

Baldwin, Callen & Ransom, PLLC

Articles

How Can We Legally Control Growth?

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For this month's article, I will share with you what the laws and our Supreme Court have said about our ability to limit or control growth. The controlling statute is RSA 674:22, which is entitled: "Growth Management; Timing and Development." It states:

"The local legislative body [Town Meeting, Council] may further exercise the powers granted under this subdivision to regulate and control the timing of development. Any ordinance imposing such control may be adopted only after preparation and adoption by the planning board of a master plan and a capital improvement program and shall be based upon a growth management process intended to assess and balance community development needs and consider regional development needs."

What does this mean? The Supreme Court, in a handful of decisions, has given us some answers. Most recently, the Court has made it clear that growth control can only be accomplished through passage of a growth control ordinance under the statute quoted above, and will not be tolerated if attempted through any more indirect means. In Ettlinger Homes, Inc. v. Town of Derry, 141 N.H. 296 (1996), the court said that the Derry planning board could not deny a 23 lot subdivision application on the grounds that it violated the prohibition in the Town's Subdivision Regulations against "scattered and premature" development, when the real basis for the decision was the fear that the Derry schools could not accommodate the influx of students from the proposed subdivision. The Court made it clear that the subdivision regulation relied on can not be stretched to accomplish the general growth control purpose that was clearly the planning board's intent. Instead, Derry was forced to allow the subdivision, and to enact a growth control ordinance pursuant to RSA 674:22. The Ettlinger court did opine that the concern about overcrowding of school facilities is a "...classic consideration in favor of growth control regulation."

So what must, and what can, a legal growth control ordinance under RSA 674:22 do? First, it must be an ordinance. Second, the Ordinance must be consistent with, and fully supported by, the Town's Master Plan and Capital Improvement Program (CIP). Next, it must be based upon a growth management process intended to assess and balance community development needs and consider regional development needs. The Court has explained this requirement as follows:

“Towns may not refuse to confront the future by building a moat around themselves and pulling up a drawbridge. They must develop plans to insure that municipal services, which normal growth will require, will be provided for in an orderly and rational manner. Any limitations on expansion must not unreasonably restrict normal growth.” Beck v. Town of Raymond, 118 N.H. 793 (1978).

In other words, the town may not attempt to stop all growth, but must have an orderly and rational plan to expand municipal services to serve “normal” growth. The capital improvement program must anticipate and budget for reasonable growth. The growth control ordinance can then restrict or prevent growth that would be in excess of the reasonable growth rate for which the Town has planned and budgeted.

The Supreme Court has also held that a Town can not simply pick or assume a maximum permissible growth rate, such as 3% or 4%, but must have a “...solid scientific, statistical basis...” for any temporary limitation, which must be continually re-examined in light of changes in the community and region. Rancourt v. Barnstead, 129 N.H. 45 (1986).

In summary, temporary limitations on issuance of subdivision approvals and/or building permits are possible, but require great care. If your community wants to assure that its growth is orderly and consistent with the reasonable expansion of available infrastructure, consider a Growth Management Ordinance.

Next Month: “Growth Management, Interim Regulations” for temporary control of runaway growth.