

CTAP Conference, December 2, 2006

Adapted from  
2001 Municipal Law Lecture Series, Lecture # 2

## “*CROSSING THE MOAT*”

Benjamin Frost, Esq., AICP  
Program Coordinator  
Housing Awareness Program  
New Hampshire Housing  
(603) 310-9361 / bfrost@nhhfa.org

### I. INTRODUCTION

The lack of housing affordable to a wide range of working households is having a direct, immediate and serious negative impact on the ability of many communities to host new business or to expand existing businesses. At lower income levels, it is undermining the ability of families to work their way out of poverty. It is overwhelming the capacity of NH's homeless shelters and placing severe burdens on many municipalities in the form of rising costs for emergency housing assistance. *Report of the Interim Study Committee for HB1199 (Study Committee on Funding for Affordable Housing), October 19, 2000.*

New Hampshire's strong economic growth over the last decade created many benefits for most of our communities and citizens; but it also generated a demand for housing that the marketplace has been unable to meet. The results are rising home purchase prices, record low vacancy rates and higher rents—a housing market that presents a significant affordability challenge for many of our citizens, a barrier to labor force development and a grave challenge to our state's continued economic growth and vitality. *“Reducing Regulatory Barriers to Workforce Housing in New Hampshire,” Report of the Legislative Commission established by Chapter 262 of the Laws of 2001, November 1, 2002.*

Throughout the 1990s, New Hampshire was one of the most notable beneficiaries of the sustained national economic expansion, and while there were distinct gains in the state, there were also some strong negative repercussions. Significant job growth met the needs of much of New Hampshire's population for gainful employment, but it also attracted a high level of in-migration. Although the population was growing at a rate that led the New England region, the number of housing units built during the same time markedly failed to keep pace. The result was competition for a constantly dwindling resource—ownership homes on the

---

market and vacant rental units. This textbook example of shifts in supply and demand led to an inevitable result: soaring housing costs.

For existing homeowners, this was seen as a windfall as their equity rapidly grew. For renters and first-time buyers, however, the situation has become a crisis, forcing many of them into excessively long commutes, into undesirable neighborhoods, or into homeless shelters. At a time when so many of New Hampshire's residents have been enjoying unprecedented wealth, many others must make choices that the more fortunate would find unacceptable: health insurance or daycare? clothing or transportation? food or shelter? What is especially important, however, is who is now facing these dilemmas:

**...the households being shut out of New Hampshire's housing market are no longer only the "traditionally needy" but a large and growing slice of our essential, productive workers—teachers, retail clerks, even lower level managers.** *Feeling the Pinch*, a report of The New Hampshire Housing Forum and the American Friends Service Committee.

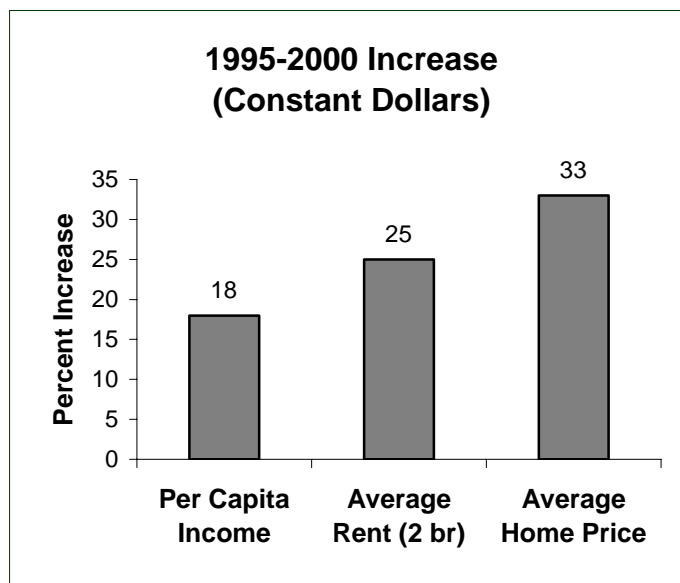
At the same time, municipalities are justifiably concerned over the loss of character that results when development is allowed to proceed unchecked by some reasonable restraint. A virtual statewide constant in town master plans is the desire to retain and preserve "rural character." The difficult problem that remains for municipalities, then, is how to balance their preservationist desires with their obligation to be a part of the solution to the affordable housing problem.

## II. WHAT IS AFFORDABLE HOUSING, AND WHY IS THERE A PROBLEM?

A. *Affordable Housing 'Defined.'* As a rule of thumb, housing that costs a household no more than 30 percent of its total income is considered affordable; generally, this level of expenditure should leave sufficient remaining income for other necessary expenses, such as food, clothing, transportation, child care, and medical care. What does this standard mean for New Hampshire? The median monthly rent for a two-bedroom apartment in New Hampshire is \$989 (2005 Residential Rental Cost Survey, New Hampshire Housing Finance Authority; includes utilities). For this cost to be affordable to a family, the household income would have to be over \$39,560, or \$19.02 per hour. While this seems to be a wage that is easily attainable for a two-income family, over 25% of New Hampshire's households were comprised of single parents with children. The variety of jobs that pay less than that level is striking: kindergarten and pre-school teachers, home health aides, bank tellers, bailiffs, emergency medical technicians, automotive mechanics, fire fighters, highway maintenance workers, and many others.

According to the US Census, in 2000 almost 32% of all renter households paid more than the affordability threshold for their housing. The same was true of almost 24% of homeowners who were paying a mortgage. This was a pattern that has been repeated throughout all regions of the state, and as the figure below illustrates, it can only be getting worse, as rental and home price costs have dramatically increased, and income has increased slowly in comparison.

---



From: NH Public Radio website ([www.nhpr.org](http://www.nhpr.org))  
Sources: US Census; NH Assoc. of Realtors; Bureau of Economic Analysis; NH Housing Finance Authority

**B. The Problem of Affordability.** The first issue to confront is that the current housing market in New Hampshire makes it difficult, or impossible, for people who are important to our communities to be able to afford to live in them. Drawing from the occupations listed above, we know that this includes many municipal employees—not just the “kids flipping burgers.” Additionally, though, it *is* our children too who will be unable to live in or return to the towns where they were born, and it is our elderly parents who will be unable to stay in their beloved communities, amongst life-long friends, all because of the cost of housing. These are predictable problems, however, and ones that have been known to exist for some time in New Hampshire.

The new piece of the problem is the impact that the short housing supply and high cost might have on the state’s long-term economic performance. Increasingly, businesses across the state are experiencing difficulty recruiting and retaining employees, because they are unable to find or keep housing that is affordable to them.

**...affordable housing is beginning to cross over from a social concern to a business concern. How can a business expand if their new employees can’t find or afford housing? How can companies recruit to talent if housing costs are substantially higher than in other parts of the country? How can employers retain a loyal workforce if employees must commute longer and longer distances to live in an affordable community?** *Housing Crunch*, Business NH Magazine, April 2001.

Like the cork in a bottle, the statewide housing shortage could have a significant impact on the state’s future economic growth. Simply put, without housing, there will be no workers; without workers, there will be no work. While the drama of that statement should not be exaggerated, neither should the vital nature of this problem be underestimated.

**C. Perceptions of the Municipal Role in Affordable Housing.** With increasing frequency and fervor, municipalities are being targeted as “the problem” to finding solutions for affordable housing. Allegations are made that reasonable proposals by developers are stymied by planning boards and zoning boards, which make unreasonable conditions of approval, or simply deny applications for what developers feel are spurious reasons. The underlying suggestion is that municipalities simply do not want additional housing, because the tax revenues generated by housing, especially affordable housing, does not pay for the cost of municipal services it requires.

**While municipalities are more than happy to accommodate a variety of non-residential uses that are perceived to be net property tax generators, housing for the families with children, the core of the labor force, is not welcome. Although there has been no broad based imposition of new development controls by municipalities, developers perceive slower and more meticulous project reviews and the imposition of impact fees in response to the increased financial stress that is associated with residential development. Local zoning ordinances, growth control measures, impact fees and other municipal regulations (whether intended or not) have created a major barrier to the construction of multi-family housing and manufactured housing parks. They have been a significant factor in the failure of the marketplace to respond to the rental housing shortage in the state.** *Barriers to Affordable Housing*, NH Legal Services Muse, February 2001.

The New Hampshire legislature addressed this issue directly in 2001 with SB21, which stated

**The general court has recently recognized that an acute shortage of housing affordable to a large number of working households, [and] has further found that local land use ordinances and other government regulations may create barriers to a response by the market to the demand for affordable housing. The general court now finds that it is necessary to act to encourage the private and non-profit sectors to address the critical shortage of affordable housing by reducing unnecessary regulatory barriers and encouraging the development of such housing.** Section 262:1

If New Hampshire’s municipalities want to retain control of the issue of how the need for affordable housing is accommodated locally, then they must take action directly. Failure to do so will leave the solution in the hands of others.

### **III. WHAT CAN MUNICIPALITIES DO TO PROMOTE AFFORDABLE HOUSING?**

**A. Start with the Master Plan.** Take a look at your community’s master plan—it probably has some general statements about encouraging a variety of housing types to provide opportunity for people of different income levels. It may not, however, take the important additional step of identifying areas within the community where growth is acceptable or wanted. It may also not specify that affordable housing is an important goal, despite the statutory requirements that it do so, and it may not enumerate different regulatory approaches that the community can take to facilitate the development of affordable housing. If the master plan is lacking in these measures, it should be updated. Although the master plan itself does not carry the weight of law, it should serve as the

---

fundamental basis for all of the substantive aspects of the zoning ordinance. As such, the master plan must anticipate the types of measures that the planning board might propose to be included in the zoning ordinance.

**B. What kinds of zoning provisions should your master plan address?** Generally, there are four areas in which municipalities can act to promote affordable housing: (1) patterns of development, (2) type and size of construction, (3) mixture of uses, and (4) directly influencing costs. Remember that affordable housing is all about money—land purchase cost, transaction costs, and construction costs. Anything that reduces the cost to the developer will tend to increase his/her ability to provide affordable housing. The following simple matrix neatly depicts the interplay between the developers’ costs and how the public influences it.

| <b>Development Costs and Public Responses</b>                                    |  |
|--|--|
| <b>Cost Input</b>  | <b>Public Response</b>   |
| Land Cost  | Increase density<br>Sale/grant of publicly owned property  |
| Carrying Costs<br>Interest<br>Property Taxes                                     | Permit streamlining<br>Subsidies/Low-interest loans  |
| Hard Costs<br>Construction costs<br>Site preparation costs<br>Off-site exactions | Zoning for manufactured housing<br>Accessory dwelling units<br>Cluster/zero lot-line standards<br>Modification of existing zoning requirements governing:<br>Street widths;<br>Off-street parking;<br>Lot coverage;<br>Sidewalks; and<br>Curb and gutter.<br>Targeted exemptions |
| Facilitating the Development Process   | Regulatory incentives<br>Early vesting and development agreements<br>Inclusionary zoning<br>Housing trust funds<br>Public-private partnerships   |

Source: *Affordable Housing*, American Planning Association, Planning Advisory Service Report Number 441, 1992

**1. Patterns of Development.**

*a. Lot Size.* The factor of development that has the greatest impact on affordability is the cost of the land. If your community’s zoning ordinance requires several acres per housing lot, then the cost of housing will be dramatically increased. There may be legitimate reasons for such a requirement, such as septic

capacity, steep slopes, or other natural constraints to development, or the desire to preserve open space or agricultural land, or to protect rural character. It is likely, however, that blanketing the entire municipality with a large lot size requirement does not fully serve even its intended goals. Certainly, no community is entirely underlain by shallow bedrock or is located entirely on 25% slopes. Your master plan should plan for growth by identifying areas within your community where growth is more appropriate. In those areas, reduced lot sizes would be appropriate as a means of reducing the cost of development. It is true that this will facilitate the creation of more housing, and many people fear that consequence—but fostering the creation of more housing opportunities is the community’s legal obligation.

*b. Density.* Even better than simply modifying the lot size requirement is changing the density of development, an approach that many communities use. Increasing the number of dwelling units permitted per acre can dramatically reduce the cost to home buyers or renters. If the master plan identifies a particular area as appropriate for future growth, then increasing the density of development there is a logical means of promoting affordable housing. Even if affordable housing is not the specific goal, increased density of development will have the resulting benefit of promoting it. To balance the potential for greater growth in higher density areas, the master plan could also identify areas within the community that are appropriate for reducing density of development, such as areas with poor highway access, high conservation value, or other important attributes.

*c. Open Space Design.* Commonly referred to as “clustering,” this is an equally commonly misunderstood approach. Clustering of development does not necessarily provide for an increased number of housing units in a development, as compared to a conventional “tract-style” residential subdivision. It simply refers to the proposition that in a development, the housing units can be concentrated in a smaller area, preserving the remainder as permanent open space. The open space development standards should ensure that a portion of the open space is “usable” land for recreation, agriculture, forestry or some other use—i.e., that it would otherwise be appropriate for development. Without such a standard, then developers would clearly be inclined toward leaving only wetlands and steeply-sloped land as open space—namely, land that would have remained undeveloped in a conventional subdivision.

Open space design has the capacity to increase housing affordability because it reduces the developer’s costs (less land to clear, shorter roads and driveways, and shorter utility infrastructures), but it alone is not enough. It is certain that even in a cluster subdivision, multi-million dollar mansions can be built. This is true of the Hollis zoning ordinance, which contains many elements that are important to open space design, yet it has not worked to promote affordable housing in that community. This result partially reflects the low density requirement that the Town maintains (2 acre minimum), but it also is based on the strong real estate market there.

---

*d. Location of Development.* Although land in outlying areas often is less expensive to purchase, it is not necessarily conducive to affordable housing. Because it is remote, the cost of extending municipal infrastructure there can be considerably higher. Such land also typically requires reliable personal transportation (automobiles) to access it. Conversely, land that is adjacent to existing villages and urban areas is often much better suited to developing affordable housing—it is close to existing municipal infrastructure; it can be within walking distance of many businesses, services, and schools; and it can more easily accommodate higher densities of development without appearing “out of place.” Identifying these areas in the master plan as “residential growth centers” is an important step in promoting affordable housing.

## **2. Type and Size of Housing.**

*a. Manufactured Housing.* Although manufactured housing often carries a stigma of being low value and poor construction (“trailer parks”), improvements in the standards and practices of construction over the last thirty years have made it a legitimate source of affordable housing. Statutory requirements aside, municipalities should closely examine particularly manufactured housing parks as a reasonable portion of their approach to affordable housing. In a park setting, either cooperatively owned by the residents or by a third party, the capacity to provide safe, decent housing to a great number of people is more reasonable because of the ability to develop at higher densities than on single lots, where the controlling cost factor remains the underlying land.

*b. Housing Size.* The New Hampshire zoning enabling statute provides for regulating the size of housing units (RSA 674:16). While most communities use this statute to support minimum dwelling unit size standards, some are also using it to establish maximum size standards. An increasing problem in more affluent communities is the propensity for new owners to tear down smaller, less expensive homes for the sole purpose of replacing them with much larger and more expensive dwellings. Similarly, this approach could be used in new subdivisions where a developer might wish to build houses only in excess of 3,000 square feet. There, the municipality could require a portion of the housing units to be of smaller size. Deed restrictions could also be required, preventing future owners from subsequently expanding the structures unreasonably. Similarly, a developer could be encouraged to leave a portion of a dwelling unfinished, thereby reducing the initial purchase price and affording the first-time buyer the opportunity to quickly build equity in the property.

*c. Housing for the Elderly and Disabled.* Both state and federal law provide for special treatment of housing for the elderly and disabled in zoning standards. Recognizing the distinct needs and different demands of elderly and disabled people, increasing density of such development is appropriate. This does not guarantee that the housing units will be affordable, but if developed in concert with federal and state housing subsidy programs, then such assurances can be made.

---

Oftentimes, communities rally around the idea that a local elderly housing complex will provide exclusively for the needs of the local elderly population. It is important to recognize that this cannot be a requirement of the development—once the doors are open all are welcome, regardless of their community of origin. Alternatively, communities see elderly housing as a “free lunch” from a property tax revenue perspective, because of the very few school children associated with such developments—but there are other costs associated with elderly housing, some of which are borne locally (emergency services), others by the state (medical costs). Furthermore, older people tend to spend much less of their income on consumer goods, with a relative negative impact upon local retail establishments in comparison with younger households.

*d. Accessory Dwelling Units.* New Hampshire law also provides for accessory dwelling units (ADU) (RSA 674:21, I(l)), commonly called “in-law apartments” (or “granny flats” in Australia!). The latter name is misleading, however, as it is possible that such a requirement would be found illegal under the terms of the Federal Fair Housing Act, in addition to being impossible to police and enforce. It is better to recognize that such housing provides an important relief valve for shortages in the rental market. ADU’s also have the significant added benefit of making the host property more affordable to the owner. Typically, an ADU is attached to a main residence, but this is not a requirement—they can be stand-alone structures. Some important provisions to consider are the proportional size of the ADU and the host structure, the visual impact of ADU. For example, in a single family neighborhood, the design could be made compatible by requiring the entrance to the ADU to be on the side or rear of the structure, by requiring that the ADU be created in such a manner as not to need an exterior fire escape, and by limiting driveway access to the same as the host dwelling.

*e. Inclusionary Zoning.* While there are many examples of inclusionary zoning nationwide, little has been done in New Hampshire, despite the specific statutory authorization (RSA 674:21, I(k)), which defines inclusionary zoning as follows:

**"Inclusionary zoning" means land use control regulations which provide a voluntary incentive or benefit to a property owner in order to induce the property owner to produce housing units which are affordable to persons or families of low and moderate income. Inclusionary zoning includes, but is not limited to, density bonuses, growth control exemptions, and a streamlined application process.**

“Voluntary” is the watchword—inclusionary zoning cannot be mandatory in New Hampshire communities. If communities do want to promote affordable housing using inclusionary zoning, then a good approach would be to meet with developers to find out what types of incentives would induce them to build affordable housing. If they would still make a greater profit building “unaffordable” housing without the use of these incentives, then their choice would be clear. This problem has been witnessed in the Town of Salem, which has had affordable housing incentives as part of its zoning ordinance since 1989. The ordinance has never been used by a

---



developer, which is a reflection of the very strong market for higher-end housing units there. The Town of Amherst has a somewhat simpler ordinance containing modest density bonuses for affordable housing. The ordinance has been used by developers on several occasions.

### **3. Mixed Uses**

*a. Home Occupations.* The need to provide for home occupations was clear to early drafters of zoning enabling legislation and zoning ordinances, as most people already conducted some sort of business from their homes. This is reflected in the current acceptance of many types of home occupations as “accessory uses” in a home, permitted without enumeration in a zoning ordinance. There are types of home occupations, however, that would tend to go beyond the customary and traditional understanding of the term, yet which a community might still want to promote. This can be done either by enumerating the acceptable home occupations as permitted accessory uses in the zoning ordinance, by developing performance standards for home occupations, or by some combination of the two. The Hollis Zoning Ordinance is a good example of the second type—performance standards, which regulate the impact of the use upon the neighborhood, and do not necessarily regulate the use itself (you can view the ordinance at [www.hollis.nh.us](http://www.hollis.nh.us)).

*b. Mixed Use and “Village” Zoning.* Seemingly contrary to the historic precepts of zoning, which was intended to separate incompatible uses, contemporary planning embraces the idea that different uses can coexist, and even benefit from each other. The classical example of this is upper story apartments over commercial establishments in downtown areas. While many of these continue to exist, in areas where there is no longer sufficient demand for all of the commercial storefronts, communities might want to consider allowing them to be converted to additional residences. In areas of new development, builders can be encouraged (or required!) to develop comprehensively planned developments that include office parks, residential clusters, small commercial establishments, and space for institutional uses, such as elementary schools. Planning boards and developers can use old New Hampshire villages as their prototypes when imagining how such developments could be created. Be sure to allow for plenty of pedestrian access, and position various uses to limit the need for automobile use.

### **4. Directly Influencing Costs**

*a. Tax Increment Financing (TIF).* A TIF district is a portion of a community designated by the municipal governing body (town meeting or city council) from which the municipal tax revenues may be specifically dedicated to a capital project within the district. The statute enabling this (RSA 162-K) is complex but flexible, and TIF can be used in a variety of ways to promote affordable housing, among other uses. The New Hampshire Office of Energy and Planning recently issued a Technical Bulletin on TIF, which is available online at

---

<http://www.state.nh.us/osp/planning/guide/docs/TechBulletin13.pdf>, or by calling OEP at 271-2155.

*b. Public/Private Partnerships.* In the past, the role of municipalities in promoting affordable housing development was probably limited to offering encouraging words of advice on how to interpret the zoning ordinance. Now, communities across the country are beginning to take an active role in ensuring the availability of sufficient housing that is affordable to the labor force. Statewide, there is a group of regional coalitions that work cooperatively with local and regional governments to provide, promote, and advocate for affordable housing. All of these initiatives closely involve and require the active participation of municipalities, and are based upon the recognition that the tight housing supply in New Hampshire poses the principle impediment to continued healthy economic growth.

*c. RSA 79-E: Local Rehabilitation Tax Relief Incentives* (Chapter 167, Laws of 2006; text: <http://www.gencourt.state.nh.us/legislation/2006/HB0657.html>). Effective April 1, 2006, New Hampshire municipalities may adopt provisions that allow them to exempt properties in downtown areas from increases in taxes that would be caused by higher assessments on the properties because of substantial rehabilitation. This is strictly a local option, and it is up to the voters to decide whether to adopt such a program. If locally adopted, downtown property owners may apply for relief from future increases in taxes for between 5 and 10 years, depending upon the type and use of the structure. Rehabilitation must be substantial—at least \$75,000 or 15% of the value of the structure, whichever is less.