

Executive Summary

A. Introduction

New Hampshire's economic growth over the past two decades has outpaced its housing growth. As the economy boomed housing developers found that the conditions for development, in particular, a labor shortage and more stringent regulatory requirements, had a significant effect on the type and number of homes that could be built. Because there was a market for large expensive single family homes and the regulatory environment encouraged their construction, much of the demand for more affordable housing was left unmet. As that demand outstripped supply, prices were driven up making living in New Hampshire expensive for all, but especially difficult for young families.

Almost a decade of study by the New Hampshire Legislature underscored the impact of local land use regulations on the cost of housing. To address this problem, in 2008 the Legislature passed a law that requires every community to provide "reasonable and realistic opportunities" for the development of affordable housing. But this obligation is not new law. In 1991 the New Hampshire Supreme Court said the same thing.

While many people are concerned about housing that is affordable to New Hampshire's labor force, most of the decisions affecting housing at the local level are made by municipal land use board members. As volunteers, these board members face significant challenges in understanding the requirements of the new law and in implementing solutions that are appropriate for their particular communities and their unique zoning ordinances and land use regulations. As they consider such solutions, board members also confront social pressures of resistance to change and common but misguided notions of what is meant by "affordable housing."

New Hampshire municipalities regulate land use independently and therefore are inclined to assess their housing supply with a local view, yet the workforce housing statute

compels them to look at housing needs on a regional basis. Without local action, the opportunity to effectively address the imbalance in New Hampshire's housing supply in a thoughtful manner may be lost, and communities may also lose control over the permitting process as frustrated developers take legal action against them.

For almost a decade, New Hampshire Housing has worked to raise awareness of the need for a more balanced supply of housing in the state. This is partly because there has been a recognized shortage of housing that is safe, decent, and affordable for New Hampshire's low- and moderate-income families; but it is also because constraints on the state's housing supply has a demonstrated impact on the performance of New Hampshire's economy. Since the Legislature enacted the workforce housing statute, many of the State's municipalities have sought the help of New Hampshire Housing as they work to understand the housing market and to provide opportunities for the development of workforce housing.

In response to this need for assistance, in early 2009 New Hampshire Housing assembled an advisory committee and hired consultants to develop written guidance for local action under the workforce housing statute. This resulting guidebook, *Meeting the Workforce Housing Challenge*, is now available to help local land use boards to address the requirements of the statute and shape future growth consistent with their vision for dynamic, healthy communities.

B. Recent History of Workforce Housing in New Hampshire

In 1991, the New Hampshire Supreme Court decided *Britton v. Town of Chester*¹, which recognized that the state's zoning enabling statute contains an obligation for every municipality to provide a reasonable and realistic opportunity for the development of housing that is affordable to low- and moderate-income families. The Court also ruled that every municipality has an obligation to provide for its "fair share" of a region's current and prospective need for affordable housing, but the Court didn't define what the term "fair share" meant, and it specifically refused to establish "arbitrary mathematical quotas."²

In the years following the *Britton* case, there were a number of efforts in the New Hampshire Legislature to study the state's housing supply. In 2001, the Legislature created a commission (SB 21) to develop legislation addressing the lack of workforce housing. The commission concluded that although there were other factors, the regulatory barriers created by towns had a significant impact on housing costs and were also within the Legislature's capacity to influence. After that, several efforts were made to pass legislation that recognized the relationship between local land use regulations and the cost of housing—and also to codify the Court's rulings in *Britton*. These efforts culminated with the enactment of SB 342 in 2008 (Chapter 299), codified at RSA 674:58 - :61, which went into effect on January 1, 2010.

¹ 134 N.H. 434 (1991).

² *Id.*, at 443.

Even in a weaker housing market, the variety of housing that exists in New Hampshire today does not satisfy the need for workforce housing in many areas of the state. Short-term economic trends should not be regarded as a means by which a municipality might hope to avoid its obligations under the workforce housing statute. It is a law that was based on a decades-long problem that will take a sustained state-wide effort to resolve.

C. Requirements of the Statute

The workforce housing statute requires each community to provide a reasonable and realistic opportunity to develop workforce housing, while providing “maximum feasible flexibility” to meet the general legal obligation in a manner that is most appropriate to its circumstances. What will constitute a “reasonable and realistic opportunity” is determined by a few specific requirements: (1) the municipality’s land use ordinances and regulations cannot facially (openly) discriminate against housing for families or in certain income ranges; (2) the collective impact of those ordinances and regulations must allow for the economic viability of a project to develop workforce housing; (3) workforce housing of some type must be allowed on a majority of the residentially-zoned land in the community; and (4) multi-family housing with at least five units per structure must be allowed somewhere in this area.

“Workforce housing” and “affordability” both have been terms of art, but they now have specific statutory definitions. A home is considered “affordable” to a household if no more than 30 percent of the household’s income is spent on housing costs. “Workforce housing” is ownership housing that is affordable to a family of four earning up to 100 percent of the median income for the area, or rental housing that is affordable to a family of three earning up to 60 percent of the median income for the area. This definition of workforce housing is generally considered to include a broader range of incomes than traditional notions of affordable or “low-income” housing.

While municipalities cannot be expected to control many of the other costs associated with housing construction, they can control things such as lot sizes and densities, building setback and road frontage requirements, and road design standards, among others. For some communities, compliance with the workforce housing statute may be as simple as some technical adjustments to these standards. For other municipalities, however, compliance could also involve a more proactive approach that provides incentives for workforce housing development balanced against measures to preserve the landscape we all cherish. Innovative provisions such as dense village centers, conservation subdivision design, inclusionary zoning, and form-based codes can accomplish these dual goals. The steps that are necessary for any municipality to meet the requirements of the statute should not threaten the appearance or composition of the community, including rural landscapes, if the community engages in a thoughtful planning process.

Municipalities that do not provide opportunities for the development of workforce housing must demonstrate that they already have their regional “fair share” of affordable housing. Data from regional planning commissions may be useful in determining whether the “fair share” exists, but there is no standard methodology used to calculate it. Municipalities that determine they have satisfied the “fair share” requirement should

carefully document that finding, as it is an assertion that would need to be defended if a developer took legal action against the community under the workforce housing statute.

If a developer believes that the municipality's regulations do not provide the opportunity to develop workforce housing, he or she can challenge either the local board's denial of an application or the restrictions placed upon the application. Under the statute, the community can use as an affirmative defense that its housing stock contains its fair share of current and reasonably foreseeable regional need for workforce housing. If this defense fails or if the municipality otherwise does not comply with the statute, the court can then order the "builder's remedy," in which the court allows a reasonable project to proceed without further review by local boards.

D. The Municipal Guidebook

Meeting the Workforce Housing Challenge is a guidebook designed to assist local land use boards address the requirements of the workforce housing statute. Municipalities are likely to confront several challenges as they undertake this work, including understanding the statute; reviewing the community's individual situation to determine the changes needed for compliance; and confronting the social and political pressures associated with these changes. The *Guidebook* can directly help with at least the first two challenges and, to a degree, the third, if those pressures can be eased through greater public understanding of the statute's requirements and purpose.

Under the workforce housing statute, developers' legal challenges to local land use regulations and to the decisions made under them will be viewed by a court in light of a municipality's efforts toward compliance with the law's requirements. An underlying purpose of the *Guidebook* is to serve as a standard to guide municipal actions, and against which a reviewing court may measure those actions. The steps outlined in the *Guidebook* will help a local land use board to create a record that demonstrates its understanding of the statute and its efforts in meeting the law's requirements.

The *Guidebook* is divided into major substantive sections: after an introduction of the statute and the history behind it, Chapter 2 discusses and explains the terms used in the workforce housing statute. Chapter 3 explains how local land use boards should approach the difficult question of "economic viability." This section reviews the complete costs of housing development, providing land use board members with an overview of the complex array of cost factors faced by developers to help board members distinguish those factors that they can influence from those they cannot. A developer's "pro forma" is provided, along with illustrative examples.

In Chapter 4, the *Guidebook* outlines the steps involved in conducting an assessment of a municipality's housing stock. The purpose of the assessment is simply to gain an understanding of the nature of the local housing market and to determine if the municipality has, in the past, been providing reasonable and realistic opportunities for both ownership and rental workforce housing. Gathered by the assessment, an inventory of affordable housing could also be compared to a municipality's "fair share" allocation of the region's need for affordable housing.

A fair share allocation may have been created as part of the regional housing needs assessment done by the regional planning commission, but this allocation is not required by statute. It is important to understand that a fair share allocation is relevant only if a community's regulations do not provide reasonable and realistic opportunities for workforce housing development, and the regulations are challenged in court. In that sense, the notion of fair share should be regarded as an "affirmative defense." The better alternative, and safer from a legal standpoint, is to ensure that reasonable workforce housing development opportunities are provided. Chapter 4 reviews changes that should be considered to zoning ordinances and land use regulations as a means of providing such opportunities. See the flowchart below for alternative conceptual approaches to the law.

Chapter 5 concludes the *Guidebook* with a discussion of how local boards should deal with applications for workforce housing. The statute contains a variety of procedural provisions that must be observed, but there are additional steps that may be particularly useful to land use boards as they seek to provide an impartial review of proposals in a manner that is consistent with the statutory requirements.

E. Meeting the Challenge

New Hampshire's new workforce housing statute presents a variety of challenges to municipalities. Some considerations, such as economic viability, may require approaches that are unfamiliar to local land use boards. For the most part, however, municipalities need to address the various regulations that add costs and, above all, uncertainty and subjectivity to the housing development process. The solution may be some simple zoning and regulatory changes, and these modifications will not alter the character of the housing in a community or fundamentally change its residents. Realizing this is an important step toward building the political will to meet the requirements of the workforce housing statute.

Meeting the Workforce Housing Challenge

