

April 25, 2018

Planning Board  
8 Newmarket Road  
Durham, NH 03824

Good evening,

First, I would like to commend the Energy Committee for continuing to work toward a bold vision and the Planning Board for its cooperation in helping to move Durham along the path to greater energy sustainability. We have come a long way since Election Day March 13, 2007, when Durham voters voted 1447 to 254 to adopt the New Hampshire Climate Change Resolution.

I am not going to address specifics of the ordinance but suggest that there is work to do before sending it to the Town Council.

Tonight I hope to make three points clear:

- I speak as an advocate of minimizing our reliance on fossil fuels.
- Beauty must not be sacrificed for functionality when we have options.
- The Planning Board has both the authority and the obligation to protect our scenic vistas.

Some of you sat on the Planning Board when I first joined the Energy Committee as a Town Council representative in 2009. For the next six years, I probably put in hundreds of hours to support energy initiatives to our community.

Successes included developing a brand new chapter of the Master Plan, the energy considerations checklist, a municipal energy inventory, municipal solar energy system installations, and changes to the plumbing code to reduce water and attendant energy usage. I helped Durham become the first town in New Hampshire to link our building construction code to more forward-thinking energy efficiencies just in time to realize greater energy efficiencies in our large residential projects.

The Energy Committee also explored wind and hydro energy opportunities and central wood-fired heating systems and concluded that, for various reasons, those were nonstarters. I coordinated our efforts to participate in the multistate Property Assessed Clean Energy program, or PACE, which would have linked homeowner investments in solar energy systems to the property itself, allowing owners to pass along outstanding investments if they moved. Unfortunately, PACE was derailed at the State Legislature.

I tell you all this to establish my street cred as a dyed-in-the-wool active advocate of energy initiatives.

As many of us have come to realize, writing zoning ordinances is hard. It's only when they are put to the test that one discovers gaps and unintended consequences. That is the job before you on the solar energy systems zoning ordinance.

If nothing else, my time on the Town Council confirmed my belief that it is up to the Planning Board and the Town Council to seek input from all sources, including focused interest groups, but to then seek to integrate that input into the broader, long-term benefit for the community.

So here it comes. Some of you have heard me say this before, but I repeat it because it is important. I believe the original should be credited to a 13th-century Persian poet, but today the version typically is: "If you have two loaves of bread, sell one and buy a hyacinth."

Durham must face practical realities, whether upcoming infrastructure expenditures or potential impacts of climate change. But we must recognize that just as we cannot develop our way out of a challenging state tax structure, we cannot save the world by allowing manmade, mechanical structures to obliterate the features that make Durham an attractive place to live. I strongly disagree with those who think that we will come to view large freestanding solar energy systems as we do telephone poles today. These are not comparable. Opposition to the Northern Pass on aesthetic grounds—not least because of potential negative impacts on the tourist industry—also comes to mind.

You will recall that Master Plans over the decades have reflected the community's deep appreciation for our natural setting. Just recently, in the Future Land Use chapter of the Master Plan, adopted January 24, 2018, the section titled "Quality of Place" notes that :

Scenic views of Little Bay, the Oyster and Lamprey rivers, and numerous farms, forests, wetlands, and conserved properties contribute to Durham's special identity.

The phrase "special identity" is an acknowledgment, echoing decades of master plans, that our history of valuing and protecting our rural setting is in part what sets us apart from neighboring towns. Also note the reference to "scenic views." The 2000 Master Plan chapter of Environmental and Cultural Resources dedicated a section to those scenic vistas, listing 34 specific locations in town where the viewsheds offer something special.

Those scenic views do not all sit on our gateways, but those that do tell me, when returning from Portsmouth or Newmarket, or from Portland or Boston, or from longer trips, that I am coming home to, yes, a special place. I do not want to see those scenic vistas marred with large ground mounted industrial solar panels.

**There is no reason why the Planning Board cannot build into its support for solar energy systems the opportunity for community feedback when it is most needed by exercising tools specifically designed to do so, such as the Special Exception. This would not place an unreasonable burden on property owners. It simply reflects our social compact: living in a community brings with it obligations to our neighbors.**

Some have claimed that the Planning Board either lacks the authority to, or simply should not, regulate on the basis of aesthetics. I want to address that point head on.

First, the Planning Board already sets standards for aesthetics in its Historic District zoning and in its site plan regulations.

Second, no less an authority than New Hampshire's esteemed land use attorney Peter Loughlin has written explicitly about the authority of the Planning Board to zone for aesthetics. That authority is tied into the broad concept of the public welfare, one of the pillars on which a planning board's authority to regulate rests, as set forth in the Town's zoning ordinance, i.e., "protecting the public health, safety, convenience and general welfare of the residents of the Town of Durham, in accordance with RSA 674:17."

I quote from Mr. Loughlin\*:

The New Hampshire Supreme Court eliminated any doubt about the ability of a municipality to use its zoning powers to promote aesthetics in *Asselin v. Town of Conway*, 298 where the Court stated:

We now conclude that municipalities may validly exercise zoning power solely to advance aesthetic values, because the preservation or enhancement of the visual environment may promote the general welfare.

*\* From: 15 New Hampshire Practice: Land Use Planning and Zoning, Ch. 2, Purposes and Limits, § 2.23 (LexisNexis Matthew Bender)*

In addition, the New Hampshire Office of Strategic Initiatives' website on Planning Resources includes a section on Aesthetics, which I attach to my letter.

The final citation is from a 2012 New Hampshire Municipal Association Law Lecture:

Zoning for aesthetic reasons is generally permissible in New Hampshire. In *Carlson's Chrysler v. City of Concord*, 156 N.H. 399 (2007), the Court upheld the City's sign ordinance which prohibited moving signs against the plaintiff's First Amendment challenge. Recognizing the valid municipal purpose of the ordinance to maintain public safety as well as "maintain and enhance the appearance and aesthetic environment of the City", the Court held that it was not necessary for the City to "provide detailed proof that the regulation advances its purported interests or safety and aesthetics." *Id.* at 404. **The Court concluded by unequivocally explaining that "a municipality may exercise its zoning power solely to advance aesthetic values because the preservation or enhancement of the visual environment may promote the general welfare." *Id.***

An ordinance prohibiting back-lit illuminated signs was also upheld in *Asselin v. Town of Conway*, 137 N.H. 368 (1993) after a challenge by the plaintiffs that the State enabling act did not authorize an aesthetic-based ordinance. The Court disagreed, **affirming as valid the purpose of the ordinance "to promote aesthetic values, include preserving scenic vistas, discouraging development from**

**competing with the natural environment, and promoting the character of a 'country community.'**" Id. at 371. The Court explained that "the State zoning enabling act grants municipalities broad authority to pass zoning ordinances for the health, safety, morals, and general welfare of the community. Id. As such, the Court held, "municipalities may validly exercise zoning power solely to advance aesthetic values, because the preservation or enhancement of the visual environment may promote the general welfare." Id. at 371-72.

*source: Zoning for Aesthetics—From Part III, Section C. of Innovative Land Use Controls: Reexamining Your Zoning Ordinance, NHMA Law Lecture #3, Fall 2012 by Attorney Keriann Roman, Drummond, Woodsum & MacMahon and Christopher G. Parker, AICP, Director of Planning & Community Development, City of Dover <<https://www.nh.gov/osi/resource-library/planning/>>*

It seems very clear that it is within your purview to consider the protection of the fast-vanishing visual features appreciated by our community throughout our history, even as you work toward enabling important opportunities that look to our future.

Sincerely yours,

*Robin Mower*

## § 2.23 Zoning for Aesthetics

The very first zoning case decided by the New Hampshire Supreme Court, *Sundeen v. Rogers*, discussed the legitimacy of zoning for aesthetic values.<sup>290</sup> The court held that the fact that the ordinance promoted aesthetic values was not a valid objection in light of the fact that it otherwise promoted the health, welfare, and safety of the community.<sup>291</sup> It further pointed out that even if the aesthetic quality was the inducement for making an ordinance prohibiting accessory buildings in the front yard, it would still invalidate the regulation.<sup>292</sup> The fact that aesthetic considerations which foster civic beauty and preserve places of historic and architectural value are also motivating factors in the enactment of a land use regulation is not fatal.

The beauty of a residential neighborhood is for the comfort and happiness of the residents and tends to sustain the value of property in the neighborhood. It is a matter of general welfare, like other conditions, that adds to the attractiveness of a community and the value of the residences located there.<sup>293</sup>

Related to the question of zoning for aesthetics is the entire topic of historic district zoning which will be discussed elsewhere in this book.<sup>294</sup> Suffice it to say here that historic district preservation may be incorporated into an overall plan to promote the community's general welfare.<sup>295</sup> Planning boards may regulate land use and even prohibit lot line readjustments based on the historical character and significance of a property that is located in a historic district. Land use boards, under certain circumstances, may legitimately be concerned about the effect that a particular proposal may have on the visual appearance of a part of the community.<sup>296</sup> "The protection of historic landmarks and areas is a legitimate and recognized exercise of a town's police powers for the purpose of promoting that town's general welfare."<sup>297</sup>

The New Hampshire Supreme Court eliminated any doubt about the ability of a municipality to use its zoning powers to promote aesthetics in *Asselin v. Town of Conway*,<sup>298</sup> where the Court stated:

We now conclude that municipalities may validly exercise zoning power solely to advance aesthetic values, because the preservation or enhancement of the visual environment may promote the general welfare. *See* RSA 674:16, I; Opinion of the Justices, 103 N.H. 268, 270, 169 A.2d 762, 764 (1961).<sup>299</sup>

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<sup>290</sup> *Sundeen v. Rogers*, 83 N.H. 253, 141 A. 142 (1928).

<sup>291</sup> *Sundeen*, 83 N. H. at 259, 141 A. at 145.

<sup>292</sup> *Sundeen*, 83 N. H. at 259, 141 A. at 145.

<sup>293</sup> *Deering v. Tibbetts*, 105 N.H. 481, 202 A.2d 232 (1964) (upheld police power ordinance that prohibited erection of trailers and certain other structures within one quarter mile of town common).

<sup>294</sup> Other Controls Affecting Land Use, *see* pt. IV, *infra*.

<sup>295</sup> *Victorian Realty Group v. Nashua*, 130 N.H. 60, 534 A.2d 381 (1987).

<sup>296</sup> *Victorian Realty Group v. Nashua*, 130 N.H. 60, 534 A.2d 381 (1987).

<sup>297</sup> *Portsmouth Advocates, Inc. v. City of Portsmouth*, 133 N.H. 876, 880, 587 A.2d 600, 602 (1991)

<sup>298</sup> 137 N.H. 368, 628 A.2d 247 (1993) (Conway's prohibition on internally illuminated signs not invalid even though adopted solely for the purpose of promoting aesthetics).

<sup>299</sup> *Asselin*, 137 N.H. at 371-72, 628 A.2d at 248.

From: 15 New Hampshire Practice: Land Use Planning and Zoning, Ch. 2, Purposes and Limits, § 2.23 (LexisNexis Matthew Bender)

While municipalities can enact zoning regulations to protect the aesthetics of the community, like any zoning ordinance, such provisions must be rationally related to the town's legitimate goals and must not be arbitrary or unreasonable as applied to a particular parcel of property.<sup>300</sup>

### **Library References**

6A E. McQuillin, *Municipal Corporations*, §§ 24.15, 24.16 (3d Ed. 2007)

1 P Salkin, *American Law of Zoning*, §§ 7.13:7.25 (5th ed.)

2 E. Ziegler, *Rathkopf's The Law of Zoning and Planning*, §§ 16:1-16:20

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<sup>300</sup> *Dow v. Town of Effingham*, 148 N.H. 121, 803 A.2d 1059 (2002) (ordinance regulating race tracks upheld); *Taylor v. Town of Plaistow*, 152 N.H. 142, 872 A.2d 769 (2005) (regulation which required a minimum of 1000' between motor vehicle dealerships in the commercial district found to be constitutional).

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## Aesthetics

- [§2.23 Zoning for Aesthetics](#)   
(From Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning, Ch. 2, Purposes and Limits, §2.23 (LexisNexis Matthew Bender))
- [Asselin v. Town of Conway, 137 NH 368, 628 A.2d 247 \(1993\)](#)  
The New Hampshire Supreme Court upheld an ordinance that prohibited internally lit signs. An expert testified that internally illuminated signs appear as disconnected squares of light with an overall effect of creating a visual block of the natural environment of the mountain town, and appear to bob around through windshields. "The evidence supports a finding that the restriction on internally lighted signs is rationally related to the town's legitimate, aesthetic goals of preserving vistas, discouraging development that competes with the natural environment, and promoting the character of a 'country community'."
- "The State zoning enabling act grants municipalities broad authority to pass zoning ordinances for the health, safety, morals and general welfare of the community. Asselin v. Town of Conway, 137 NH 368, 371, 628 A.2d 247 (1993); see RSA 674:16, I (1996). In enacting a zoning regulation, a town may consider the knowledge of town selectmen and planning board members concerning such factors as traffic conditions and surrounding uses resulting from their familiarity with the area involved. Quirk, 140 NH at 129, 663 A.2d 1328. Furthermore, a municipality may exercise its zoning power solely to advance aesthetic values because the preservation or enhancement of the visual environment may promote the

general welfare. Asselin, 137 NH at 371-72, 628 A.2d 247." [[Richard Taylor & a. v. Town of Plaistow](#)

Argued: February 9, 2005 Opinion Issued: April 22, 2005]

- [Zoning for Aesthetics](#)  From Part III, Section C. of Innovative Land Use Controls: Reexamining Your Zoning Ordinance, NHMA Law Lecture #3, Fall 2012 by Attorney Kerriann Roman, Drummond, Woodsum & MacMahon and Christopher G. Parker, AICP, Director of Planning & Community Development, City of Dover

## Capital Improvements Program

- [A Capital Improvements Plan is Not Just a Wish List](#), *New Hampshire Town and City*, September/October, 2016  
The preparation and adoption of a Capital Improvements Plan (CIP) is an important part of a municipality's financial planning and budgeting process. The purpose of the plan is to recognize and resolve deficiencies in existing public facilities and anticipate and meet future demand for capital facilities and the replacement of vehicles and equipment. A plan typically includes all of the anticipated capital expenditures of a town/city, library and school district for the next six year period.
- [Financing Capital Projects](#), *New Hampshire Town and City*, September/October, 2016  
In general, financing should be considered as part of the initial development process of a capital project. Below is a step-by-step process for determining and obtaining the right financing for your project. Of course, a bond counsel attorney should also be hired to review the warrant article for the authorization of bonds and to review the steps required by statute for this process.
- [Orford Takes Stock of Community Facility and Infrastructure Needs](#) - *New Hampshire Town and City*, September/October 2015, by Nathan Miller and Terry Martin  
The Town of Orford, New Hampshire (Pop. 1,237) is situated along the Connecticut River approximately 20 miles north of the Town of Hanover. In many ways, Orford is a quintessential rural New England town. The town has a rich agricultural history and features some of the finest federal-style architecture in New Hampshire. Like many rural New Hampshire communities, Orford's residents have long relied on each other to "get things done" in a spirit of pragmatic Yankee volunteerism.
- [The Best Planning Tool You Aren't Using: Capital Improvements Plans](#), *New Hampshire Town and City*, September/October 2014, By C. Christine Fillmore  
Although it is a tool many larger communities have been using for years, a capital improvements program (CIP) can be useful and valuable for even very small communities. Essentially, it is a prioritized list of anticipated large expenses. The threshold of what a "large expense" is and the details of what is needed may vary from municipality to municipality, but the process, the governing law and its usefulness are the same across the state.