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**CONSEQUENCES OF LAND USE POLICY:  
WHY & HOW NEW HAMPSHIRE COMMUNITIES CAN GROW SMART**

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To grow or not to grow? That is not the question. The question is how to grow – and that question filled the Dover City Hall on the evening of Thursday, November 29, 2007, in a free public policy forum sponsored by the Seacoast law firm of Donahue, Tucker & Ciandella PLLC. The forum, “Consequences of Land Use Policy: Why & How New Hampshire Communities Can Grow Smart,” joined issues of housing affordability, zoning and land use planning in the context of New Hampshire’s changing demographics. A diverse crowd of professional and volunteer planners, housing developers, local officials and concerned Granite Staters gathered ‘round, New England-style, for an interactive evening that raised as many questions as it answered and injected new life into our collective thinking about how we shape and live in our communities.

Presenters were Peter Francese (author and demographer), George Bald (Commissioner, New Hampshire Department of Resources and Economic Development), Clay Mitchell (Epping Town Planner), Tom Irwin (Senior Attorney, Conservation Law Foundation), Eric Chinburg (President, Chinburg Builders, Inc.), Ben Frost (Housing Awareness Program Coordinator, New Hampshire Housing) Richard Ingram (Executive Director, The Housing Partnership) and Michael J. Donahue, Esq. (Senior Partner in the Development Practice Group of Donahue, Tucker & Ciandella). Award-winning local filmmaker Jay Childs (Director and Producer, JBC Communications) provided sneak-preview snippets from “Communities and Consequences,” a film he is producing with Peter Francese in collaboration with the New Hampshire College and University Council. The film addresses in dramatic fashion how growth, demography and economic sustainability will present challenges to New Hampshire over the next decade and how assumptions, decisions and municipal planning affect the state’s residents and businesses. The film is expected to debut on public television in early 2008.

The evening highlighted how two compelling interests in New Hampshire, land conservation and land development, needlessly compete at the other’s expense. The casualty of this recurring battle is a dwindling stock of reliable and affordable housing for the state’s workforce. New Hampshire’s traditional agricultural-based economy and its evolving service- and tourism-based economies – and those workers’ ability to pay rents and mortgages – heavily depends on the aggressive conservation and protection of open space. A consequence of aggressive conservation is a citadel of local land use regulations that has rendered the production of simple, decent housing, even in modest amounts, effectively impossible. The opportunity cost of these policies, as it would be characterized by economists, is the foregone production of housing that is affordable and located

near the places people work. The state's newer, developing economic sectors, such as the medical and high-tech fields, together with traditional retail activity, especially depend on the availability and affordability of housing in order to attract and retain the right employees. New Hampshire's workforce pays the price in its quest for more affordable housing: longer commutes, more traffic, less time with family, more fill-ups at the gas tanks and resulting air pollution, higher rents and mortgages. The resounding message from the evening in Dover: it does not have to be this way; we can grow smart.<sup>1</sup>

## RETHINKING THE CONVENTIONAL WISDOM

Peter Francese, author and demographer, says we are witnessing a social movement towards balance and away from the three powerful myths he reports hearing over and over. First, that what we do in our own community has no effect beyond our town line. Second, that if we allow any housing that is not age-restricted we will put too many kids in the schools. Third, that if we buy up the open space and put it in conservation easements our taxes will go down.

The first myth identified by Francese ties into New Hampshire's proud ethic of localism. Land use regulation is a last bastion of local control in an era when state and federal governments are as ubiquitous as ever. The fact remains that land use planning and housing are inherently regional issues. The 1926 U.S. Supreme Court land use case of *Village of Euclid v. Ambler Realty Co.*, upholding the constitutionality of zoning, dealt with the Euclid, OH zoning ordinance that the village adopted in response to the rapid expansion of nearby Cleveland.<sup>2</sup> The 1975 landmark affordable housing case of *Southern Burlington County NAACP v. Township of Mount Laurel* hinged on the New Jersey Supreme Court's decision that communities had a legal obligation to affirmatively plan for their "fair share" of the region's housing needs.<sup>3</sup> In the 1991 New Hampshire Supreme Court case of *Britton v. Chester*, the Court required the Town of Chester to provide reasonable opportunities for the creation of affordable housing and to provide a share of the regional housing

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<sup>1</sup> NH RSA 9-B:3 (State Economic Growth, Resource Protection, and Planning Policy) defines "smart growth" as:

the control of haphazard and unplanned development and the use of land which results over time, in the inflation of the amount of land used per unit of human development, and of the degree of dispersal between such land areas. 'Smart growth' also means the development and use of land in such a manner that its physical, visual, or audible consequences are appropriate to the traditional and historic New Hampshire landscape. Smart growth may include denser development of existing communities, encouragement of mixed uses in such communities, the protection of villages, and planning so as to create ease of movement within and among communities. Smart growth preserves the integrity of open space in agricultural, forested, and undeveloped areas. The results of smart growth may include, but shall not be limited to:

- I. Vibrant commercial activity within cities and towns.
- II. Strong sense of community identity.
- III. Adherence to traditional settlement patterns when siting municipal and public buildings and services.
- IV. Ample alternate transportation modes.
- V. Uncongested roads.
- VI. Decreased water and air pollution.
- VII. Clean aquifer recharge areas.
- VIII. Viable wildlife habitat.
- IX. Attractive views of the landscape.
- X. Preservation of historic village centers.

Smart growth is the land use planning community's answer to "sprawl." The American Planning Association aggressively launched the smart growth land use reform movement in the 1990's. Principles of smart growth typically include more efficient land use characterized by compact or clustered development patterns combined with the conservation of green and open spaces, less dependence on the automobile, a range of housing opportunities and choices and improved jobs/housing balance.

<sup>2</sup> *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

<sup>3</sup> *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713 (N.J. ), *appeal dismissed*, 423 U.S. 808 (1975). See *Southern Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390 (N.J. 1983) (*Mt. Laurel II*).

need.<sup>4</sup> In 2005, the Strafford County Superior Court followed the *Britton* regional perspective and quashed one community's refusal to grant variances for the construction of multifamily housing. In *Great Bridge Properties v. Town of Ossipee*,<sup>5</sup> a study of Ossipee and the Carroll County region concluded that Ossipee was providing a disproportionately low amount of the region's need for low- and moderate-income housing. The court found that Ossipee's zoning ordinance operated to effectively preclude low- and moderate-income households from residing in Ossipee by restricting the ability to cluster multiple structures on a single lot. The question of regional impact is increasingly prominent in land use decision-making.

Francese discussed the second and third myths in the context of the state's property tax system. Francese specifically addressed the too-many-schoolchildren myth by pointing out that New Hampshire communities' property taxes continue to increase at a rate faster than inflation despite the consistent decrease in the state's school-age population. In fact, according to Francese, New Hampshire has become the sixth "oldest" state in the nation, tied with Florida. He explained what he sees as the ramifications of attributing higher property taxes to children and how it can impact a community. The bottom line, he says, is that children are a vital resource. A population like New Hampshire's that is increasingly elderly will fall victim to an economy that is out of balance and not sustainable. On the other side of the aisle, he sees many Granite Staters who see through the myths and understand that any negligible effect children may have on property taxes are outweighed by their benefits. They are tired of being presented with a false choice between conservation and growth.

#### STRANGE BEDFELLOWS NO LONGER

George Bald, New Hampshire Department of Resources and Economic Development (DRED), highlighted the state's efforts to link conservation and the preservation of open space with affordable housing and community development. As the Commissioner of DRED, his mission is to work with the state's businesses and institutions to ensure that New Hampshire adopts a comprehensive, holistic approach to economic development and resource protection in which the two goals are not mutually exclusive.

New Hampshire understands its dependence on the preserved landscape and vibrant open spaces. These attributes are lodged in the state's economic conscience to the tune of billions of dollars per year. In a January 1999 report prepared for the Society for the Protection of New Hampshire Forests, Resource Systems Group, Inc. estimated that 89 percent of the state qualified as open space.<sup>6</sup> The report found that open space based economic activities contributed \$8.2 billion per year to the New Hampshire economy in 1996/97 and 25 percent of the state's civilian jobs were dependent on open space.<sup>7</sup> These are jobs in the agriculture, forestry, tourism and recreation sectors

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<sup>4</sup> *Britton v. Town of Chester*, 134 N.H. 434, 595 A.2d 492 (N.H. 1991). The Town's zoning limited apartments to parcels of 20 acres or greater and prohibited development on steep slopes and wetlands area. The regulations left 1.73 percent of the Town's land available for apartments.

<sup>5</sup> *Great Bridge Properties v. Town of Ossipee*, No. 04-E-110 (Strafford County Super. Ct., Feb. 7, 2005).

<sup>6</sup> DEBORAH BRIGHTON, THE TRUST FOR PUBLIC LAND, MANAGING GROWTH: THE IMPACT OF CONSERVATION AND DEVELOPMENT OF PROPERTY TAXES IN NEW HAMPSHIRE 7 (2005). "Open space" is areas that are not built up, excavated or developed, including wild areas, forests, tree farms, open productive agricultural land, grassland, pasture, wetlands, lakes, natural seashores and municipal parks.

<sup>7</sup> RESOURCE SYSTEMS GROUP, INC., THE SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS, THE ECONOMIC IMPACT OF OPEN SPACE IN NEW HAMPSHIRE 14 (1999) at 1-2.

of the state's economy. Agriculture related activities gross an average of \$413 million per year for New Hampshire.<sup>8</sup> Forestry based activities produce approximately \$1.2 billion in annual gross revenues.<sup>9</sup> Tourism and recreation generate a yearly average of \$3.2 billion.<sup>10</sup> New Hampshire needs open space.

Clay Mitchell, Town of Epping, reported that planning boards often appear strapped and held hostage to a process in which they have neither the time nor resources to subject development applications to the scrutiny they require, let alone engage in broader community planning efforts. Often, boards are not even able to do a site walk. Neither builders nor municipalities win when the planning and project review process is compromised or unnecessarily extended to hear the same repeated or ever-shifting concerns from project opponents. Communities can suffer from this even when they have detailed, comprehensive Master Plans that are the result of extensive polling and community input. Mitchell referenced the fact that, in New Hampshire, there is no statutory connection between the Master Plan and the Zoning Ordinance. Many states have statutes that require zoning, subdivision and other regulatory mechanisms to be "consistent" with the municipality's comprehensive general plan. Litigation over the meaning of consistency is inevitable. Even a "loose" interpretation of consistency, as in some jurisdictions, can ensure greater project scrutiny and stave off the unsustainable building patterns that result in sprawl. Mitchell stressed that sprawl-type housing developments, in addition to being unaffordable, require massive amounts of energy consumption. How about some green building?

The National Association of Home Builders (NAHB) recently promulgated a new energy efficient, green building ratings system. Both the NAHB and the U.S. Green Building Council (USGBC) offer an array of green building ratings systems. People are most familiar with the USGBC's LEED (Leadership in Energy and Environmental Design) ratings systems. Nationwide, dozens of municipalities have integrated LEED standards into their zoning ordinances and building codes, usually as part of a voluntary, incentive-based system. Many builders and regulators feel that green is good and should be encouraged, but it should not be mandatory. The NAHB ratings system is voluntary. Several municipalities, including Boston, MA, are pushing the envelope with mandatory green building codes, often LEED-based, that are widely applicable to all kinds and sizes of commercial and residential projects.

Tom Irwin, Conservation Law Foundation, echoed Mitchell's concerns around sprawl and added that he would like to see more tax incentives that promote redevelopment as opposed to new development. Additionally, Irwin cited the deleterious effect on ecosystems of the impervious surfaces that result when we pave over our land and cap it for new construction. Opportunities to reuse existing structures, even those that are located "on the grid" and serviced by municipal utilities, often present engineering, environmental and construction challenges not presented by new construction. Developers routinely find that reuse is significantly more expensive than building new. Tax credits for developers and/or their investors could make reuse more feasible. Currently, the federal Low Income Housing Tax Credits (LIHTC) and New Markets Tax Credits (NMTC) programs are prime examples of how the federal government uses the Internal Revenue Code to encourage large-scale private investment in affordable housing and community development

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<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

projects. But there are no parallel programs, as of yet, that directly target or “incentive-ize” reuse or infill projects.

Eric Chinburg, Chinburg Builders, Inc., recounted his experiences, as a developer, in which the process deficiencies discussed by Mitchell can lead to arbitrary land use policies. Arbitrary policies discourage progressive developers from investing the time and money into creative project applications. Developers may feel forced to resort to traditional projects that, Chinburg stressed, do not reflect the latest and greatest smart growth principles. Developers, whether motivated by public relations concerns or the dictates of their consciences, increasingly want to do the right thing. Municipal land use boards often, knowingly or unknowingly, make it difficult for developers to break from the mold with land use regulations whose effect is to exclude.

## JUDICIAL AND LEGISLATIVE TRENDS

New Hampshire’s courts have aggressively battled exclusionary tactics. Nationwide, state courts showed intolerance for exclusionary zoning tactics as early as the 1960’s.<sup>11</sup> Exclusionary tactics, also known as snob zoning, may include large lot zoning, inflated setbacks, strict aesthetic requirements and low maximum allowable densities. The practices may not be invalid per se if they serve an otherwise legitimate land use purpose. If the effect of a zoning practice on housing is exclusionary, then red flags go up. First, an aggrieved party must challenge the practice. The threat of litigation is made more real by increasing third-party rights in the development process. State courts routinely grant standing to litigate to an array of interests including developers, realtors, builders and housing rights advocates. Municipalities nationwide enjoy high levels of judicial deference towards their land use planning practices. Practices that effectively exclude affordable housing continue unnoticed and effectively remain legal if no one challenges the practices. Courts do not pro-actively “audit” local land use laws.

Ben Frost, New Hampshire Housing, drew the audience’s attention to the fact that, after all this discussion about smart growth and affordable housing, the New Hampshire legislature’s definition of smart growth, RSA 9-B:3, does not include housing affordability. Notwithstanding this philosophical gap in our statutes, the New Hampshire legislature, via RSA 674:21, enables municipalities to adopt innovative land use controls. Possible controls include timing incentives, intensity and use incentives, impact zoning, environmental characteristics zoning, cluster development, impact fees and inclusionary zoning.

Inclusionary zoning tends to be one of the more controversial innovative land use controls available. Inclusionary zoning is less controversial in New Hampshire because RSA 674:21 does not enable municipalities to adopt mandatory inclusionary zoning ordinances. In many states, the typical inclusionary zoning ordinance (IZO) presents private developers with a mandatory requirement to construct a certain amount of affordable housing as part of a development. Voluntary programs, also known as incentive zoning, usually reward the developer with an expedited permitting process, a waiver of certain zoning standards or an allowance for increased density – flexibility and freedom that even hard-won variances may not offer. This flexibility can translate into monetary savings or

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<sup>11</sup> In *National Land Investment Co. v. Kohn*, 215 A.2d 597 (Pa. 1965), the first successful challenge to exclusionary zoning, the Pennsylvania Supreme Court invalidated a scheme of providing for a minimum lot size of four acres in a suburban community located in the path of urban development.

gains that make it worthwhile for the developer to produce affordable units. Mandatory programs rely on requirements, not rewards, to ensure the production of affordable housing.

Statewide inclusionary zoning initiatives in Massachusetts, New Jersey and California came on strong in the late 1970's and early 1980's. Over 250 municipalities in at least twelve states administer mandatory inclusionary zoning ordinances. The New Hampshire Housing Finance Authority is launching the Inclusionary Zoning and Implementation Program (IZIP), which will provide grants to communities who wish to create zoning incentives, not mandates, for developers to build low-cost homes.

Frost addressed earlier concerns about the increasing perception of compromised zoning and project review processes. New Hampshire's Housing and Conservation Planning Program is a matching grant program that aims to assist municipalities to plan for housing and conservation by providing municipalities with state funding to purchase technical planning assistance. The New Hampshire Office of Energy and Planning (OEP) administers the program, which is similar to Massachusetts' Community Preservation Act. New Hampshire's Growth and Development Roundtable advocated for the program. The Growth and Development Roundtable, convened by the New Hampshire Charitable Foundation in the summer of 2005, is a diverse statewide coalition of environmental, housing, governmental, historic and business interests. Governor Lynch signed the program into law in July 2007.<sup>12</sup>

#### POLICIES DO NOT MAKE PROJECTS

Richard Ingram, The Housing Partnership, noted how "policies do not make projects." Good policies are half the battle. Money is the other half. Affordable housing developers, non-profit and for-profit, have to ask: will the project "pencil"? In a regulatory landscape dotted with exclusionary policies, inadequate funding can render the best-intentioned projects DOA at the planning board.

In New Hampshire, affordable housing developers choose from a variety of funding sources. The sources, like in market-rate real estate, include a mix of debt and equity. Individual sources are rarely willing and able to provide the full amount necessary for the development. Affordable housing developers often use a "dime and cent" approach of cobbling together money from multiple private, local, state and federal sources. These sources usually offer "cheap money," i.e. direct grants and mortgages or loans with minimal interest rates and/or deferred repayment.

Common sources for affordable housing financing in New Hampshire include the federal Low Income Housing Tax Credits (administered through NHHFA), Community Development Block Grants from the U.S. Department of Housing and Urban Development and First Mortgages from U.S. Department of Agriculture – Rural Development. Other funding mechanisms may be available from the New Hampshire Charitable Foundation, the New Hampshire Community Loan Fund and the Federal Home Loan Bank of Boston's Affordable Housing Program. Many smaller non-profits and municipalities may also offer some financing. Affordable housing sources cooperate with each other and the developer to ensure that the development receives adequate financing. Financing sources increasingly attach conditions, known as affordability covenants, to money to ensure that long-term or perpetual affordability is preserved.

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<sup>12</sup> N.H. RSA 4-C:29-30 (Housing and Conservation Planning Program).

Ingram also noted how, even when the money is available to make a project feasible, some planning boards have an increasingly hard time keeping up with the innovative, smart-growth developments brought before them for approval. This presents a conceptual roadblock that needlessly slows down many affordable housing proposals. Ingram's comments highlighted the public relations battle facing affordable housing. Preconceived notions about what affordable housing looks like and who lives "there" remain entrenched.

#### WE CAN GET THERE FROM HERE

Attorney Mike Donahue (Donahue, Tucker & Ciandella) wrapped up the evening with some practical observations from his thirty plus years of attending land use meetings. He observed that the demographics in New Hampshire have substantially changed with the influx of well-educated citizens who have moved to New Hampshire. This demographic group includes both retirees and working professionals. They are usually trying to escape the negative impacts of growth. They are active participants in the land use process as abutters and volunteer citizen planners. Often, Donahue reported, they see their role as preventing new development from changing that which they moved to New Hampshire to enjoy. They may not see the traditional value of economic diversity in our communities and will support large-lot zoning and other land use regulations that are, in fact, counterproductive to creating viable and environmentally-valuable open space for habitats.

Donahue closed with practical examples of the need for zoning changes if smart growth is to foster the development of affordable housing in village and central, core areas where greater density should be encouraged. He encouraged a continuation of the state's efforts through the New Hampshire Department of Environmental Services (DES) to foster the redevelopment of brownfields. He suggested that financial incentives for clean-up and reuse for affordable housing and community development projects should be considered to create a win-win result for communities that have these properties that often generate no tax revenue.

Donahue, drawing on his extensive "in the trenches" experience, stressed that the misguided battle between housing and conservation must end. New Hampshire is ready to embrace both.

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