

WORKFORCE HOUSING STATUTE FREQUENTLY ASKED QUESTIONS

1. What Land Use Regulations are Subject to the Workforce Housing Law?

The law applies to any ordinance or regulation that has its enabling authority in RSA Chapter 674. This would include subdivision regulations in those communities that don't adopt zoning. It would also include those communities that do not adopt zoning, but adopt flood plain ordinances in order to participate in NFIP (but see caveat below). But with a flood plain ordinance there's no regulation of specific land uses, so while the Workforce Housing statute would apply, it would have no practical effect. Such an ordinance would also fall under the exceptions found in the bill's RSA 674:59, IV —“Paragraph I shall not be construed to require municipalities to allow workforce housing that does not meet reasonable standards or conditions of approval related to environmental protection, water supply, sanitary disposal, traffic safety, and fire and life safety protection.”

Flood Plain Caveat: flood plain ordinances are the only circumstance in which a municipality may adopt “single purpose zoning” in NH, at least with specific statutory authority; and this authority was only recently enacted. Other ordinances (e.g., a telecommunications facility ordinance in a town that otherwise doesn't have zoning) are legally suspect because they don't have an enabling statute.

2. Who Determines Whether An Inclusionary Zoning Ordinance Will Render Development Economically Unviable? RSA 674:59, II

The first test of the impact of inclusionary zoning incentives should be done by the planning board when it is drafting the ordinance. For that reason, planning boards should talk with developers to find out what kinds of incentives would work. The provision in the law that addresses that (RSA 674:59, II) really means that a municipality cannot adopt an unusable inclusionary zoning ordinance and hope to meet the “obligation” in RSA 674:59, I. After that, the tests would be in the planning process when a land use board is processing an application, then in court if an appeal is filed. It is important to remember that inclusionary zoning can only be voluntary (see the statutory definition at RSA 674:21), and can only meet the terms of the law's requirement if development can occur under it and remain economically viable. That means that that inducements offered in the ordinance must be realistic attempts by the municipality to create a regulatory environment that encourages developers to build affordable housing.

3. How do we determine what our community's “fair share” is?

First, bear in mind that *all municipalities* are *always* responsible for meeting their ‘fair share’ of their present and reasonably foreseeable regional need for workforce housing (this is equally true under the statute and under *Britton v. Chester*). If a community's existing housing stock provides that fair share, then the municipality needs to take no other action under this law.

The regional planning commissions look at information for their regions to the extent they are able to re-aggregate available data, but the age of Census data is a problem, as will be the lack of detailed information in future iterations of the Census. This is because the long form in the Census has been eliminated, and replaced with the American Community Survey (ACS), which does not have the same level of detail and accuracy for smaller geographies. But RPC regions are not necessarily always the best fit for all communities. This was the apparent upshot of the Strafford County Superior Court’s first order in *Great Bridge Properties v. Town of Ossipee* (2005)—the court found that the Lakes Region Planning Commission data was not appropriate, and that the Conway Labor Market Area was better suited to analyzing the Town of Ossipee for questions of housing affordability.

New Hampshire Housing is presently revising a model for use by regional planning commissions that will be based on currently available data, and that could be used by the RPCs to identify municipal fair shares of workforce housing. But the law does not require RPCs to do this, and it is ultimately a municipality’s responsibility. There are various methods that might be used to identify a community’s fair share, if it chooses to undertake such an analysis. Consultation with your regional planning commission is the first best step for your municipality to take if you determine that it is important to identify what your community’s fair share of affordable housing is.

A more important issue is that it is actually unnecessary for any community to identify what its fair share responsibility is, as long as it is providing the opportunity for the development of workforce housing. The fair share question only comes up as an “affirmative defense” asserted by a community that has failed to provide reasonable and realistic opportunities for workforce housing development. If the framework of a community’s land use regulations and ordinances provides a reasonable and realistic opportunity for the development of workforce housing, including multifamily rental housing, then conducting a fair share analysis is an unnecessary exercise.

4. How do we know that workforce housing will actually be—and remain—affordable?

When a developer promises to build affordable housing, for many communities it is important for those housing units to remain affordable for a long period and for them to specifically target the intended beneficiaries. Any municipality is free to impose long-term affordability requirements on workforce housing that gets created through inclusionary zoning, and there are many different options that have been used. The Workforce Housing statute does not need to address this, because the communities already have the power to do this.

Alternatively, if a workforce housing development is created through a court appeal and the developer is awarded the builder’s remedy, then the law outlines a clear process for creating long-term affordability restrictions on housing units that are intended to be affordable. New Hampshire Housing has created a model affordability covenant that allows a the owner of an affordable property to gain the benefit of equity gains through

market increases, as well as those gained through owner-motivated home improvements—but there are also many other models available for use by municipalities.

5. Why is multifamily housing separately defined in this law?

In this statute, multifamily housing is defined as a structure with 5 or more units—this is tied to RSA 204-C, which deals with housing affordability, rather than RSA 674:43, which is a threshold of jurisdiction for planning board review and is unrelated to issues of affordability. This does not mean that a municipality needs to change its definition of multifamily housing, unless it actually prohibits multifamily structures with less than 5 units per structure. Reasonable provisions must exist in the municipality’s ordinances and regulations for the development of multifamily housing with at least 5 units per structure.

6. Workforce housing must be allowed in a majority of residentially-zoned area, but what about multifamily housing?

The final sentence in RSA 674:59, I specifically states that multifamily housing does not need to be permitted in a majority of residentially-zoned areas. The zoning ordinance only needs to provide some reasonable opportunity for multifamily housing of 5 or more units per structure to be developed—it is up to the municipality to decide where it would be most appropriate. But a municipality could otherwise satisfy its overall workforce housing obligation by allowing affordable housing developments of 3 or 4 units per structure