



**BARRINGTON PLANNING BOARD
BARRINGTON ELEMENTARY SCHOOL MPR
570 CALEF HIGHWAY
BARRINGTON, NH**

**THURSDAY, APRIL 7, 2011
MEETING MINUTES**

*Item 1 March 31, 2011 meeting minutes to be reviewed April 14, 2011

- PRESENT:** John Huckins, Chair
Michael Clark- Ex-officio
Alan Kelley
David Vincent
Anthony Gaudiello
George Calef
Jacqueline Kessler- Alternate
Stephen Jeffery- Alternate
- ABSENT:** Edward Lemos, VMD; Vice-chair
Steve Oles- Alternate
- STAFF:** Connie Brawders, Town Planner
AuBriana Morency, Temporary Staff Transcriptionist
- GUESTS:** Mike Sillon, 75 Emery Mills Rd; Lebanon, Maine
Randy Orvis, Farmington, NH
Bernard Cote, Farmington, NH
John Wallace, Barrington Conservation Commission
Steve Haight, Haight Engineering
Atty. Jim Schulte, Dover, NH
Paul Thibodeau, Dover, NH
Wayne Stocker, Union, NH
Garrett Walker, 215 Deer Ridge Dr; Barrington, NH
Calvin Cole, 143 Deer Ridge Dr; Barrington, NH
Bill Condon, 133 Deer Ridge Dr; Barrington, NH
Chris Hamann, 216 Deer Ridge Dr; Barrington, NH
Kate Moore, 149 Deer Ridge Dr; Barrington, NH
Ellen Conkin, 352 Hemlock; Barrington, NH
Steve Conkin, 352 Hemlock; Barrington, NH
Linda Reynolds, 441 Franklin Pierce Hwy; Barrington, NH

Sharon Reynolds, 34B Court St; Barrington, NH
David Roy, 35 Eastern Ave #2; Barrington, NH
Mark Faretra,
Susan Rice, 409 Franklin Pierce Highway, Barrington, NH
PB Howes, 67 Homestead; Barrington, NH
Matthew Trnovsky, 101 Bassett Dr; Barrington, NH
Kevin Knight, 534 Calef Highway; Barrington, NH
Christian Smith, 70 Ports Ave; Barrington, NH
Frank Catapano, 123 Water St; Exeter, NH
Joseph Falzone, 123 Water St; Exeter, NH
Scott Cole, 70 Portsmouth Ave; Statham, NH
Atty. Malcolm McNeill, 180 Locust St; Dover, NH
Jason Pohopek, Barrington
Stanley Franczak, 161 Deer Ridge Dr; Barrington, NH
Mike Sievert, 5 Railroad St; Newmarket, NH

CALL TO ORDER

The meeting was called to order by Chairman John Huckins at 7:06 PM.

ROLL CALL

Members were introduced by the Chair confirming members and guests present as stated above.

PB Alternate Kessler designated by Chair for Vice-Chair Lemos.

Ex-Officio Clark arrived at 7:28 p.m.

MINUTES REVIEW AND APPROVAL

** Planning Board Member Gaudiello moved to table the Minutes Review and Approval to the end of the public hearing. PB Member Vincent seconded the motion. The motion passed unanimously, with a vote of six (6) in favor, to zero (0) against.*

1. Approval of March 31, 2011 Public Hearing Minutes.

As the current time was 11:00 p.m. PB Member Kelley moved to table the approval of March 31, 2011 Public Hearing Minutes to April 14, at 7:00 p.m. at the scheduled meeting location. PB Alternate seconded the motion. The motion passed unanimously, with a vote of seven (7) in favor, to zero (0) against.

STAFF COMMUNICATIONS

2. Jae Whitelaw, Town Attorney, Guest.

Town Attorney introduced.

ACTION ITEMS

- 3. 10/610 (Fisheye Properties, LLC) Request by applicant to develop a 12 lot single-family subdivision on a 46.22 acre site located at Young Road (Map 140/Lot 15) in the Neighborhood Residential (NR) Zoning District. Applicant: Fisheye Properties LLC, Wayne Stocker; P.O. Box 250; Union, NH 03887.**

PB Member Vincent recused himself from the Board; PB Alternate Stephen Jeffery delegated.

Atty. James Schulte (660 Central Ave; Dover, NH 03820) took the floor, representing the applicant.

Schulte opened his comments. The Application was presented to the Board August 2010, with the application being accepted as complete January 2011. The applicant is coming before the Board for application approval, pending the need for 3rd party review.

Schulte stated there was discussion between the former owner, and the Town of Barrington, to create an easement at the property line at Lot 7 shifting the alignment of Young Road to address a hazardous curve in the road. There was no agreement made between the town and previous property owner.

Fisheye Properties, LLC proposes an easement on the property, to improve the sight distance, and service for drainage and utilities. The applicant has offered to cover the cost of \$32,000 for the easement, and removal of the preexisting house on the property in lieu of offsite improvement fees of approximately \$6,000.00.

The proposal does meet all subdivision standards, meeting lot size, setbacks and frontage requirements, including setbacks for the Prime Wetland; with each lot having at least 200 feet of road frontage on an existing road and each lot at least 80,000 sq ft in area. No development will be made on the subdivided lots. The applicant plans on selling the lots to individual owners, who will be responsible for constructing their driveways, drainage and installation of utilities.

Schulte briefly remarked on plan review comments by police, fire and road agent.

Schulte stated that there are two types of impact fees in the Town of Barrington; general impact fees applying to developments anywhere in the community, and school impact fees, which is the only one Barrington applies; any lot to be developed is assessed and charged the school impact fee. There are more specific offsite fees, which are those that relate to particular roads on which property is proposed to be subdivided, in this case, the Young Road subdivision.

Fisheye is proposing that the Town accept the contribution of the permanent easement to allow for view, drainage and utilities for the 12-lot, 45-acre site with 16 acre lot open space at a value of over \$30,000 in exchange for waiving the \$6,000.00 proportional share off-site improvement fee.

A traffic letter had been submitted for consideration by the Board and Town's consulting engineer, Dubois & King (18 Constitution Drive; Bedford, NH). The subdivision has nominal to no impact on the traffic on Young Rd and Route 9 during peak hour travel.

Schulte went on. The Board, at a previous meeting, decided that the applicant would not need to submit a Stormwater Management Plan. The Board cannot request a Drainage Analysis on each individual lot of the subdivision. The Board previously voted that instead of a Stormwater Management Plan, they would like a Drainage Analysis done, to determine the effect on the culvert, for the subdivision as a whole.

The Drainage Analysis by Haight Engineering (181 Watson Rd, Dover, NH) was submitted to DuBois & King, the Town Consulting Engineer, and DuBois & King agreed with the analysis. The impervious area on the subdivision drainage analysis was the lot maximum of 40% to determine the maximum impact on the culvert.

Post development analysis determined that the run-off water entering the culvert from the subdivision would not have an effect on the culvert during a 100 year storm based on the 800 acre watershed area.

The applicant proposed an Erosion Control Plan would be submitted for each lot, when it was developed, which the Board accepted. An agreement to the Erosion Control Plan will be a stipulation of individual lot's deeds.

Schulte reminded the Board that concern regarding Development of Regional Impact was addressed. Planner Brawders sent an invitation to 8 adjacent communities to attend a Public Hearing Meeting to address Regional Impact; and there has been no contact from the 8 communities at this time.

Ex-Officio Member Mike Clark arrived at 7:28 p.m.

Schulte continued by stating that the subdivision will cause no hazard to the community, and no large population growth. The subdivision will not cause any harm or injury to the community.

The applicant asked the Board if the subdivision will require third party review for the proposed site easement on the property. If third party review is deemed necessary, the applicant requests the Board send the application to DuBois & King early next week. If third party review is deemed unnecessary, the applicant requests that the Board accept the application.

The Board discussed issues and concerns they shared with the applicant and the applicant's engineer.

The Board discussed the necessity of a Stormwater Management Plan for this subdivision. Member Kelley expressed his concern with the new direction the applicant was taking to propose erosion control measures rather than a Stormwater Management Plan. The Board discussed the January 6, 2011 meeting and what analysis was needed for this application. Atty. Schulte reminded the Board that only the Planning Board can request studies from an applicant; staff and consulting engineers can not specify studies. The Board had not requested a Stormwater Management Plan for this proposed subdivision; however, they did request a limited

drainage report.

The Chair opened the floor to public comments regarding the application.

John Wallace- Barrington Conservation Commission- One of the concerns is the entrance of nitrogen into Great Bay River. Lawn fertilizers are a large contributor to nitrogen into the waterways. Wallace expressed if there could be any restriction on the use of lawn fertilizers.

Steve Conklin- There is a requirement for nutrient pass-through has now been regulated through EPA.

Sharon Reynolds- University of New Hampshire has been studying stormwater run off. Using native plants assists in the water conditions of property, and the amount of run off.

The Chair closed the floor to public comments to consider the unresolved issues to determine if the easement provides adequate site distance, and if the town straightens the road, the easement would be adequate to construct the road to current codes and standards. Chair Huckins asked the Board to consider if the easement draft will require third party review.

PB Member Kelley moved to submit the plan to DuBois & King for evaluation of the sight line and for compliance with the current codes and standards. PB Member Calef seconded the motion for discussion. The motion failed, with a vote of two (2) in favor to four (4) against, with one (1) abstain.

The motion was restated.

PB Member Calef moved to submit the plan to DuBois & King for the purpose of determining if the easement provides adequate site distance and, if the town straightens the road within the right-of-way whether the easement will be adequate to meet town road requirements including slope and drainage. PB Member Gaudiello seconded the motion for discussion. The motion passed, with a vote of six (6) in favor to zero (0) against, with one (1) abstain.

The Board considered the proposed subdivision as a development of regional impact. Jeffery commented that the development was Scattered and Premature, citing the "Scattered and Premature, and Impact Fees" document provided before the meeting (See Attachment #1).

PB Alternate Kessler moved that the development is not a Plan of Regional Impact. PB Member Calef seconded the motion. The motion failed, with a vote of three (3) in favor, to three (3) against, with one (1) abstain.

Further discussion ensued for clarification regarding the definition of how this plan may be determined to fit the criteria of a development of regional impact and to restate the motion.

PB Member Kelley moved that the development has Regional Impact for proximity to aquifers or surface waters which transcends municipal boundaries. PB Alternate Kessler seconded the motion. The motion failed, with a vote of two (2) in favor with four (4) against, with one (1) abstain.

Planning Board Member Kelley raised concern for the submittal having not met Subdivision Regulations of Article 10.2-Grading, Erosion and Sediment Control and Plan and Article 10.3-Stormwater Management Plan.

PB Member Kelley moved to have the applicant submit a plan that meets the requirements of Article 10.2 and 10.3, noting the sections of the Articles which do not apply. The motion was not seconded, and as such failed.

The Board discussed the Storm Water Runoff Analysis.

PB Member Calef moved to accept the Stormwater Runoff Analysis and the DuBois & King review submitted to the Board. PB Member Gaudiello seconded the motion. The motion passed, with a vote of four (4) in favor to two (2) against, with one (1) abstain.

The Board discussed the Traffic Letter.

PB Member Calef moved to accept the Traffic Letter and DuBois & King review submitted to the Board. PB Member Gaudiello seconded the motion. The motion passed; with a vote of six (6) in favor with one (1) abstain.

The Board discussed the waiver of off-site improvements.

PB Member Gaudiello moved to accept easement in-lieu of the waiver of the off-site \$6,000 impact fees. PB Member Calef seconded the motion. The motion passed, with a vote of four (4) in favor to two (2) against, with one (1) abstain.

The Board discussed conditional approval of the application for subdivision.

PB Member Gaudiello moved for Conditional Approval of the application, upon favorable review from DuBois & King and the review of easement documents by the Town's legal counsel. PB Member Calef seconded the motion. The Board discussed among themselves the concerns they had regarding the application. The motion failed, with a vote of three (3) in favor to three (3) against, with one (1) abstain.

PB Alternate Kessler withdrew her vote after reviewing Road Agent Peter Cook's memo, and voted yes to PB Member Gaudiello's motion for Conditional Approval. The motion then passed, with a vote of four (4) in favor to two (2) against, with one (1) abstain.

Planner Brawders excused herself and left the Public Hearing Meeting at 9:20 p.m. The Board took a five minute recess.

- 4. SR10/383 (Aroma Joe's Coffee) Request by applicant to construct a drive through coffee shop within the northern most building on a 4.26 acre site located at 528 Calef Hwy (a/k/a 371 Route 125) (Map 238/Lot 49.1) in the Town Center (TC) & Stratified Drift Aquifer Overlay (SDA) Zoning Districts. Applicant: Marty McKenna; 63 Broadway; Dover, NH 03820.**

Bernard Cote addressed the Board, representing the applicant.

The applicant is seeking conditional approval. The application has received draft approval from New Hampshire Department of Transportation, and is pending the septic condition approval from NHDES.

There were no concerns or comments from the Planning Board, or the public.

PB Member Gaudiello moved for Conditional Approval of the application, pending the approval of septic design. PB Member Calef seconded the motion. The motion passed, with a vote of six (6) in favor to zero (0) against, with one (1) abstain.

PB Member Vincent returned to the Board, PB Alternate Jeffery stepped down. Ex-Officio Mike Clark stepped down from the Board for the rest of the meeting.

- 5. 10/528A (Gerrior Lane Trust) Request by applicant to amend a Site Plan to relocate and construct Detention Pond #2; amend Grading Plan; and review of surety for Phase 2 of the development located at Gerrior Drive from Route 4 to St. Matthews Drive (Map 268/Lots 1.6 & 1.7) in the General Residential (GR) Zoning District. Applicant: Peter Daigle, Esq. 1550 Falmouth Road, Suite 10; Centerville, MA 02632.**

The applicant has responded to the Board condition of approval regarding revised Phase 1, Phase 2, and Final Phase plans, which have all been approved.

Outstanding is the legal review of the proposed easement deed and plan and surety. The Louis Berger Group, the Town's previous consulting engineer working with this proposal, recommended the applicant add mobilization, engineering and contingency costs, to the detention pond construction cost estimate which the Board decided was not needed. The applicant is present at the recommendation of the Town Planner.

The applicant has not yet met all the conditions for approval in the stated time frame.

The Chair opened the floor to public comments.

John Wallace- Reminded the Board that Gerrier has not paid the \$2,000 donation. There was discussion if the \$2,000 was a donation or a fee, which will be reviewed by the Town Attorney.

Steve Conklin- Discussed the downstream flooding on Route 4, and listed four (4) concerns of the Southeast Watershed Alliance.

Concerns are: 1. NHDES requirement for Barrington to establish an implementation plan for Nonpoint Source nutrient reduction has been tabled indefinitely; 2. A new development is not at this time required to obtain an EPA stormwater permit even if the project is declared of regional impact; 3. Barrington should expect the EPA and NGO to pressure to remediate Nonpoint Source pollution; 4. EPA guidelines establish that wastewater treatment plant costs, including upgrades, should not result in an annual household sewer rate that exceeds 2% of median household income.

Paul Howl- Expressed concerns regarding the storm water run-off on Route 4.

The Chair closed the floor to Public Comments.

PB Member Kelley moved to grant a 90-day extension for conditional approval. PB Member Calef seconded the motion. The motion passed, with a vote of five (5) in favor, with zero (0) against, with two (2) abstain.

NON-ACTION ITEMS

PB Member Calef and PB Member Gaudiello recused themselves from the Board. PB Alternate Jeffery appointed delegate for PB Member Gaudiello. As the time was after 10:00 p.m. PB Member Kelley moved to extend the Public Hearing Meeting until Item 6 is addressed. PB Alternate Kessler seconded the motion. The motion passed unanimously, with a vote of six (6) in favor, to zero (0) against.

- 6. 11/612 (Harbor Street Limited Partnership- Village Place) Request by applicant for a Preliminary Conceptual Review to present a proposal for a conservation subdivision on a 133.7 acre site located off Franklin Pierce Highway (a/k/a Route 9 (Map 238/Lots 9.1 & 14 (Lot 14 continues onto Map 235). Applicant; Harbor Street Limited Partnership, Joseph Falzone; 123 Water Street; Unit 4SE; Exeter, NH 03833.**

Atty. Malcolm McNeil (180 Locust Street; Dover, NH 03820) represented the applicant.

Atty. McNeill opened his presentation by stating that the applicant met with the Board on March 3, 2011 regarding the proposal for a conservation subdivision, and donation of a 20-acre parcel to the Town of Barrington. Summary of Relevant Factors was submitted by the applicant's attorney, and forwarded to the Town Attorney.

The developers chose to notify the abutters for the preliminary review, which is not required. The applicant's attorney received the Town Attorney response to the eight issues of legal concern raised at the March 3 Public Hearing at noon time on April 7,

2011. The applicant's attorney stated that they expected more time to gather information regarding their response.

The applicant's attorney agreed with the Town Attorney regarding the understanding of the Zoning Ordinance. There was a disagreement regarding how "Open Space" is defined. The applicant's attorney has determined that "Open Space" means current Open Space, and could be developed upon, with a minimum donation required. The Town Attorney disagreed, stating that "Open Space" is open, and no development can be made, and there is no minimum or maximum donation requirement of "Open Space".

The applicant's attorney questioned what is considered reasonable "Open Space"? The Applicant is posing 20 acres given to the Town for the required "Open Space", all of which could be developable. If "Open Space" must remain open, and preserve the density, the parcel would no longer become developable, and remain Open Space.

The Board could retain some of the Open Space, to not be developed, and have a section which could be developable. In the absence of a specific Open Space requirement, the applicant moves that a hybrid would be acceptable, because of the absence of the Open Space requirement.

The 100 ft buffer surrounding the parcel is un-developable, and is not considered "Open Space". The 100 ft buffer surrounding the parcel would be owned by the Town of Barrington.

The applicant's attorney noted that the main public concern on the application is regarding the through road onto Deer Ridge Road. A crash gate, a gate accessible by emergency vehicles only, was suggested. The Town Attorney suggested that a crash gate is not acceptable in that location, but the Town Attorney decision could be waved by the Planning Board.

The applicant's attorney and applicant would like to discuss with the Town Attorney regarding the preliminary conceptual plan, and receive additional time regarding the application.

PB Member Vincent moved to accept the waiver request to extend the applicant to a third preliminary conceptual review to April 28, 2011, at 7:00 p.m. at the Barrington Elementary School Library. PB Member Kelley seconded the motion. The vote was unanimous, with a vote of six (6) in favor, to zero (0) against.

The Board requested a Conventional Density Plan Review, so the Board can determine the Open Space shown.

For comparison purposes, a second preliminary Conceptual Development Plan illustrating a conventional subdivision layout was shown to the Board at the meeting. The applicant's attorney discussed with the Board the minimum lot road frontage. The

applicant's attorney and the Town Attorney discussed the Zoning Ordinance Regulations, and determined that at least 50 feet of frontage was needed. The conventional preliminary plan shows each lot has at least 50 ft of road frontage.

The donation of "Open Space" is only acceptable if the preliminary plan is a conservation subdivision, opposed to a conventional subdivision. The applicant expressed that the preliminary plans shown would not differ much from if the applicant made the subdivision conservation, except in the lack of donated land and Open Space.

PB Member Vincent expressed his concerns regarding the subdivision meeting the requirements to be a conservation subdivision, and that the Applicant may want to consider speaking with the Barrington Conservation Commission regarding requirements.

The Chair opened the floor to public comments and questions.

Chris Hammann- Deer Ridge- The next preliminary meeting, the public is welcome to attend, but their public comment is limited. The crash gate is in question; the Board would have to look at a waiver for the crash gate.

Kate Moore- Deer Ridge- What time of year would a traffic study be completed? During the process of the application, and an adjustment would be done for the different time of year.

Gerald Walker- Deer Ridge- Community is against the road cutting through Deer Ridge Extension, not the development. Would like the donation land by Deer Ridge and instead put the subdivision lots by Route 9, and have the exit road off Route 9 or Route 125.

Stanley Franczak- Deer Ridge- Showed the Board where the Open Space is located on Deer Ridge.

Bill Condon- Deer Ridge- An access road has to be connected to the donated open land, so there would be wetland disturbance.

Jason Pohopek- Would prefer the donor piece not be developed for a library, and possibly developed for the new Town Hall.

John Wallace- Barrington Conservation Commission- Would rather not have a library built in the donated open space. Can not see the plan as is as a conservation subdivision and the 100 ft buffer around the lot is not the intent of the zoning requirement.

Susan Rice- Franklin Pierce Highway-Conservation subdivision should not all be about the wetlands, but also the uplands. There is a lot of wildlife in the area, so the uplands should also be protected. There is also a gravel pit that needs to be addressed. There is breach in the stonewall connecting to her property, which she

would like to see fixed. She also discussed the possibility of sidewalks.

Calvin Cole- Deer Ridge- Questioned who would own the buffer zone? Would be part of Open Space, and could be owned by the town via easement, or owned by the community, or owned by one owner. Is there going to be a Home Owner's Association? It is now required by Zoning.

Huckins and Vincent discussed the possible need for paper streets connecting to the abutting parcel and that they should be situated in a way so they could be viable if they were needed in the future.

The Chair closed the floor to public comment.

PB Member Calef and PB Member Gaudiello returned to the Board.

ADJOURNMENT

With no further business, Member Kelley made the motion to adjourn at 10:56 p.m.; Member Gaudiello seconded the motion. The motion carried unanimously, seven (7) in favor to zero (0) against.

Respectfully submitted,
AuBriana Morency, Temporary Staff

“Scattered and Premature” and “Impact Fees”

Points relevant to the discussion:

The culvert and the corner do not meet the current adopted codes and standards.

Both problems are recognized as hazards by town officials and developer.

This is first subdivision on Young Road.

Any further development exposes more people to risks.

Failing to reconstruct the corner and culvert may constitute negligence in implementing regulations by the town resulting in the loss of immunity from liability.

Failing to address known significant deficiencies, ie. culvert, could disqualify Barrington under the Stafford Act regarding disaster assistance.

Does Barrington have authority require both an impact fee for town wide impacts and an offsite extraction for site specific road improvements?

Scattered and Premature

Q.) Is “scattered and premature” a valid reason for a planning board to disapprove a development proposal?

A.) Yes. A determination that an application is "scattered and premature" can be a valid reason for denial. This phrase is contained in RSA 674:36, II (a).

<http://gencourt.state.nh.us/rsa/html/LXIV/674/674-36.htm>

The following is from *Handbook of Subdivision Review* (OSP 1996):

Disapproval

When denying an application, the planning board must vote to disapprove specifying the reasons for denial and citing the sections of the regulations that were not satisfied. The reasons for denial must be clearly stated in the board's minutes and other records of its actions. The board must notify the applicant, in writing, of the reasons for the denial. While the applicant may disagree with the board's decision, s/he should be able to understand the basis for the decision. Such careful documentation will support the board's action if the decision is appealed.

The option to disapprove an application can be taken by a planning board in the following situations.

- 1) The proposal does not or could not meet the local requirements due to specific factors relating to soils, road conditions, lack of state permits, or the inability to meet zoning requirements.**
- 2) The proposal cannot adequately address the legitimate concerns raised at the public hearing, such as drainage, traffic, or other health or safety issues.**
- 3) The applicant failed to provide information required by the board.**
- 4) The proposal would result in a "premature or scattered" subdivision. This determination would be based on the goals and objectives in the master plan that are referenced in the subdivision regulations. A statement of intent for the particular zoning district would lend further support to such a finding. An analysis of the timeliness of the proposal in light of actions outlined by the**

- 5) capital improvements program would also be an important factor in determining whether a proposal is premature.

On the flip side, there was a recent Supreme Court case, Ettlingen Homes v. Town of Derry (1996) [<http://www.state.nh.us/courts/supreme/opinions/9608/ettlinge.htm>] where the town denied a subdivision based on the "scattered and premature" nature citing that the school system was overcrowded and this subdivision would just be too much of a burden for the town and the court reversed the ruling. The following is from the 1997 Case Law Update by Atty. Tim Bates at the May 31, 1997, OSP Planning & Zoning Conference:

TOWNS MAY NOT USE SUBDIVISION POWER TO IMPOSE GROWTH CONTROL

Ettlingen Homes, In. v. Town of Derry, 141 N.H. ____ (August 12, 1996).

The plaintiff sought approval for 23 residential lots on its eighty acre parcel. The planning board denied the application, finding it was "scattered and premature" under the town's subdivision regulations and RSA 674:36, II(a). The plaintiff lost his challenge to the denial in superior court, but the supreme court agreed that the planning board's denial was unlawful, because it constituted illegal growth control.

The critical factor in the planning board's denial was the inability of the Derry schools to accommodate even the existing level of students. After all, RSA 674:36, II(a) explicitly provides for consideration of the adequacy of school facilities in determining whether a subdivision is premature. But the supreme court ruled that the statute does not serve to replace comprehensive growth control regulation, and that the circumstances of the school facilities do not constitute a "danger . . . to health, safety or prosperity by reason of the lack of . . . schools." The denial was plainly intended to control growth, and it thus exceeded the board's authority under the statute.

However, the court reaffirmed that the proper "scattered and premature" inquiry from earlier cases, is "upon the effect of the *proposed development on the community, not the effect of future development in general on the community.*" (emphasis added.)

Lastly, probably the best discussion of this topic can be found in section 29.08 of NHP Vol. 15, *Land Use, Planning and Zoning* by Atty. Peter Loughlin (Lexis Publishing, 3rd Edition, 2000). That section discusses the concept of "scattered and premature" and gives excellent direction about how it may or may not apply given a specific development proposal. From NH OEP

Regarding scattered and premature development as articulated in our regulations. From a copy of a A hard Road to Travel by the Local Government Center.

"Without this limitation a private developer could single-handedly require an increase in the municipal tax burden." *Land/Vest Properties, Inc v. Town of Plainfield*, 117 NH 817, 825 (1977) NH Supreme Court

The court has ruled that "Prematurity is a relative rather than absolute concept. The board must ascertain what amount of development, in relation to what quantum of services available, will present the hazard described in the statute and regulations. At the point where such hazard is created, further development becomes premature.

In the case of Zukis v. Town of Fitzwilliam, 135 NH 384 (1992) The plaintiff argued the pre-inadequacies were the town's problem and could not justify disapproval. The court disagreed in that the existing roads were inadequate and safety hazards and thus the "point where such a hazard has already been surpassed." Although the hazard existed prior to the plaintiff's subdivision proposal was submitted, "a planning board must consider current as well as anticipated realities" when ruling on a request for subdivision approval. Exposing more households to the risk ... does magnify the existing hazards. cited Patenaude v. Town of Meredith, 118 NH 616 (1978) In the Zukis case the court further decided this can only apply to site specific factors and not be used as a town wide method of restricting development.

Impact Fees

There are two types of impact fees – exactions for off-site improvements and impact fees. The only area for which the Planning Board can use existing authority is for off-site exactions. These are improvements close to, and specific to the development. Off site exactions can be authorized under the Subdivision and Site Plan Regulations. It's a negotiated process. Off-site exactions can be used only for water, sewer, drainage and highway improvements.

Everything else has to be under a pre-determined charge on an impact schedule. Impact fees have to be assessed equally to all similar new development. They have to be enabled by an ordinance. There is a pre-set schedule of fees and they are generally not negotiable although waivers may apply.

There are two parts of the Impact Fee process - the Ordinance and the Basis of Assessment. The Ordinance is 5% of the work. It enables the process. It can be fairly brief. It usually defines what will constitute new development (expansion of floor area, new homes, conversions, etc.). It may establish waivers, for instance waiving school fees for age-restricted housing. It also lays out the administrative procedures for appeals, refunds, etc. More often than not the Ordinance is adopted without the specific schedule. Most communities establish the Ordinance and then follow that up with specific studies and establish the schedule. The Ordinance can appoint either the Planning Board or the Selectmen to be the authority that adopts the actual schedules. From minutes PB Belmont NH 12-5-2005

Municipalities without impact fee ordinances that address exactions for road improvements may impose upon developers the cost of off-site improvements that are reasonably related to the proposed development and are within the guidelines of RSA 674:21, V as amended. See Simonsen v. Derry below

Why a town needs an impact fee ordinance.

Rockingham No. 98-153

**EDWIN AND STEPHANIE SIMONSEN v. TOWN OF DERRY
November 15, 2000**

Donahue, Tucker & Ciandella, of Exeter (John J. Ratigan on the brief and orally), for the plaintiffs.

Boutin & Associates, P.L.L.C., of Londonderry (Steven A. Clark and Edmund J. Boutin on the brief, and Mr. Boutin orally), for the defendant.

H. Bernard Waugh, Jr., of Concord, by brief, for New Hampshire Municipal Association, as amicus curiae.

NADEAU, J. The defendant, the Town of Derry (town), appeals orders of the Superior Court (Gray, J.) denying a motion to dismiss for lack of subject matter jurisdiction and granting summary judgment in favor of the plaintiffs, Edwin and Stephanie Simonsen. The plaintiffs cross-appeal the trial court's denial of their motion for attorney's fees. We affirm.

The parties do not dispute the following facts. The plaintiffs own and operate a camp in Derry containing a private nine-hole golf course. In 1997, they sought site plan approval to add an additional nine holes and to open the course to the public. The planning board approved the plan, contingent upon payment of \$7,500 for off-site improvements necessitated by increased traffic.

The plaintiffs appealed to the superior court challenging the planning board's requirement that they pay for off-site improvements. The town moved to dismiss, arguing that the petition was not "duly verified," see RSA 677:15, I (1996), and thus the court lacked subject matter jurisdiction. The trial court denied the motion.

Thereafter, the plaintiffs moved for summary judgment, arguing that because the town had not enacted an impact fee ordinance, the town lacked authority to require payment for off-site improvements. See RSA 674:16, II, :21 (1996). The trial court granted the motion, finding "no facts in dispute which affect the fact that no impact fee ordinance has been adopted." The court denied the plaintiffs' subsequent motion for attorney's fees. This appeal and cross-appeal followed.

We note, however, that RSA 674:21 does preserve a planning board's authority to impose conditions on site plan or subdivision approval that require expenditures to improve some aspect of the applicant's own property.

From Greenfield Town Office 7 Sawmill Road, Greenfield, NH

V. As used in this section "'impact fee'" means a fee or assessment imposed upon development, including subdivision, building construction or other land use change, in order to help meet the needs occasioned by that development for the construction or improvement of capital facilities owned or operated by the municipality, including and limited to water treatment and distribution facilities; wastewater treatment and disposal facilities; sanitary sewers; storm water, drainage and flood control facilities; public road systems and rights-of-way; municipal office facilities; public school facilities; the municipality's proportional share of capital facilities of a cooperative or regional school district of which the municipality is a member; public safety facilities; solid waste collection, transfer, recycling, processing and disposal facilities; public library facilities; and public recreational facilities not including public open space. No later than July 1, 1993, all impact fee ordinances shall be subject to the following:

- (a) The amount of any such fee shall be a proportional share of municipal capital improvement costs which is reasonably**

related to the capital needs created by the development, and to the benefits accruing to the development from the capital improvements financed by the fee. Upgrading of existing facilities and infrastructures, the need for which is not created by new development, shall not be paid for by impact fees.

1. This ordinance shall not be deemed to affect the existing authority of the Planning Board over subdivisions and site plans, including, but not limited to the authority to declare a development to be premature or scattered in accordance with the regulations of the Board and in accordance with RSA 674:36, II (a).