

The Granite State

P L A N N E R



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Simonsen v. Derry Discussed at NHPA Meeting

by Ben Frost, Director, Upper Valley Lake Sunapee Regional Planning Commission

Most New Hampshire planners are by now aware of the NH Supreme Court's November decision in Simonsen v. Derry, No. 98-153, which reversed 25 years of case law, notably N.E. Brickmaster v. Salem, 133 N.H. 655 (1990), and reinterpreted NH statutes dealing with impact fees and development exactions. To ferret out the meaning of Simonsen, the New Hampshire Planner's Association hosted a meeting at the New Hampshire Municipal Association on December 18, attended by approximately 60 planners, attorneys, and municipal officials, including representatives from the Town of Derry.

It was clear that Simonsen caught most by surprise, as the Court dismissed the commonly-accepted distinction between **impact fees**, based on a formula for off-site impacts on, for example, schools and **exactions**, based on the immediate and easily discernable effects of a development on such facilities as adjacent road systems.

Neatly summarizing the case, Justice Nadeau wrote for the Court, "at issue is whether RSA 674:21 represents the sole authority for conditioning the approval of a site plan upon the applicant's payment of money for off-site improvements." The Court held that it does, and that towns can no longer rely on Brickmaster:

...we conclude that RSA 674:21, V(i) does not preserve the "existing authority" of a planning board under RSA 674:44 to condition the approval of a site plan upon the applicant's payment of money for off-site improvements. While the statute authorizes municipalities to impose impact fees, it comprehensively regulates the municipality's

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Proposed Legislation for 2001

by Kerrie Diers, Director of Planning & Economic Development, Town of Pembroke
and NHPA Legislative Committee Chair

The legislative season will soon be under way, and our legislators are proposing a number of bills that relate to planning and zoning. One day shy of the December 22nd deadline, Legislative Services reported that it had received a total of 690 legislative service requests (LSRs). Following receipt of an LSR, which is a request from a legislator to draft a bill on a certain topic, attorneys at Legislative Services work on drafting the language of the bills. Legislators then have until January 26 to sign off on the bills, and must introduce them by February 8, 2001. LSR titles currently include:

- 2001-H-0031-R Establishing that local zoning ordinances regulating location are applicable to community living facilities.
- 2001-H-0041-L Relative to the adoption of a state building code.
- 2001-H-0108-R Relative to the zoning board of adjustment.
- 2001-H-0127-R Prohibiting the land application of sludge in certain excavation areas.
- 2001-H-0128-R Establishing a moratorium on the land application of class B biosolids.
- 2001-H-0200-R Establishing a village plan alternative in zoning and land use planning laws.
- 2001-H-0294-L Allowing municipalities to establish a program of tax incentives for the rehabilitation of, and new construction in, existing residential areas.
- 2001-H-0295-R Relative to enabling local adoption

of "smart codes" which promote rehabilitation and historic preservation.

- 2001-H-0379-R Relative to the voluntary merger of contiguous lots.
- 2001-S-0429-R Establishing a committee to study methods of strengthening and clarifying the comprehensive shoreland protection act and its application.
- 2001-H-0432-R Creating a committee to study amending the constitution to require that government decisions affecting the environment reflect consideration of the welfare of future generations.
- 2001-H-0474-R Relative to airport zoning.
- 2001-H-0493-R Enabling municipalities to enact "organic zones" that exclude commercial farmers that are not organic certified.
- 2001-H-0607-R Relative to standards for records filed with a registry of deeds.
- 2001-H-0668-R Establishing a committee to examine the recodification of planning and zoning laws for the purpose of building safety and public health.

It does not appear that legislation will be introduced to deal with the Simonsen v. Derry impact fee issue. The next issues of this newsletter will update you on planning related legislation after it has been introduced. 🏠

Growth Management Report Update

by Chris Northrop, Principal Planner, NH Office of State Planning

The Growth Management Report, pursuant to HB207 in 1999 (Ch.19), is still being finalized. A link to the original bill text is <http://gencourt.state.nh.us/legislation/1999/HB0207.html>. The report will be completed in mid January, with the Executive Summary available for distribution in early February. A notice will be posted on the OSP website when the report is available <http://webster.state.nh.us/osp>.

The NHPA Newsletter is published in the Spring, Summer, Fall, and Winter. Contact the Newsletter Editor for copy deadline. The primary purpose of the newsletter is to foster the exchange of information between planners throughout the Granite State. Anyone wishing to submit an article, editorial, request for information, or anything else of interest to planners is encouraged to do so by contacting the Newsletter Editor. The NHPA welcomes paid business advertising. Rates are \$40 per issue and \$100 per year (four issues) for a business card ad. NHPA membership information can be obtained from the treasurer.

implementation of such fees. . . . The statute's scope suggests that the legislature intended to preempt the common law rule set out in N.E. Brickmaster.

Looking further into the legislative history of RSA 674:21, the Court determined that the need for "uniformity" among the State's municipalities was the underlying purpose of the statute, and that "a construction of the statute permitting municipalities to charge impact fees without adopting an impact fee ordinance, and thus perpetuating the lack of uniformity, would be illogical."

The NHPA meeting drew consensus from Simonsen on a number of points:

- ***New Hampshire communities should prepare to adopt an impact fee ordinance as soon as possible.*** Such an ordinance need not be complex, nor must it contain a formula by which to calculate fees; its language can rely mainly upon RSA 674:21, V for structure and content. The fundamental concept behind an impact fee ordinance is that there should be a rational nexus between the fee imposed and a municipal capital need caused by a development. At least two ordinances have already been drafted (Bedford and Lebanon) that can serve as models that can be tailored to meet the needs of most New Hampshire communities.
- ***Simonsen applies to subdivisions, as well as site plans.*** Although the case was a site plan review, the Court's opinion clearly addressed subdivisions as well.
- ***Read Simonsen broadly—it's not just about money.*** Simonsen should not be read as applying only to monetary contributions. The Court is unlikely to find a difference between a payment made by a developer to a municipality and a requirement that a developer perform an improvement. The effect is the same, as it costs the developer either way.
- ***The adoption of an impact fee ordinance by a municipal legislative body is the last step of a process*** beginning with a master plan, followed by the creation and adoption of a capital improvement program.

The CIP need not contain all projects that will be subject to an impact fee ordinance. It need only include those projects representing deficiencies for which the municipality itself is responsible. The impact fee ordinance can apply more broadly, to those capital needs created or worsened by a development, for which a community may not have had any plans.

- ***Planning Boards can still deny subdivision and site plan applications that do not meet identified standards.*** This may seem obvious, but it merits repeating. Simonsen does not order planning boards to roll over and play dead. Similarly, denial of subdivisions on the basis that they are "scattered or premature" [see RSA 674:36, II(a)] is alive and well, provided that a hazard to public health, safety, or prosperity is a demonstrated result of a proposed development, or that the development would necessitate excessive expenditure of public funds.

Among the more difficult questions of the day were those that involved the interplay between impact fee ordinances and growth management ordinances. RSA 674:21, V(h) specifically prohibits the application of a growth management ordinance to a development that has already had an impact fee levied against it, and towns contemplating using these tools together should do so with great caution. There was also considerable discussion that centered upon how to deal with Simonsen without adopting an impact fee ordinance.

There was general agreement that applicants can make voluntary contributions to a municipality to mitigate the impacts of their proposed developments, but that planning boards should develop their decisions sufficiently to demonstrate that without the voluntary contribution, the application would have been denied on the basis of being "scattered or premature." Further, the planning board and the applicant should enter into an agreement that clearly indicates the contribution was not made as a condition of approval. The concluding point, though, was also the first one made: adoption of an impact fee ordinance is the best solution.



Third Annual Bike/Walk Conference

When: May 24, 2001

For more information: Call Tom Jameson at 271-1668 or communicate on-line at <http://www.state.nh.us/osp/planning/events.html#3ABWC>

LCHIP is Off & Running

The Land & Community Heritage Investment Program (LCHIP) has been moving steadily ahead. The LCHIP Board of Directors, co-chaired by natural resource consultant Charlie Levesque and Attorney Tom Burack, approved a final version of the LCHIP program Criteria, Guidelines, and Procedures (available at www.specialplaces.org). The board hopes to have their new executive director on board this month, and begin accepting applications early this spring.

The LCHIP bill that was passed in the 2000 legislative session includes \$3 million in start-up funding to be used for matching grants in support of community-based land conservation and historic preservation projects. Municipalities and qualified non-profit organizations may apply for grants under a two-step process. Each applicant will initially complete a prerequisite eligibility application and, following an eligibility determination, submit the full application. Eligibility application deadlines are set for February 12, 2001 and August 1, 2001; and full grant application deadlines are April 2, 2001 and September 4, 2001.

Unfortunately, no permanent funding has yet been established for LCHIP. The 2001 legislative session will hear a request for successive and permanent LCHIP funding. Securing these funds will require extensive grass roots support throughout the 2001 legislative session. A portion of revenues received from the sale of the new conservation license plates will be set aside for LCHIP administrative costs.

The LCHIP Authority can be contacted at P.O. Box 4206, Concord, NH 03302-4206 or by calling 226-0012, or on the web at nhlchip@aol.com.



Save These Dates for the NHPA Spring Conference

When: Thursday, May 31, 2001
and Friday, June 1, 2001

Where: Waterville Valley

**Theme: Planning in New Hampshire:
The Past, The Present, The Future**

By popular demand, this conference is also intended to provide a (much needed) opportunity to network and commiserate with fellow planners.

Highlights of OSP Fall Conference on Telecommunications

*by Chris Northrop, Principal Planner,
NH Office of State Planning*

On Saturday December 9, 2000 the Office of State Planning (OSP) held its annual Fall Planning & Zoning Conference at Concord High School. The focus of this year's conference was telecommunications. The first panel, which focussed on the legal framework of the issue, included NH Office of State Planning Director Jeff Taylor, Attorney Robert Ciandella of Donahue, Tucker and Ciandella, and Linda Ray Wilson of the NH Division of Historical Resources. This session included discussion surrounding House Bill 733, the Federal Telecommunications Act of 1996, and Section 106 Review.

The second panel presentation was made from the industry's perspective by a panel of industry representatives which included Frank Marino and Mark Gartley of US Cellular, James Donahue of Crown Castle Corporation, and Bill Norton of Norton Asset Management, Inc. After a short break, a presentation was made by Ben Frost of the Upper Valley Lake Sunapee Regional Planning Commission and Clay Mitchell of MG Planning on local regulatory approaches that communities should consider.

After lunch Richard Enright of Verizon Wireless made a presentation on the evolution of the wireless industry. The last panel of the day focused on case studies from within New Hampshire. Tom Hildreth of McLane, Graff, Raulerson, and Middleton, PA, moderated the session which included a presentation by Roger Hawk of Nashua and Gene Webber of Dublin.

OSP is in the process of creating a technical bulletin to assist towns in dealing with personal wireless communication facilities. The bulletin will be available after the first of the year. Keep a eye on the OSP website (webster.state.nh.us/osp) for an announcement of when it will be available.

Of Plans and Planners

by Cindy Hayden, Community Development Director, City of Portsmouth

There are many new faces in the world of planning over in the Nashua area. Steve Wagner has joined the Nashua Regional Planning Commission to serve as a Regional Planner. In addition to being the circuit rider for Litchfield, he will be working on transportation projects. Steve earned his undergraduate degree in Earth Science at SUNY College at Brockport with an emphasis in meteorology. He has a broad range of professional experience in the areas of air quality, real estate and computer consulting as well as many years of volunteer experience serving on the Brookline Planning Board, ZBA and Master Plan Committee. Steve replaces Dave Gilmour who has moved on to become Town Planner for Gloucester, MA.

Matt Higgins is also a new Regional Planner on the NRPC staff. His efforts will focus primarily on circuit riding for the Wilton Planning Board, overseeing public transit projects and managing various economic development, housing and master planning projects. Most recently, Matt worked for the City of Lowell, MA as both a Neighborhood Planner and Economic Development Officer. Previously, he worked for the City of Richmond, VA. He has a Masters in Public Administration with a concentration in Planning from Virginia Commonwealth University.

Steve Heuchert is the new Town Planner for Hollis and Brookline. Steve has a Bachelors degree in Environmental Studies (Urban Geography) from the University of Waterloo, Ontario and a Masters in Environmental Planning (Urban Regeneration and Design Control) from the University of Nottingham, England (cool!). Steve was previously a Senior Planner for the Martin County Growth Management Department where he was involved with comprehensive planning, land use, greenways, art in public places and urban design.

Jill Seifried has joined the Nashua Planning Department. She will be working on a variety of planning projects, including the Master Plan and Capital Improvement Plan.

Jay Minkarah, Community Development Director for Merrimack, reports that the town recently hired Donald Scott McPhie to fill the newly created position of Community Resources Planner. Scott earned a bachelors in Business Administration and spent several years working in the business community as well as serving on the City of Nashua Historic District Commission, and volunteering in historic preservation and neighborhood housing related initiatives before earning his Masters in City Planning earlier this year.

Scott's responsibilities will include staffing the Conservation and Heritage Commissions, assisting in grant administration and providing general planning assistance in natural, historic and cultural resource issues. He joins William D'Andrea, Planning & Zoning Administrator and Louise Donington, Assistant Planner on the Merrimack Community Development Department's planning staff.

Ross Moldoff reports that Salem has contracted with Doug Woodward of Concord to prepare a new Master Plan for the town. Ross says they will be televising all the meetings and putting the draft chapters on their web page to try to increase public participation. Randall Arendt has been working on reviewing Salem's open space preservation ordinance and subdivision regulations and he presented his recommendations to the Planning Board last month. Finally, last year, the town hired Tischler Associates from Maryland to prepare a fiscal impact model for the town.

In the Seacoast area, Chuck Wise joined the staff of the Strafford Regional Planning Commission this past July. Dave Murphy, after a multi-year hiatus during which he pursued other professional planning roles, has reclaimed his post in NHOSP's NH Coastal Program. In Portsmouth, Peter Britz started on December 18th as Environmental Planner for the City of Portsmouth. Peter has a graduate degree in Marine Affairs from the University of Washington and an undergraduate degree in English from Middlebury College. Peter's prior experience includes work as a Natural Resource Planner for an environmental firm in Portland, Oregon, and as a Coastal Planner, also on the west coast, for the Columbia River Estuary Study Task Force.

Further north, Stacey Wyvill, a graduate of Frostburg State University in western Maryland, has joined the staff of the North Country Council as their new Community Planner. In her previous planning lives, Stacey worked in Montana near Yellowstone National Park, and in North Carolina for a municipal planning agency. Andrew Locke, previous Alton Planning Director, has headed to Geographic Data Technology in Lebanon where he will be working on product development for their streets database.

And, finally, at the state level Diane Hardy has made the move from the NH Office of State Planning's Coastal Program to be a park planner for DRED's Division of Parks and Recreation. In her new role, she will be developing master plans for state parks and carrying out recreational planning for State treasures like Mount Monadnock.



Healthy Trees in the Built Environment

A Tree Workshop for Administrators, Planners, Designers and Builders

When: Friday February 16, 2000

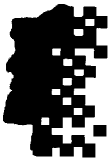
Where: Center of New Hampshire, Manchester, NH

Based on the belief that trees require more than luck to thrive in a growing New Hampshire, this full-day workshop will explore trees in our built environment. The event, sponsored by the Granite State Landscape Architects, will be geared toward those who plan, design, and construct our future streets and parks, as well as commercial and residential landscapes. The cost of the workshop is \$55 per person, including lunch.

The Healthy Tree Workshop will feature keynote speaker Jim Urban, a nationally recognized expert on tree planting in urban soils and conditions. Urban's new Standard Tree Planting Details have recently been published in Architectural Graphic Standards and his presentations around the country have been extremely well attended.

Mary Reynolds, Urban Forester for the NH Department of Resources and Economic Development, will present her complementary work on planting and tree care methods. Dr. John Parry, Urban Forester, and Dr. Bernie Raimo, Entomologist, of the USDA Forest Service will explain how insects and disease strike when a tree is stressed. Jeff Ott, Certified Arborist and owner of Northeast Shade Tree of Portsmouth, NH, will discuss his first-hand experience with tree care before and during construction and how to lessen damage and alleviate problems caused by construction.

For more information: Call Carol Williams, Granite State Landscape Architects at 603-448-0079 (days) or 603-927-4532 (evenings).



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