This chapter includes an overview of state and local regulation of junkyards. Keep in mind that there are other state laws and also federal laws relative to junkyards that are not discussed in this chapter.

I. Is it a junkyard?

A. Definition of "junkyard"

State law defines "junkyard" as a place used for storing and keeping, or storing and selling, trading, or otherwise transferring old or scrap copper, brass, rope, rags, batteries, paper, trash, rubber debris, waste, or junked, dismantled, or wrecked motor vehicles, or parts thereof, iron, steel, or other old or scrap ferrous or nonferrous material. RSA 236:112. The term "junkyard" also includes, the following:

- Automotive recycling yards: A motor vehicle junk yard, the primary purpose of which is to salvage multiple motor vehicle parts and materials for recycling or reuse;
- Machinery junk yards: Any yard or field used as a place of storage in which there is displayed to the public view, junk machinery or scrap metal that occupies an area of 500 square feet;
- Motor vehicle junk yards*: Any place, not including the principal place of business of any motor vehicle dealer registered with the director of motor vehicles under RSA 261:104 and controlled under RSA 236:126, where the following are stored or deposited in a quantity equal in bulk to 2 or more motor vehicles*:

    - Motor vehicles which are no longer intended or in condition for legal use according to their original purpose including motor vehicles purchased for the purpose of dismantling the vehicles for parts or for use of the metal for scrap; and/or
    - Used parts of motor vehicles or old iron, metal, glass, paper, cordage, or other waste or discarded or secondhand material which has been a part, or intended to be a part, of any motor vehicle.

***** Motor vehicles:
The term "motor vehicle" uses the definition found in RSA 259:60, I, namely, any self-propelled vehicle not operated exclusively on stationary tracks, including ski area vehicles. RSA 236:112, IV. Thus, a location may be a motor vehicle junkyard even if it does not contain old automobiles or trucks.

***** What quantity is the "bulk" of two motor vehicles? Good question. One could argue that the amount is as small as two motorcycles. The statute is not clear, but it is likely that a court would apply a larger volume, such as two compact sized automobiles, since

the purpose of the statute is not to prevent storage of all unused items, just those that are large enough to constitute a potential hazard to public safety or an unwarranted intrusion into the property interests of abutters.

Important considerations when determining whether a property is a junkyard:

- *It's the accumulation of "junk" that matters*: The owner of the stored material need not intend to sell the items for the area to be classified as a junkyard. Even though the property owner may not be engaging in the commercial or retail operations often associated with a junkyard, if he has an accumulation of junk that meets the definition and is not otherwise exempt, he has a junkyard!
- *Not just for motor vehicles!* When we hear the word "junkyard," many of us picture car parts and vehicles up on blocks. However, as you can see from the definition above, there are many accumulations of material that must be licensed, even if they do not include any motor vehicles or motor vehicle parts.
- *Motor vehicle registration is no longer the standard*: The law no longer requires the vehicles to be unregistered to constitute a motor vehicle junkyard—that requirement was removed in 2002. Motor vehicles with current registration plates can be classified as junk. However, accumulation of unregistered motor vehicles can still be part of the determination of whether a particular property qualifies as a junkyard.
- *There are exemptions*: Certain operations are explicitly not classified as junkyards by state law for the purpose of the local licensing requirements. See section II.B., below.
- *Local zoning may be different:* Keep in mind that your *zoning ordinance* may use this state law definition or may use a different one. **See Section IV for more on zoning ordinances and junkyards.**

II. The Local Licensing Requirement

The licensing obligation covers a wide range of properties, from the smallest individual homeowner storing an accumulation of material, to the largest commercial recycling operation that receives, processes, and distributes thousands of tons of material.

Municipalities do not need to adopt a local licensing ordinance in order to require junkyards to be licensed. RSA 236:111-:129 requires all junkyards to comply with the state licensing statutes, and requires all municipalities to enforce these statutes. Furthermore, even if a junkyard has a Department of Transportation (DOT) license, the operator must obtain an additional local license. Under RSA 236:111-a, I the local licensing obligation applies to any location defined as a junkyard, including those regulated by DOT under RSA 236:90-:110.

A. Licensing and zoning are different.

A common mistake is conflating the licensing and zoning requirements. Licensing and zoning are distinct but related concepts. The municipal licensing obligation arises from RSA 236:111-:129 and is independent of any zoning ordinance. If you have a zoning ordinance, the junkyard must follow zoning *as well as* the licensing requirements.

In addition, ***the zoning concept of grandfathering generally does not apply to junkyard licenses***, although it will apply to the junkyard as a *use* under your zoning ordinance. In other words, the licensing requirement applies regardless of whether the junkyard qualifies a pre-existing non-conforming use for zoning purposes. There is an exception, however: If a junkyard was established before July 8, 1965, that junkyard may be "grandfathered" in its location for the purpose of the municipal license. RSA 236:121; *see also Guy v. Town of Temple*, 157 N.H. 642 (2008). That date is the effective date of the state statute creating the municipal licensing requirement. However, since licenses are non-transferable, if the junkyard was sold to a new owner, then the new owner would be required to obtain a new license. And, even if the junkyard location is protected as a non-conforming use, the day-to-day operation of the yard must remain in compliance with regulatory requirements that protect public health, public safety, or the environment. The law of non-conforming uses does not permit an operator to create a public nuisance or become a danger to the health or safety of the public. Of course, like any preexisting non-conforming use under zoning, the grandfathered location cannot be expanded or substantially changed either in size or in the scope of its operations without a hearing, and a change to the underlying license.

B. Certain Motor Vehicle Operations are Exempt from the Licensing Requirement

There are certain locations and activities involving motor vehicles that are not classified as junkyards and thus are not required to obtain the local license:

- The principal place of business of any **motor vehicle dealer** registered with the director of motor vehicles under RSA 261:104 and controlled under RSA 236:126 (RSA 236:91, IV).
- Noncommercial **antique motor vehicle restoration activities** involving antique motor vehicles more than 25 years old, if the following are true:
    - All antique motor vehicles kept on the premises are owned by the property owner or lessee;
    - All antique motor vehicles and parts of motor vehicles are kept out of view of the public and abutters by storing them inside a permanent structure, or by suitable fencing complying with the fencing requirements of RSA 236:123, or by shrubbery sufficient to block visual access year round;
    - Any combination of antique motor vehicles or parts thereof that are not stored inside a permanent structure do not exceed a total amount of five vehicles or parts equal in bulk to five vehicles;
    - All mechanical repairs and modifications are performed out of view of the public and abutters;
    - Not more than one unregistered and uninspected motor vehicle that is not more

than 25 years old shall be kept on the premises; and

- The use of premises is in compliance with all municipal land use ordinances and regulations. RSA 236:111-a, III.

- **Solid waste facilities** approved by the state under RSA Chapter 149-M are not treated as junkyards, including: landfills; incinerators and other processing or treatment facilities that are not automotive recycling yards; or transfer stations that collect, store, and transfer municipal solid waste, whether or not they also collect source separated waste derived from motor vehicles, such as tires, lead acid batteries, or used oil, and/or common household or commercial machinery, such as appliances, office equipment or lawn mowers. RSA 236:111-a, II.
- The principal place of business of a **new or used car dealer** is not treated as a junkyard even though the location may contain a sufficient amount of wrecked vehicles or vehicle parts to meet the statutory definition. Instead, dealers are required by RSA 236:126 to remove from their principal place of business any motor vehicles that would be considered "junk" within 160 days from the date the motor vehicles are brought onto the premises. Any other location within the same municipality used by the dealer to keep or store wrecked vehicles or parts is subject to the junkyard licensing requirement if the operation qualifies as a junkyard under the statutory definition in RSA 236:112. This provision means:
  - A motor vehicle dealer with a state dealer license is not necessarily exempt from the local licensing obligation;
  - The principal location of the dealership remains exempt only if no defined material is stored more than 160 days. It is possible to operate a dealership and a junkyard at one location; and
  - Any dealership with more than one location can only protect a single location from the licensing obligation.

C. Acquiring the Initial License for New Junkyards

The local licensing requirement means that every person who wishes to operate a junkyard must first obtain from the municipality's governing body (a town's board of selectmen, town council, city council, or aldermen) the following:

- A license to operate a junkyard business (to be renewed annually, as discussed in Section D. below); and
- A certificate of approval for the location of the junkyard (*if your municipality has a zoning ordinance*). RSA 236:114.

1. Application

The licensing process begins with a written application to the local governing body, as required by RSA 236:115. There is no specific form that is required, and each municipality may create a form that serves its own purposes. At a minimum, the written application must include:

- A description of the land where the junkyard is to be located, by reference to permanent boundary markers;
- In municipalities that have a zoning ordinance, a certificate from the zoning board of adjustment (ZBA) stating that the proposed location is not contrary to the prohibitions of the zoning ordinance; and
- Certification of compliance with best management practices established by the DES for automotive recycling yards and motor vehicle junkyards.

The fee for the license cannot be more than $250, which is paid at the time of application. If the license request is denied, the fee must be returned to the applicant.

2. Hearing Notice

Once the governing body has received the application, it must do the following:

- ✓ Schedule and conduct a public hearing not less than two or more than four weeks after the date on which the application was received.
- ✓ Give written notice of this hearing to the applicant by mail, postage prepaid, to the address given in the application.
- ✓ Give notice to the general public by publishing it at least once in a newspaper with a circulation within the municipality, which publication must take place at least seven days before the hearing. RSA 236:116.

The statute governing hearings before local officials is RSA Chapter 43. It does not specifically mention junkyard licensing, but it does state that any proceeding "affecting the conflicting rights or claims of different persons" shall be governed by its rules. And although there are no New Hampshire Supreme Court cases holding that the notice requirements of RSA Chapter 43 apply to junkyard licensing hearings, RSA 43:2 says that if a person's "property or rights may be directly affected by the proceeding," the person is entitled to receive notice of the matter by a written communication that is given directly to them or left at their abode, or if they are nonresident, by publication in the local newspaper.

Therefore, a cautious governing body may wish to go beyond the minimum requirements and provide additional notice to abutters and others who may be directly impacted by the proposed junkyard. This should include direct written notice to the applicant either in person or by verified mail; verified mail notice to any abutter or other person whose property is likely to be directly affected by the proceeding; notice to the general public by newspaper publication at least seven days prior to the date of the hearing; and a specific mention of the proceeding in the posted notice of the public meeting of the governing body placed in at least two places in the town.

3. Holding the Adjudicative Hearing

a. <u>Avoid Conflicts of Interest</u>

When the application is received, the members of the governing body should

determine if any member is disqualified to make a decision on the application. The standard for disqualification is found at RSA 43:6, and requires a member to step down if he or she "would be disqualified to sit as a juror for any cause in the trial of a civil action in which any of the parties interested in such case was a party." Without going into a detailed discussion on conflicts of interest and disqualification, the "juror standard" means that no member sitting on the junkyard application may have a "direct personal or pecuniary interest" in the outcome of the decision. In addition, a member will also be disqualified if he or she prejudged the outcome of the decision or has publicly spoken either for or against the application either prior to its filing or at the time of the filing, that is evidence of prejudgment.

Board members cannot force a board member to recuse him or herself. If there is any question as to whether a member should be disqualified, the issue should be discussed in public before the presentation of evidence. If either the applicant, or an interested person feels that a member must be disqualified, the issue must be raised at the earliest possible time in order to allow the governing body an opportunity to correct the problem.

b. Develop a Record

If the application is likely to generate a large volume of documents, or a large volume of testimony, or there is a possibility that the applicant or interested parties may appeal the decision to the superior court or the zoning board of adjustment, the governing body may wish to consider using a stenographer to transcribe the hearing, and otherwise assist in developing the record of the proceedings. Even if the proceeding seems to be routine, the governing body should assure that there is an adequate record of the proceedings by creating a separate file for the documents, and maintaining an audio or videotape of the hearing as part of the minutes of the meeting. This will allow a court to receive sufficient information to undertake a review of the issues in the matter in the event an appeal is filed.

c. Weigh Evidence and Testimony

RSA 43:4 requires that all witnesses be placed under oath. The oath may be administered by any one of the members of the governing body, and must require that the witness promise that the evidence provided shall be truthful.

RSA 236:117 requires the governing body to hear the applicant and anyone else who wishes to be heard regarding the application. The governing body must collect evidence and decide whether a junkyard license should issue to a specific applicant at a specific location. As an alternative to speaking at the hearing itself, some people may wish to file a letter or other document with the board. All documents received should be marked with a number or letter, and kept as part of the record of the proceedings.

In determining whether to grant or deny the application, RSA 236:115, :117, :118 and :120 require the governing body to consider the following factors:

- The suitability of the applicant, including his or her:
    - Ability to comply with the fencing requirements imposed by RSA 236:123;
    - Ability to comply with other reasonable regulations concerning the proposed junkyard;

- Convictions for any type of larceny or receiving stolen goods; and
- Proof of legal ownership or right to the use of the property.

- The proposed location must be:
  - Located at least 1,000 feet from the right of lines of interstate highways, RSA 236:118, I;
  - Located at least 660 feet from the right of way lines of Class I, II, III and III-a state highways and at least 300 feet from the right of way lines of Class IV, V and VI municipal highways (*unless a lesser setback is allowed by your local zoning ordinance)**;
  - Located within an established zoning district that does not prohibit the use (*if your municipality has a zoning ordinance*);
  - Reasonably prevented from affecting the public health, safety or morals by reason of offensive or unhealthy odors or smoke, or of other causes; and
  - Considered in light of the nature and development of surrounding property, such as the proximity of churches, schools, hospitals, public buildings or other places of public gatherings.

- General aesthetic considerations should include:
  - The type of road servicing the junkyard or from which the junkyard may be seen;
  - The natural or artificial barriers protecting the junkyard from view;
  - The proximity of the location to established tourist and recreational areas or main access routes to those areas; and
  - Whether any other suitable site for the junkyard is reasonably available.

> *Under RSA 236:118, IV, municipalities without a zoning ordinance are permitted to adopt a separate ordinance establishing lesser setbacks.

4. The Decision

Within two weeks after the public hearing, the governing body must make its factual findings and produce a written decision that approves or denies the application. Notice of the decision must be provided to the applicant in writing by mail, postage prepaid, to the address given in the application. The application, the notices sent to parties, the evidence that notice was sent and published in the newspaper, and the written decision must be recorded with the town clerk and kept as a permanent town record. RSA 43:4. If the application is approved, the governing body must issue the license to operate the junkyard and the certificate of approval of the location. If the matter is routine, the findings of fact may be short, and the decision may only consist of a few sentences. In a more complex matter, the findings of fact

may be extensive, and the written decision may be much longer and more difficult to create. It may even be necessary to delegate the drafting to a single member of the body, or to a staff person. The body may need assistance or advice from the municipal attorney. When the draft has been created, it should be reviewed, changed as necessary, and then adopted by the governing body as its decision in a duly noticed public meeting.

The text of the decision should follow the evidence that has been provided, and if necessary, should note the absence of evidence on any point that the statute indicates should be considered. The written decision document provides the governing body with an opportunity to advise the applicant, all interested parties and ultimately a reviewing court, of the facts used to reach its conclusion. A carefully drafted decision may prevent additional litigation, since it will clearly point out whether or not the applicant met its burden to produce sufficient information to allow the body to grant a license, and will clearly show the reasoning behind any conditions imposed.

The governing body must deny the application if the applicant fails to meet its burden of proof on any statutory requirement for the issuance of a license. For example, if an applicant is unable to obtain a certificate of location from the zoning board of adjustment, the governing body has no authority to waive that requirement.

5. Conditions of Approval

a. Standard Conditions

Certain conditions attach to the license automatically under RSA 236:121:

- The license is effective only until the following April 1;
- The certificate of location is part of the license; and
- The approval is personal to the applicant and cannot be assigned or assumed by a different person or entity. This means that if the property or business is transferred to a new person or entity, the new owner/operator must apply for and obtain a new approval, which will be effective only until the next April 1.

b. Compliance with Best Management Practices

RSA 236:115 requires all applicants to certify compliance with the best management practices of the Department of Environmental Services. An applicant for a new location cannot certify compliance for a facility that does not yet exist, but compliance can be a condition of the approval to assure that the facility will be constructed in such a way that compliance is possible, and once operations begin the facility may be inspected to assure that its practices and procedures comply.

c. Fencing Requirements under RSA 236:123

Prior to opening, a new junkyard must be surrounded with a solidly constructed fence with a gate. The fence must be a minimum of six feet high and substantially screen the area. The gate must be closed and locked except during hours of operation or when the applicant or his/her agents are present. The applicant

must store all motor vehicles and parts of motor vehicles within the enclosure, except when removal is necessary to transport the material in the reasonable course of business. All wrecking or other work on motor vehicles and all burning shall be performed within the fenced area.

The governing body may reduce or eliminate the fencing requirements when natural geographic features (such as topography, natural growth or other natural barriers) or other considerations accomplish the same purposes. The governing body may also increase the fencing or screening requirements to protect abutting properties from harm.

d. Other Conditions
The governing body may also consider attaching reasonable conditions to the approval under RSA 236:117 and RSA 236:121. These might include:

- There will be no refund or proration of the application fee if a transfer occurs during the license period.
- The facility must be operated by the licensee, and not an affiliated entity. That is, the applicant cannot create an array of corporate or other limited liability entities, which will prevent the municipality from assigning responsibility for deficiencies directly to the applicant.
- The physical location of the facility may need to be described more precisely than in the application: even though the applicant owns a large parcel of land, the junkyard location may be restricted to a much smaller portion of the property that is carefully described by reference to an engineered plan, a specific footprint, or a specific number of acres.
- The size and capacity of the operation may be restricted: the operation may be limited to a specific number of vehicles stored, or a specific number processed during the term of the license.
- The operation of the facility may be restricted in other ways, such as hours/days of operation, or number of employees.
- The governing body may incorporate applicable local, state or federal requirements administered by others as conditions of the license.
- The governing body may wish to develop a condition that permits it to easily monitor compliance with its conditions during the license year, such as a requirement to report on the number of vehicles processed.

6. Appeal of Decision
With regard to the fencing requirement of RSA 236:123, any citizen of the municipality may apply to the superior court for a writ of certiorari to review the action of the governing body. If an application for either a new junkyard location, or the renewal of an existing license is not granted, the fee shall be returned to the applicant, and the applicant may appeal that denial to the superior court by seeking a writ of certiorari. RSA 236:121. This statute does not permit other interested persons to seek a writ of certiorari in the superior court if the license is granted over their objections, but if there is a zoning ordinance, an

administrative appeal of the governing body decision may be taken to the local zoning board of adjustment. *47 Residents of Deering v. Town of Deering*, 151 N.H. 795 (2005).

D. License Renewal for Existing Junkyards

RSA 236:125 states that "the location of junk yards or automotive recycling yards already established are considered approved by the local governing body of the municipality where located and the owner of the yard considered suitable for the issuance of a license."

However, as stated previously, a junkyard license is valid for a maximum of one year, and RSA 236:125 therefore requires existing junkyards to apply for a renewal application by every April 1 of every year. An applicant may renew his or her license without a hearing upon payment of the annual license fee, provided the following are true:

(a) All the provisions of the junkyard statute have been complied with during the previous license period;

(b) The junkyard has not become a public nuisance under the common law or RSA 236:119;

(c) The applicant has not been convicted of any type of larceny or receiving stolen property, RSA 236:121; and

(d) For automotive recycling yards and motor vehicle junkyards, the applicant certifies compliance with best management practices established by the Department of Environmental Services. RSA 236:121, III.

If the renewal application, or other records of complaints, show that any of these conditions have not been satisfied, the license may not be renewed without a hearing. Based upon the findings of the governing body at the hearing, the license may not be able to be renewed at all, or conditions may have to be placed upon the renewal. The occurrence of any of these events during the licensing period are also cause to evaluate whether the municipality should take other enforcement action. The governing body should consult municipal counsel for assistance in conducting a renewal hearing if it feels that the legal or factual issues are complex, since the operator has a right under RSA 236:121 to appeal directly to Superior Court for a writ of certiorari if the renewal of the license is denied.

III. Penalties and Enforcement of Licensing Violations

Under RSA 236:119, any junkyard located or maintained in violation of RSA 236:111-:129 is a nuisance. The legislature has provided tools to seek abatement of the nuisance in RSA 236:127-:129.

A. Civil Penalty

The governing body or other enforcement official of the municipality, after providing notice, may impose a civil penalty of up to $50 for each day upon any person whose

land is deemed a nuisance under RSA 236:119 until the nuisance is removed or abated to the satisfaction of the governing body, or until the owner of the land acquires a license and is in compliance with the provisions of the junkyard statute. RSA 236:128, III. The building inspector or other local official with the authority to enforce this statute may bring an action in the district court to collect the civil penalty. Imposition of a civil penalty does not relieve the owner of the obligation to comply with the law or preclude other enforcement action allowable under the law. RSA 236:128, III. This tool is not available if the junkyard is presently licensed, or if the current license is pending annual renewal.

B. Violation

Any person who violates the junkyard licensing statute is guilty of a violation; each day of operation in violation constitutes a separate offense. RSA 236:127. This tool is available whether or not the location is presently licensed. The penalty for a violation is imposed by the district court, and may involve a fine of up to $1,000 for each offense. RSA 651:2. A violation is not a crime, and a conviction will not prevent a person from becoming licensed in the future.

C. Injunction

There are times when no amount of monetary fines will serve to change a person's conduct. The governing body may sue to obtain an injunction in superior court to cease the illegal operation itself. If the governing body declines to pursue that enforcement action, the attorney general may obtain an injunction in the name of the State. RSA 236:128, I and II. This type of equitable relief directs the landowner or occupant to either take certain actions, or refrain from taking certain actions. It is a powerful and flexible tool that relates directly to the behavior that is creating the nuisance. If the individual subject to the order fails to comply, the court may find the individual in contempt of court, and may take coercive actions that range from imposing monetary fines, to seizure of property and/or incarceration of the individual.

D. Citizen Complaint

Finally, any property owner who is directly affected by a junkyard that is not maintained in compliance with the junkyard statute may request, in writing, that the governing body take appropriate action. A copy of the written request must also be mailed to the junkyard owner. If the governing body does not take appropriate action on the complaint within 30 days, the property owner may seek an injunction from the superior court. RSA 236:129. From the municipal perspective, this is a powerful incentive to investigate and attempt to obtain resolution of all complaints. If complaints are ignored, there is the possibility that the municipality will be drawn into a dispute it did not create, and will itself be ordered by the court to take action, instead of appearing in court seeking to have action taken. That is, instead of proceeding to the court as a plaintiff, the municipality can find itself in court as a defendant, with the possibility that it will be coerced by the court to act to resolve a dispute between its own citizens.

IV. Junkyards and Your Zoning Ordinance

A. Authority to Regulate Junkyards through Zoning

Per RSA 674:16 & :17, the municipal zoning power may be used to regulate junkyards and property accumulations for the following reasons:

- To promote the general health, safety or welfare of the community. RSA 674:17, I(c); *Corey v. Town of Merrimack*, 140 N.H. 426 (1995);
- To protect aesthetic and scenic values. RSA 674:17, II; *Asselin v. Town of Conway*, 137 N.H. 368 (1993); *Taylor v. Town of Plaistow*, 152 N.H. 142 (2005);
- To protect the environment. RSA 674:21, the innovative land use controls statute, enables towns to enact environmental characteristics zoning, serving as the basis for regulating the pollution and other environmental issues raised by the storage of "junk" and the operation of junkyards.

Zoning regulations must be consistent with the constitutional protections afforded to private property interests. Any land use regulation that is not "rationally related" to the municipality's zoning authority and the stated purpose of the provision may be challenged as fundamentally unfair, or invalid as applied to a specific property. *Dow v. Town of Effingham*, 148 N.H. 121 (2002).

Towns and cities may, under RSA 674:20, establish zoning districts "as may be deemed best suited to carry out the purposes of RSA 674:17." Regulations that apply to structures and uses in one district may differ from regulations in another district; however, regulations must be uniform for each class or kind of buildings throughout each district. For example, municipalities may prohibit junkyards and junk dealerships from all residential districts, but permit junkyards in industrial districts and junk dealerships in commercial districts.

B. Include Definitions in Your Zoning Ordinance

Successful regulation of junkyards, automotive recycling yards, junk dealerships and the accumulation of junk on private property through the municipal zoning power depends upon clearly defined terms. A common complaint received by local officials involves the unsightly accumulation of junk on an abutter's property, particularly in residential areas. Some municipal zoning ordinances use the definitions for "junk" and "junkyard" that are found in RSA 236:91 and 236:112, respectively. However, regulations that do not define the types of items that are considered "junk," or that are in conflict with the definitions in state statute, can make matters more difficult for zoning enforcement officers than no regulation at all.

In the case of *City of Rochester v. Corpening*, 153 N.H. 571 (2006), a city ordinance defined a motor vehicle junkyard as a place having two or more unregistered motor vehicles no longer intended or in condition for legal use on the public highways—a requirement that had been removed from the definition previously. Thus, it was easier for a parcel to qualify as a motor vehicle junkyard under state law than the municipal ordinance. The Court determined that under RSA 236:124 the local ordinance controlled, even though it resulted in less regulation on the local level than on the state level. Municipal officials and planning boards should review the language of their police power ordinances and zoning ordinances to assure that the current versions of these controls afford them the full measure of regulatory authority permitted by state statute.

> Recall from Section II of this chapter that while a junkyard may be grandfathered as a "use" for the purposes of zoning, it is not exempt from maintaining a license under state law.

C. Certificate of Location

Recall from Section II.C. above that if your municipality has a zoning ordinance, property owners applying for an initial license under RSA 236:111-:129 must also obtain certification from the ZBA stating that "the proposed location is not within an established district restricted against such uses or otherwise contrary to the prohibitions of the zoning ordinance." RSA 236:115.

If junkyards or automotive recycling yards are not a permitted use in the zoning district in which the property is located, or if other zoning provisions would be violated by the operation of a junkyard or automotive recycling yard, the ZBA may not issue the certificate and the governing body may not issue the junkyard license. In this situation, the applicant may apply to the ZBA for a variance from the terms of the zoning ordinance.

In addition, RSA 236:124 provides that if the licensing statutes (RSA 236:111-:129) conflict with provisions of the municipal zoning ordinance, the zoning ordinance controls. In *47 Residents of Deering, N.H. v. Town of Deering*, 151 N.H. 795 (2005), the New Hampshire Supreme Court discussed the interplay between provisions of the junkyard licensing statute, particularly RSA 236:121, :123, :124 and :129, and a municipal zoning ordinance regulating junkyards. The junkyard owner claimed that the ZBA did not have jurisdiction to hear the appeal of a neighborhood citizens group, arguing instead that the superior court had jurisdiction over their appeal of a select board's licensing decision. The Court explained that RSA 236:121 allows an applicant who is denied a junkyard license to appeal to the superior court, but does not provide recourse to others, such as abutters, who are affected by the grant or denial of the license. RSA 236:123, the Court said, provides recourse to the superior court to any citizen who wishes to contest the issue of fencing for a new junkyard. RSA 236:129 provides recourse to the superior court for any person who owns property directly affected by the site of a junkyard that is maintained in violation of RSA 236:111-:129; however, the Court said, these provisions in RSA Chapter 236 do not override or limit the application of a validly adopted zoning ordinance regulating these issues. In fact, the junkyard licensing provisions in RSA Chapter 236 are interpreted to assist local zoning regulation. RSA 236:129 provides, "Specific local ordinances shall control when in conflict with [RSA Chapter 236]."

V. Regulation of Junk Dealers, RSA Chapter 322

The category of "junk dealer" is an occupation separately regulated by RSA Chapter 322. That chapter authorizes municipalities to license "suitable persons" to be dealers of "old junk" and the like. However, most of the sections do not speak directly to the materials discarded or accumulated today, such as motor vehicles, electronics or household goods such as dishwashers or washing machines, but the statute instead deals with other things seldom seen today, such as old bottles and unfinished cloth. It is unclear which statute would control if there were a conflict between the junk dealer licensing statute and the junkyard licensing statute.

The concept of a "junk dealer" suggests that the person with the material intends to purchase and sell the items and to conduct a business. In many municipalities, zoning

ordinances restrict business operations to areas zoned for a commercial or industrial type of use. The junk dealer statute is not a planning or zoning law; it is a different and additional local licensing requirement for the person who desires to conduct a business dealing in junk, regardless of how the land where the material is stored is zoned. It does not preempt the local zoning ordinance, or relieve the proposed business operator from the duty to comply with local subdivision or site plan review regulations adopted by the planning board, or conditions imposed by the zoning board of adjustment if a special exception or variance is required by the zoning ordinance at that specific location.

The statute, RSA 322:1, allows the selectmen of towns, the police commissioners of a city or town, or the mayor and alderman of a city to:

- License “suitable persons” to be junk dealers, and
- Determine and designate “the place where the business is to be carried on and the place where the commodities … may be accumulated, stored or handled.”
- Require sufficient records be kept and to inspect premises licensed under this chapter.

This is only a summary. Refer to RSA Chapter 322 for more details.

VI. Authority of Other Officials Relative to Health, Safety, and Welfare

Health officers, building code officials, and fire officials have statutory authority to deal with unsafe buildings and the accumulations on property that so often result from lack of maintenance or ordinary care of property and structures. Acting together with their governing bodies, these municipal officials are primarily charged with the task of correcting situations that threaten health, safety, and welfare. See Chapter Three for more information.

CHAPTER THREE: REGULATIONS PROTECTING HEALTH, SAFETY & WELFARE

Municipal officials are often faced with complaints about the condition of property that do not necessarily fit squarely into pre-established categories, such as zoning violations or unlawful junkyards. This chapter explores the authority and means available to municipalities for investigating and enforcing those "miscellaneous" issues that threaten health, safety, and welfare of the public.[1]

I. Health Regulations: Nuisances, Toilets, Drains, Expectoration, Rubbish and Waste, RSA Chapter 147

Every town must have a health officer, who is appointed by the commissioner of the New Hampshire Department of Health and Human Services (DHHS) upon recommendation of the select board. RSA 128:1. The health officer and the select board constitute the town board of health, but it is the health officer who is given statutory power as the secretary and executive officer of the board of health. RSA 128:3.

Municipal health officers are charged with the investigation and removal of nuisances. To do this, health officers can both adopt local health regulations, and/or use the authority and procedures in Chapter 147.

A. Local Health Regulations

Under RSA 147:1, health officers can adopt local regulations relative to nuisances and related issues:

1. Regulations for the prevention and removal of nuisances, and such other regulations relating to the public health as in their judgment the health and safety of the people require.

- *Note*: These regulations go into effect when approved by the select board, are recorded by the town clerk, and are either published in a newspaper printed in the town, or posted in two or more public places in the town.

2. Regulations relative to the sanitary and health conditions for issuing a license to restaurants or other food serving establishments operating within the town limits.

- *Note*: These regulations are subject to the approval of the commissioner of the department of health and human services.

Health officers must forward copies of all regulations made by them to the department of health and human services.

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1 Substantial portions of this chapter were adapted from NHMA's 2016 Municipal Law Lecture Materials, *A Guide to Code Enforcement in New Hampshire*, written and presented by Attorneys Eric Maher, Justin Pasay, and Christopher Hilson of Donahue, Tucker, and Ciandella.

B. Violations of Local Health Regulations

Any person willfully violating municipal health regulations is guilty of a violation. RSA 147:1, III; RSA 651:2. (Note: This means that RSA 31:39-d can be used to enforce violations of RSA 147:1; see Section One of this book for more details.) In addition, RSA 147:1, II provides special authority for restaurants violating local sanitary and health codes:

> (a) Notwithstanding any other law to the contrary or other licensing authority, any restaurant or other food serving establishment found to be in violation of the sanitary and health code adopted may be closed without a hearing for a 10-day period or until the violation is corrected and the sanitary condition is approved by the local health officer.
>
> (b) If the sanitary or health violations are not corrected within the 10-day period, the local health officer may suspend the license to operate the restaurant or other food serving establishment after notice and hearing.

C. Investigating and Enforcing Nuisances under RSA Chapter 147

Even in the absence of local regulations, RSA Chapter 147 provides significant authority to health officers to deem certain conditions or activities to be nuisances, to order removal or abatement of nuisances, and to bring the violator to court for failure to comply with such an order. In fact, RSA 147:3 says that health officers "***shall*** inquire into all nuisances and other causes of danger to the public health." Pursuant to this duty, health officers may do the following:

- Investigate Nuisances: Inspect any building, vessel, or enclosure by obtaining an administrative inspection warrant, including authority to forcibly enter those structures (***the municipal attorney should be consulted before forcible entry is considered***). *See* RSA 147:3.

- Order Nuisances Removed: If a nuisance or other cause of danger is observed by the health officer, the health officer can issue a notice to the owner or occupant of a building, vessel, premises, or property to remove or destroy a nuisance or other thing deemed injurious to the public health within a designated period of time. *See* RSA 147:4.

- Remove Nuisances: If, after appropriate written notice is given, the order is not complied with, the health officer may "forcibly enter and cause the nuisance or other thing to be removed or destroyed." RSA 147:4. In addition, RSA 147:5 allows the health officer, when the owner of a building, vessel or enclosure is unknown, or does not reside in town, and the same is unoccupied, or the occupant is, in their opinion, unable to remove the same, to immediately and without notice cause the nuisance or other thing by them deemed injurious to the public health found therein to be removed or destroyed. ***However, the municipal attorney should be consulted in such instances for further advice before private property is entered without the benefit of a search warrant or administrative inspection warrant in order to avoid creating claims that the entry was unnecessary or illegal. Please note that a statute cannot remove an individual's rights against unlawful searches and seizures under the Federal and State Constitutions; therefore, to "forcibly enter" the premises, either the health officer would have to obtain a warrant from a judge, or an exception to the warrant***

requirement would have to exist (such as exigent circumstances that did not allow sufficient time to obtain a warrant).

- Recoup Expenses: If the health officer enters the premises to abate the nuisance or dangerous condition, there are two procedures that can be used to recover the expenses and fees associated with the abatement. The first is to institute a civil action to collect the fees and expenses. *See* RSA 147:7. The other procedure is to use an Order for Abatement Costs pursuant to RSA 147:7-b.

D. Order for Abatement Costs

This procedure starts with the municipality providing the owner/occupant with a notice describing the nuisance; the corrective action required; and a statement that failure to take corrective action may result in the town taking that action with the costs associated with the abatement of the nuisance constituting a lien on the real estate, and enforceable in a manner similar to a tax lien. *See* RSA 147:7-b. The governing body must authorize the health officer to issue the Order for Abatement Costs, and the order must be served on the owner of record in the same manner as prescribed by a civil action, meaning the sheriff's department.

Once an Order for Abatement Costs is made, the owner has 30 days from service of the order to provide an answer, stating the owner's objections to the order. If an objection is not provided, the health officer must forward the order to the officials responsible for issuing tax warrants in the municipality. If an objection is filed, the health officer may file a "motion to affirm" the order in the circuit court - district division if the amount is within that court's jurisdiction, otherwise in the superior court. Following the filing of a motion to affirm, the court will hold a hearing and either affirm the order, correct the order, or deny the order.

A court will set aside the order only if 1) the order was "clearly outside the authority of the health officer"; or 2) the owner did not receive a copy of the order and the nature of the nuisance is not one for which an owner "may be held strictly liable under state or federal law," or the owner did not have reason to know of the circumstances constituting the nuisance. This is a difficult standard for a property owner to overcome. If the order is affirmed, the municipality is entitled to its costs and attorney's fees associated with litigating the matter.

E. Specific Types of Nuisances

In addition to the general authority to enforce and cause the abatement of nuisances and "other causes of danger," RSA Chapter 147 also allows health officers the authority to abate specific types of nuisances, including:

- the failure to have a toilet facility (RSA 147:8)*;
- the keeping of a privy, toilet, sink, drain, cesspool, or septic tank, or a pen, or sty for swine in a place or condition injurious to public health (RSA 147:10);
- placement of offensive matter near highways, streets, alleys, public places, or wharves (RSA 147:13);
- drainage of toilets, sinks, drains, cesspools, or septic tanks into open highway ditches (RSA 147:14).

- The municipality may use the same procedure detailed above for the removal of nuisances and other causes of danger. *Additionally, violations of RSA 147:8 are subject to a fine for a violation, which can be up to $1,000.00. RSA 651:2.

F. Ordering Building Vacated

In extreme circumstances, the non-compliant conditions on the premises are extensive enough to warrant a municipal official's ordering a structure vacated. Pursuant to RSA 147:16-a, health officers have the authority to order occupants of a building, structure, or premises to vacate "based on reasonable information and belief that the condition of such premises constitutes a clear and imminent danger to the life or health of occupants or other person, and that protection of life or health requires vacating the premises." (Fire Chiefs have similar authority to order a building vacated pursuant to RSA 154:21-a—See Section II below).

This authority is not applicable to all structures, however: a health officer cannot order a residence vacated if it is occupied only by the owner and his/her immediate family, except if the condition of the premises constitutes a clear and imminent danger to the life or the health of persons other than the occupant or occupants. RSA 147:16-a.

To order a building vacated, the health officer must post an order to vacate at the entrance of the building in a form compliant with RSA 147:16-a. In addition, the health officer must send a written notice of the order to vacate to the owner of the property and the lessees who exercise control of the premises. RSA 147:16-a. This notice must be provided to the owner and the lessees within 24 hours of the health officer's physically posting the notice to vacate on the structure. The notice must identify the premises, and provide a statement particularly identifying the danger to life, health, or safety, as well as the date and time the order became effective, and a statement as to the owner's right to request a hearing.

Upon receipt of the notice, any person aggrieved may file a written request with the circuit court – district division to contest the order. If challenged, the court must fast-track the proceedings, and will schedule a hearing within 7 days, at which time the court will determine whether the order is justified and/or whether the court will require the responsible party to abate the dangerous condition. The court will affirm, modify, or set the order aside. If an order to vacate is violated, the violating party may be guilty of a misdemeanor.

See RSA 147:16-a for complete details on the procedure.

II. Fire Regulations, RSA Chapter 154

A fire chief may make regulations, after conferring with recognized authorities and the state fire marshal, for the elimination of fire hazards and for the fighting of fires. RSA 154:18. The regulations must be signed by the fire chief, recorded with the town clerk and posted in two public places in town for 30 days before they take effect. There is no requirement for a vote of the legislative body to enact fire regulations.

A fire chief and his or her duly authorized subordinates have the authority to inspect all buildings, structures or other places, including but not limited to any place where any combustible or hazardous material is stored, including waste paper, rags, shavings, waste,

leather, rubber, crates, boxes, barrels, rubbish or other combustible material that is or may become dangerous as a fire menace to such buildings, structures or other places. The fire chief, or his or her designated representative, may also inspect an area if he or she has reason to believe that such material has accumulated or is liable to be accumulated. RSA 154:2. If consent for the inspection is denied or not reasonably obtainable, the fire chief may obtain an administrative inspection warrant under RSA Chapter 595-B.

Like the health officer, the fire chief has the authority to order occupants to vacate a building when he or she determines, based on reasonable "information and belief" that the condition of the premises constitutes a "clear and imminent danger" to the life of its occupants or others, and that protection of life or health requires vacating the building. RSA 154:21-a. Note that this statute gives the chief the authority to use the same procedure as the health officer in RSA 147:16-a. In the case of a residential building where the owner and his family occupy the building, the fire chief may only order them to vacate when the condition of the building constitutes a clear and imminent danger to the life and health of persons *other than* the occupant or occupants. RSA 154:21-a, II.

III. Hazardous and Dilapidated Buildings, RSA Chapter 155-B

Even if the municipality has not adopted the International Property Maintenance Code (see Section V below), RSA 155-B authorizes municipal officials to require the repair or removal of hazardous and dilapidated buildings.

A structure may become hazardous if it is not well constructed or maintained. Under RSA 155-B, a hazardous building is defined as a building "which, because of inadequate maintenance, dilapidation, physical damage, unsanitary condition, or abandonment, constitutes a fire hazard or a hazard to public safety or health." RSA 155-B:1. (Keep in mind that an old and dilapidated structure, or its parts, or the property stored in the structure, may also constitute "junk" or "solid waste.")

Sometimes it is not readily apparent that a building is hazardous, particularly if the problems are structural or involve electrical or heating systems. It may take an experienced building code official, licensed electrician, or other trained technician to detect the issues during an inspection. This inspection task may be performed by local building and fire officials. If the landowner refuses consent to an inspection, an administrative inspection warrant may be requested.

The governing body of a municipality may order the owner of a hazardous building to correct the hazardous condition or raze and remove the structure. RSA 155-B:2. To be statutorily valid, the order must state why the building is hazardous and must provide a reasonable time for compliance. RSA 155-B:3. The order must also state that a motion for summary enforcement will be made to a court if corrective action is not taken and that the costs and attorney's fees incurred to obtain the corrective action can be enforced as a lien on the subject property and any other property owned by the owner in the State. RSA 155-B:3. Like notices issued pursuant to RSA 676:17-a, the order must be served upon the owner of record, any occupying tenant, and all lien holders in the same manner that a summons in a civil action is effectuated — through the sheriff's department. RSA 155-B:4. Once provided with a notice, the owner of the property has two options: (1) comply with the municipality's order or (2) challenge the order and the facts underlying the order. RSA 155-B:6.

If the owner fails to comply with the municipality's order, the municipality can petition the circuit court – district division to enforce the order, and the circuit court can enter judgment accordingly, upon an adequate presentation of evidence. RSA 155-B:7. Prior to seeking to enforce the order, the municipality must file a copy of the order and proof of service with the circuit court – district division no less than five days prior to filing a motion to enforce the order. RSA 155-B:5. The municipality must also file a notice of the "pendency of the proceeding" with the registry of deeds. If the owner provided an answer, the district court will schedule a hearing, whereupon the court will determine if the order should be sustained. If the order is sustained the court will set a date by which the structure must be destroyed or repaired. RSA 155-B:8.

If, following a judgment from the circuit court – district division, the owner does not comply with the order, the governing body can take the corrective action, and the cost of the corrective action will constitute a lien on the property enforceable as a tax lien under RSA Chapter 80. RSA 155-B:9. If the property's value is insufficient to recoup all of the costs, the municipality may lien the owner's other property in the State; however, that lien does not have the heightened priority of a tax lien under RSA Chapter 80. See RSA 155-B:9. If the owner has no other property in the State, the municipality may also have a lien as to any insurance proceeds payable as a result of the damage or destruction of the subject property. See RSA 159-B:9-a. This lien is subordinate to any other liens on the insurance proceeds.

If the materials that were once incorporated into the building, or fixtures removed from the building, or personal property removed from the building have value, the municipality may sell the items at auction. Any funds received from the sale may be used to reimburse the municipality for the costs of the proceeding and the removal of the offending structure.

IV. Minimum Housing Standards, RSA Chapter 48-A

Under RSA 48-A:2, municipalities can adopt ordinances, codes, or bylaws to cause the repair, closing, demolition, or removal of dwellings that are "unfit for human habitation due to dilapidation, dangerous defects which are likely to result in fire, accidents, or other calamities, unhealthful lack of ventilation or sanitary facilities, or due to other unhealthy or hazardous or dilapidated conditions." In adopting such an ordinance, code, or bylaw, the municipality must also create a "public agency" that will hear complaints associated with violations of that ordinance, code, or bylaw. RSA 48-A:3.

If the municipality adopts housing standards, it must investigate potential violations whenever it receives a petition from 10 residents stating that the dwelling is unfit for human habitation or whenever the public agency observes the same. RSA 48-A:2. If a preliminary investigation substantiates the suspicions/allegations, the municipality shall serve on the owner, every mortgagee of record, and all "parties in interest" (including tenants) a complaint setting forth the charges. RSA 48-A:3. The notice must state that the public agency will hold a hearing on the allegations no less than 10 days and no more than 30 days from the date of service of the complaint. The notice must further advise the owner/occupant/mortgage holder of his/her right to answer the allegations, appear at the hearing, and present testimony in his/her defense. RSA 48-A:3.

If the public agency finds the allegations to be substantiated, it must serve on the owner an order to either 1) repair, alter, or improve the structure to make it fit for human habitation or 2) remove or demolish the structure, if the structure cannot be reasonably repaired when

the costs of the repair are compared to the value of the structure. An aggrieved owner can appeal that order to the governing body of the municipality, following the receipt of which the governing body will hold a public hearing to determine if the order was justified. If the owner does not comply with an order of the public body, the public agency may file a petition in the superior court setting forth the charges and all other allegations as to why the structure is unfit for human habitation. *See* RSA 48-A:4. Any resulting appeal to the superior court is treated *de novo*, meaning that the superior court will treat the case anew, without giving deference to the factual findings made by the governing body. Consequently, the superior court can hear evidence as to the structure's habitability as it deems relevant.

If the superior court finds in favor of the public agency, it can grant the public agency the authority to carry out the order, the costs for which shall be a lien against the property. See RSA 48-A:6. The lien shall also include the public agency's attorney's fees. *Id*. That lien may be foreclosed upon petition to the superior court, but, unlike liens imposed by RSA 676:17-a, the lien is subordinate to mortgages of record in existence prior to the initiation of the action with the superior court. If the owner prevails in superior court, the court will award the owner his/her reasonable costs and expenses, including attorney's fees, related to defending against the action in superior court. *See* RSA 48-A:5.

In municipalities that have not enacted an ordinance, code, or by-laws regarding habitable buildings, RSA Chapter 48-A still provides some basic authority to regulate the standards of housing.

RSA 48-A:14 provides a series of minimum standards applicable to landlords of residential property. Some common violations of minimum housing standards include when a landlord keeps rented premises in conditions when the premises:

- Are infested with insects, bed bugs, and rodents, when the landlord is not conducting a "periodic inspection and eradication program";
- Have defective plumbing, or a back-up of sewage due to a faulty septic or sewage system;
- Have exposed wires, improper connectors, defective switches, or outlets, or other conditions which create a danger of electrical shock or fire;
- Have roof or walls that leak consistently;
- Have an accumulation of garbage or rubbish in common areas; and
- Do not have heating facilities that are properly installed, safely maintained, and in good working condition, or are not capable of safely and adequately heating all habitable rooms, bathrooms and toilet rooms to a temperature of 65 degrees Fahrenheit.

An infringement on the minimum housing standards is a violation. After notice is given of the violation, each day that the property remains in violation constitutes an additional, separate offense. A violation can result in a fine of $1,000 and can also be enforced using RSA 31:39-d. *See* RSA 651:2; RSA 31:39-d; RSA 48-A:15.

V. Consider Adopting a Property Maintenance Code

Many municipalities struggle with “junk-filled” or “eye sore” properties that may or may not violate provisions of the codes discussed previously in this book. Investigation and enforcement can be costly and time consuming, and so municipalities may want to consider adoption of the International Property Maintenance Code.

Just like our State Building Code, the International Property Maintenance Code (IPMC) is a code created by the International Code Conference (ICC). However, unlike the building code, it is not one of the ICC codes listed in RSA 155-A:1, and, therefore, must be adopted by any municipality wishing to enforce it. The IPMC is adopted by following RSA 674:51-a, which essentially allows municipalities to adopt local building and fire code provisions, as well as other code promulgated by the ICC, by following the same basic adoption procedures for zoning ordinances found in RSA Chapter 675.

In short, the International Property Maintenance Code (IPMC) applies to “all existing residential and nonresidential structures and all existing premises and constitute minimum requirements and standards for premises, structures, equipment and facilities for light, ventilation, space, heating, sanitation, protection from the elements, life safety, safety from fire and other hazards, and for safe an sanitary maintenance; the responsibility of owners, operators and Occupants; the occupancy of existing structures and premises, and for administration, enforcement and penalties.”

The IPMC is particularly useful in addressing and enforcing dilapidated or unmaintained buildings and the, IPMC has standards for means of egress and structural integrity. Once adopted by the municipality, it is a “code” enacted pursuant to Title LXIV and, therefore, is enforceable pursuant to RSA 676:15, :17, and :17-a.

CHAPTER FOUR: EXCAVATIONS[2]

I. RSA 155-E: The Law Governing Excavation of Earth Materials

Chapter 155-E was enacted August 24, 1979. This law grants municipalities the authority to regulate earth excavations within their borders. This law has rather significant ramifications for both planning boards and gravel pit owners/operators alike. This chapter will provide an explanation of the important provisions of the law and recommended procedures for compliance by planning boards and land owners.

Planning Board as Regulator: RSA 155-E confers on planning boards* the authority/ responsibility to regulate RSA 155-E. This can only change if the town meeting or legislative body votes to have either the select board or the zoning board of adjustment serve as regulators. In towns without a planning board, the select board is the regulator, or if the land area is an unincorporated place, the county commissioners act as the regulators. RSA 155-E:1, III.

> * Throughout this chapter, reference will be made solely to the planning board as the regulator, with the understanding that in your municipality either the ZBA or select board may be designated as the excavation regulator.

II. All Earth Excavations Must Have a Permit Unless Exempt Under RSA 155-E:2

A. **Earth Excavation Defined:** "Earth" means sand, gravel, rock, soil or construction aggregate produced by quarrying, crushing or any other mining activity or such other naturally-occurring unconsolidated materials that normally mask the bedrock. "Excavation" means a land area which is used, or has been used, for the commercial taking of earth, including all slopes. These definitions exclude the excavation/quarrying of dimension stone, an activity regulated by the commissioner of the department of natural and cultural resources under RSA Chapter 12-E.

B. **Excavation Operations Exempt from Permit Requirement:** The law allows certain exemptions from the requirement for a permit. However, exempt operations must nevertheless comply with the express operational and reclamation standards as outlined in RSA 155-E:4-a - :5.

1. Grandfathered Operations: The law distinguishes between existing operations and all others, the distinction being that existing, or grandfathered, operations are not required to obtain a permit. If an excavation was in business, and was in compliance with existing zoning laws between August 24, 1977 and August 24, 1979, it would be exempt from getting an excavation permit. RSA 155-E:2, I.

a. Expansion of Grandfathered Operations: Grandfathered operations are not

2 This Chapter on Excavations has relied heavily on, as well as excerpted portions of, a publication produced by the Southwest Region Planning Commission in 1999 entitled *RSA 155-E: The Law Governing Earth Excavations.*

allowed to expand without a permit. Expansion is defined as being beyond the limits of the town (in which case a permit would be needed from the bordering town), and the area which on or before August 24, 1979 has been appraised and inventoried for property tax purposes as part of the same tract as the excavation site. The burden of proof is on the land owner to demonstrate to the planning board that the area in question was intended to be excavated.

b. Grandfathered Operation Excavation Report: In order for a grandfathered pit to retain its status, the owner must have filed an excavation report with the planning board no later than August 4, 1991—two years from the effective date of the amended law. If the report was never filed, the excavation did not acquire grandfathered status; in addition, one of the criteria by which a board can determine whether to judge an excavation as abandoned or not is whether this report was filed.

2. Stationary Manufacturing Plant: No permit is required for excavation from a site which on August 4, 1989 was contiguous to or on land contiguous to a stationary manufacturing and processing plant that was in operation as of August 24, 1979 and used earth obtained from this contiguous site. To the extent such an excavation contiguous to a stationary manufacturing plant had received local and state permits since August 24, 1979, the ongoing operation of such an excavation continues to be regulated by such permits, and any extensions or renewals are permitted only by the original permitting authority or authorities. However, sites of stationary manufacturing plants may cross town boundaries, roads or other easements. For other operations, contiguous land area must be contained within the same town boundaries, and specifically excludes roads and other easements. RSA 155-E:2, III.

3. Highway Construction: Any excavation that is exclusively performed for road construction (state or local) does not require a permit. A copy of the pit agreement between the owner and the governmental unit must be filed with the board or the operation shall be deemed to be in violation of RSA 155-E. The express standards for operation and reclamation must be followed, and the excavation cannot operate in violation of local zoning, unless an exemption has been granted prior to operation. RSA 155-E:2, IV.

4. Incidental to Construction: Excavation that is exclusively incidental to the construction or alteration of a building or structure or the construction or alteration of a parking lot or right-of- way, including a driveway on a portion of the premises where the removal occurs. Such excavation may be commenced without an excavation permit provided all state and local permits required for the construction have been issued. RSA 155-E:2-a, I (a). For a more complete analysis of the meaning of "incidental," *see Batchelder v. Town of Plymouth Zoning Bd. of Adjustment*, 160 N.H. 253 (2010).

5. Incidental to Agriculture: Excavation that is incidental to agricultural or silvicultural activities, normal landscaping, or minor topographical adjustment is exempt from obtaining a permit. RSA 155-E:2-a, I (b).

6. Dimension Stone: Excavation from a granite quarry for the purpose of producing dimension stone, if such excavation requires a permit under RSA Chapter 12-E, is exempt from obtaining a permit. RSA 155-E:2-a, I (c).

C. Abandoned Excavations: Under RSA 155-E:2, II, an excavation operation with non-reclaimed area(s) shall be deemed abandoned if:

1. No material of sufficient weight or volume to be commercially useful has been removed during any two-year period either before, on, or after August 4, 1989*;*
2. The site is still active but has not complied with the requirements for incremental reclamation;

3. The owner has not posted a bond*;* or

4. The owner has neither received a permit nor filed a report with the Planning Board.

The planning board can require complete reclamation of any site it has determined to be abandoned, based on the criteria spelled out above. In the event an operation should be declared abandoned, the planning board has the authority to require that the owner either file a reclamation timetable and post a bond or complete reclamation within an agreed-upon reasonable time.

III. Operational and Reclamation Standards

A. Prohibited Projects – RSA 155-E:4: An excavation permit cannot be issued where:

1. The excavation would be unduly hazardous or

injurious to the public welfare.

2. It would substantially damage a known aquifer.

3. The project would violate the operational standards or could not comply with the reclamation standards.

4. Existing visual barriers would be removed.

In addition, no excavation is allowed unless permitted by the zoning ordinance, however, the law makes an exception if the zoning does not permit some opportunity for excavation activity.

B. Express Operational Standards RSA 155-E:4-a: All excavations that require a permit under 155-E, and all excavations that do not require a permit under RSA 155-E:2, must comply with the following minimum standards:

1. No excavation shall be permitted below road level within 50 feet of the right of way of any public highway.

2. No excavation shall be permitted within 50 feet of the boundary of a disapproving abutter, within 150 feet of any dwelling which either existed or for which a building permit has been issued at the time the excavation is commenced.
3. No excavation shall be permitted within 75 feet of any great pond, navigable river, or any other standing body of water 10 acres or more in area or within 25 feet of any other stream, river or brook which normally flows throughout the year, or any naturally occurring standing body of water less than 10 acres, prime wetland as designated in accordance with RSA 482-A:15, I or any other wetland greater than 5 acres in area as defined by the department of environmental services.
4. Vegetation shall be maintained or provided within the peripheral areas required by paragraphs 2 and 3.
5. Drainage shall be maintained to prevent the accumulation of free-standing water for prolonged periods.
6. No fuels, lubricants, or other toxic or polluting materials shall be stored on-site unless in compliance with state laws or rules pertaining to such materials.
7. Where temporary slopes will exceed a grade of 1:1, a fence or other suitable barricade shall be erected to warn of danger or limit access to the site.
8. Prior to the removal of topsoil or other overburden material from any land area that has not yet been excavated, the excavator shall file a reclamation bond or other security as prescribed by the regulator, sufficient to secure the reclamation of the land area to be excavated.

C. Express Reclamation Standards RSA 155-E:5 Within 12 months after permit expiration or the completion of excavation, the excavation site shall have completed the reclamation of the areas affected by excavation, according to the following minimum standard:

1. Except for exposed rock ledge, all areas which have been affected by the excavation or otherwise stripped of vegetation shall be spread with topsoil or strippings, if any, but in any case covered by soil capable of sustaining vegetation, and shall be planted with seedlings or grass suitable to prevent erosion.
2. Earth and vegetative debris resulting from the excavation shall be removed or otherwise lawfully disposed of.
3. All slopes, except for exposed ledge, shall be graded to natural repose for the type of soil of which they are composed so as to control erosion or at a ratio of horizontal to vertical proposed by the owner and approved by the regulator.
4. The elimination of any standing bodies of water created in the excavation project as may constitute a hazard to health and safety.
5. The topography of the land shall be left so that water draining from the site leaves the property at the original, natural drainage points and in the natural proportions of flow.

D. Incremental Reclamation RSA 155-E:5-a: After an area of 5 contiguous acres or more has been depleted of commercial earth materials, or any excavation where commercially useful amounts of earth materials have not been removed for a 2-year period, must be reclaimed within 12 months following such depletion or 2-year non-use.

E. Exceptions RSA 155-E:5-b: After a hearing the planning board can grant exceptions to the operational standards, reclamation standards and incremental reclamation requirement for good cause shown.

IV. Permitting Procedures

A. Excavation Regulations RSA 155-E:11: The planning board should adopt regulations that are separate from the zoning ordinance and the statutes. Regulations governing earth excavations are adopted by the same process as subdivision or site plan review regulations. Without regulations in place, the board can only enforce violations of the law, it cannot review any applications for a permit that might come before them. The planning board should address the various requirements of the law by establishing criteria by which certain activities will be judged. The public hearing procedure included in the regulation should specify that it applies not only to those applicants filing for an excavation permit, but that it might also apply to those pit owners who need to come before the board to demonstrate compliance with the law.

B. Permit Application RSA 155-E:3: Before commencing any excavation, the owner must apply for a permit and send a copy of the application to the conservation commission. At a minimum the application must provide: a sketch and description of the location and extent of the proposed excavation; the proposed duration of the project; the elevation of the highest annual average groundwater table; a reclamation plan and methods for fuel and chemical handling and storage, dust control, traffic, noise control and abatement.

C. Hearing RSA 155-E:7: Within 30 days of receiving an excavation permit application the planning board must hold a public hearing with 10 days prior notice to all abutters and the general public, including newspaper publication notice. Notice of the hearing must also be posted in three (3) public places in the municipality. Within 20 days of the hearing the planning Board must issue a decision approving or disapproving the application, and giving reasons for any disapproval.

D. Permit Approval RSA 155-E:8: If the planning board votes to approve the permit, an excavation permit can be issued to the applicant upon receipt of an excavation fee not to exceed $50 and the posting of a bond or other such surety reasonably sufficient to guarantee compliance with the permit conditions. A copy of the permit shall be prominently posted at the excavation site or the principal access thereto. A permit shall not be assignable or transferable without the prior written consent of the planning board. A permit shall specify the date upon which it expires.

E. Appeal RSA 155-E:9: Any interested person affected by a decision to approve or disapprove an excavation permit, or amended permit, may appeal to the planning board for a rehearing. The motion for rehearing must specify every ground upon which it is alleged that the decision or order complained of is unlawful or unreasonable and must be filed within 10 days of the date of the decision appealed from. The planning board must either grant or deny the request for rehearing within 10 days, and if the request is granted a rehearing shall be scheduled within 30 days. Any person affected by the decision on a motion for rehearing may appeal in conformity with the procedures specified in RSA 677:4-15.

V. Recommended Actions

A. Inventory All Known Excavation Operations: The planning board should inventory all known excavation sites in town—whether active or inactive. The inventory should include the date when each excavation began operation, so the board can determine what action is required by the board or the excavator, depending on the particular excavation. That inventory should categorize each site as: (a) existing "grandfathered" excavation; (b) operations begun since August 24, 1979; (c) excavations abandoned for any two-year period between August 24, 1987 and the present; and (d) excavations abandoned prior to August 24, 1977.

B. Notify All Pit Owners: Upon completion of the inventory, the planning board should then notify owners of the status of their operation and what that means in terms of compliance with RSA 155-E. The planning board should inform all pit owners of the law and ask them to come before the board and demonstrate that they are operating in compliance with RSA 155-E. Notification should be by certified mail, return receipt requested.

C. Zoning Requirements: RSA 155-E:4, III provides that in municipalities which have commercial earth resources on unimproved land within their boundaries, and which do not provide for opportunities for excavation of some of these resources in at least some, but not necessarily all areas within the municipality, or in municipalities which have zoning ordinances which do not address the subject of excavations, excavation shall be deemed to be a use allowed by special exception as provided in RSA 674:33, IV, in any non-residential areas of the municipality. In light of this statutory mandate, make sure that your zoning ordinance allows for excavations in some part of town; the rule of thumb here is "reasonable opportunity" for excavation. It is not acceptable to zone an area for excavation just to comply with the law if it is known that there is no gravel in such areas.

D. Master Plan Revisions: RSA 674:2, III(d) recommends that all towns adopt a water resources management and protection plan as part of the master plan. This plan essentially identifies surface and groundwater supplies and any aquifers in the town, along with sources of pollution. Once such a plan has been adopted, the information in it can be used in concert with the excavation regulations to protect identified aquifers and other water supplies, both below- and aboveground.

The construction materials section that is now included in the enabling legislation for a master plan identifies all known sources of sand and gravel deposits and the location and estimated extent of permitted excavations. This is basically an inventory of the town's gravel deposits. If your town does have a water plan, you will notice that the delineated aquifer areas are essentially the same as the areas of sand and gravel deposits that need to be identified for the construction materials section.

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THE SERVICE AND ACTION ARM OF NEW HAMPSHIRE MUNICIPALITIES

A GUIDE TO EFFECTIVE ENFORCEMENT

Investigating and Enforcing Code and Land Use Violations

2021 Supplement

Part Two: Beyond Zoning – Remedying Other Violations

Ch. 1 Building and Fire Code
Section I, State Building Code, subsection A, page 32

Replace subsections 1 and 2 with:

1. Current NH Building Code 2021:
    (a) The International Building Code 2015
    (b) The International Existing Building Code 2015
    (c) The International Plumbing Code 2015
    (d) The International Mechanical Code 2015
    (e) The International Energy Conservation Code 2015
    (f) The International Swimming Pool and Spa Code 2015
    (g) International Residential Code 2015

2. Current NH Building Code 2021 – NFPA Code:
    The National Electric Code 2017

Section I, State Building Code, subsection B, page 32-33

Replace subsection 3 with:

3. Building Permits for State and Local Buildings: The state fire marshal issues permits and conducts inspections for buildings owned by the state, the community college system of New Hampshire, and the university system. The state fire marshal can contract with or authorize a local enforcement agency or other qualified third party to issue such permits and certificates of occupancy. Any municipality that has adopted an enforcement mechanism under RSA 674:51 may request the services of the state fire marshal under the state building permit system, including issuing of permits, conducting of inspections and issuance of certificates of occupancy, for buildings or projects owned by counties, cities, towns or village districts, if a project requires specialized knowledge of the state fire marshal or due to staffing limitations of the municipality (although the state fire marshal is not required to provide such services in this situation). RSA 155-A:2, IV.

Add a new subsection 5:

5. Tents: Event tents erected on public or private property must comply with the state building and state fire code. Municipalities are not permitted to enact any additional regulations of event tents on public or private property beyond that in the state building and fire codes. A building permit is not required for any size erected as an accessory structure on property that is an owner-occupied, one- or two-family dwelling. RSA 155-A:2, V-a; RSA 155:20.

Subsection D(1), page 33

Add the following sentence to the end of existing subsection 1:

Any notice of violation issued by the building inspector must include the relevant section of the state or local building or fire code alleged to be in violation. RSA 155-A:7, V.

Section II State Fire Code, Subsection A, page 35

Change reference in existing subsection A to:

Uniform Fire Code NFPA 1 2015

Section III Building Code and Fire Code Appeal Process, Subsection C, page 37

Replace the last sentence with:

Decisions from the local building code board of appeals may be filed within 30 days after the board's decision with the state building code review board. RSA 674:34, II; RSA 155-A:10, IV(c).