

PLANNING AND FAIR HOUSING LAW

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New Hampshire Housing

Purpose and Overview



□ Purpose:

- ▣ Increase Understanding of the Implications of Fair Housing Laws on Municipal Law-making
- ▣ Illustrate the connections between the Workforce Housing Law and Compliance with Fair Housing Laws

□ Overview:

- ▣ Federal and State Fair Housing Laws
- ▣ Relevant Case Law
- ▣ Workforce Housing Law

Federal Fair Housing Act



- Prohibits Discrimination in housing
 - ▣ By landlords, sellers, lenders, insurers, governmental entities, and others
- Protected Classes
 - ▣ Race, color, religion, national origin, gender, disability, familial status
- Goals of FHA
 - ▣ Elimination of segregation
 - ▣ Equal access to housing opportunities

Key Features of the FHA: Protected Classes

- Race
- Color
- Religion
- National origin
- Sex
- Familial status (families with children under 18)
- Disability
- NH law adds the protected classes of sexual orientation, age, and marital status

Key Features of the FHA: Prohibited Conduct

- ❑ Discriminatory treatment or results on the basis of protected class status in housing-related areas including land use and zoning laws
- ❑ Includes individuals and corporations, sellers, landlords, lenders, insurance companies, appraisers, governmental entities, and many others engaged in the provision of housing or housing-related services

Types of Housing Discrimination

- Intentional – but no animus required
 - ▣ includes disparate treatment in terms, conditions, and policies
 - ▣ includes “benign” practices

- Disparate Impact – also known as “discriminatory effects, ”seemingly neutral laws, regulations, policies and practices that have a negative impact on a protected class

Disparate Impact and Municipalities

- Disparate impact type fair housing violations rather than intentional discrimination are the most likely risk for planners, municipal boards and executives
 - ▣ failure to incorporate fair housing analysis and principles in planning and law-making processes
 - ▣ failure to recognize structural barriers within the community that promote segregation and lack of access to opportunity
 - ▣ application of different standards for affordable housing development

Disparate Impact Law



- The Fair Housing Act :
 - ▣ Does not explicitly articulate disparate impact
 - ▣ All federal appellate courts that have adjudicated this issue have supported the theory but with different approaches
- HUD Regulations on Disparate Impact:
 - ▣ Issued February 8, 2013
 - ▣ Definition of Discriminatory Effect:
 - “[a] practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, [disability], familial status or national origin.”

Affirmatively Furthering Fair Housing (AFFH)

- Fair Housing Act directs the Secretary to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further fair housing”
- Receipt of HUD funding creates obligations of grantees
- HUD-funded programs and activities must be administered in a manner affirmatively to further the policies of the Fair Housing Act
- The obligations extend not only to the direct recipients of HUD funds but to subgrantees

More on AFFH

- Certification required on contracts
- Requirement of states and entitlement communities to conduct Analysis of Impediments to Fair Housing (AI)
- Focus is on promotion of racial integration
- HUD has issued proposed regulations on AFFH

Key Findings of New Hampshire's 2010 Analysis of Impediments Update

- ❑ Lack of Affordable Housing for Families
- ❑ Source of Income Discrimination
- ❑ Discrimination against Domestic Violence Survivors
- ❑ Local Land Use Controls that Suppress Multifamily Housing
- ❑ Non-compliant Age-restricted Housing
- ❑ Lack of Data on Prevalence of Housing Discrimination
- ❑ Disparate Treatment in Federally Subsidized Housing of Persons with Limited English
- ❑ Lending Practices
- ❑ Lack of Data on Progress on Eliminating Impediments
- ❑ Lack of “Substantial Equivalency” with HUD
- ❑ Lack of Knowledge of Fair Housing Law and Protections

Municipalities and Liability

- Examples of activities where municipalities have been found liable under the FHA:
 - ▣ Failure to AFFH (*Westchester*)
 - ▣ Restricting Affordable Housing Development to areas of concentrated poverty (numerous cases)
 - ▣ Prohibiting the development of multifamily housing in municipality (*Dews*)
 - ▣ Refusal to provide access to municipal services (*Zanesville*, *UFW of Florida*, *Hawkins*)
 - ▣ Treating affordable housing developers differently than other developers (numerous cases)
- Liability generally arises when patterns have been established.

Other Key Federal Laws



□ Federal Statutes

- ▣ Civil Rights Acts of 1866 and 1964 — provide other avenues for legal actions based on race, color, national origin
- ▣ Americans with Disabilities Act - provide additional protections to persons with disabilities
- ▣ Section 504 of the Rehabilitation Act - impose additional obligations for federally-funded entities in assuming the costs of accommodations and modifications for persons with disabilities
- ▣ False Claims Act - allows litigation against recipients of federal funds that falsely certify compliance with federally-imposed obligations (like AFFH)

Relevant New Hampshire Law



- RSA 354-A – Law Against Discrimination – contains NH’s housing discrimination laws
- RSA 674:58-61 – Workforce Housing Law – codifies NH’s case law requiring communities to provide “reasonable and realistic opportunities” for affordable housing
- RSA 36:47, II – Regional Planning Commissions – update Housing Needs Assessment every 5 years

HUD Regional Planning Grants: FHEA



□ Grantees must:

- Adopt a housing plan that incorporates housing that is “affordable at all ranges of income”
- Incorporate fair housing analysis of housing choice into regional planning
- Address how the plan will further fair housing
- Create a Fair Housing Equity Assessment (FHEA) or Regional Analysis of Impediments to Fair Housing (AI)

FHEA Requirements



- Identification and Assessment of:
 - ▣ Areas of racial/ethnic segregation
 - ▣ Areas of increasing integration
 - ▣ Areas of racially/ethnically concentrated poverty
 - ▣ Areas of opportunity (access to jobs, good schools, health care, safe neighborhoods)
 - ▣ Fair housing issues, services, activities
- HUD will provide assessment tools

Relevant New Hampshire Cases



- Trovato – (NH Fed'l Dist Ct. Case) – Zoning ordinances subject to obligation to accommodate disabled persons under FHA, ADA, Sec 504
- Community Resources for Justice II – Zoning ordinances must be “substantially related to an important governmental objective.”
- Gilsum – Town sued under FHA when it treated residential program for HIV persons differently than other such programs

The Law of Affordable Housing in NH

- Britton v. Town of Chester (1991)
 - ▣ Interpretation of the zoning power
 - ▣ Municipalities are not “isolated enclaves”
 - ▣ The obligation of every city and town: provide a reasonable and realistic opportunity for the development of affordable housing
 - ▣ “Community” means the region within which a municipality is situated—“fair share”
 - ▣ The “builder’s remedy”
- Then what happened?

Great Bridge v. Ossipee (2004)

- Zoning Limitations – variances sought
 - ▣ Multi-family allowed only on sewer and water, and only in *existing buildings*
 - ▣ Only one principal building per lot
 - ▣ Maximum of 4 units per building
- ZBA Chairman at the public hearing: “...when this ordinance was written it was known at that time that this was exclusionary. It was written exactly for that reason. It is my opinion but that it is very – also clear with the people in town voted for that knowing it, maybe not knowing that in its entirety at the time. I believe the spirit of this ordinance was to deny the opportunity for multi-family housing to go forward in this town. I believe that’s the intent of the ordinance whether it is right or it is wrong.



2008 – Workforce Housing Law



- RSA 674:58 - :61 Workforce Housing In Statute
 - ▣ Reasonable and realistic opportunities for the development of workforce housing, including rental and multi-family housing
 - ▣ Look at the collective impact of all local land use regulations
 - ▣ Allow in a majority of residentially-zoned land area
 - ▣ Lot size and density must be reasonable

Workforce Housing

□ Definitions RSA 674:58

- ▣ Workforce housing—housing that’s “affordable”
 - *Renter* family of 3 making 60% of Area Median Income
 - *Owner* family of 4 making 100% of Area Median Income
 - Does not include age-restricted housing; does not include developments with >50% of units having less than 2 bedrooms
- ▣ Affordable—no more than 30% of income should be spent on housing (rent + utilities; or PITI)

Workforce Housing



- “Fair share” and reasonable restrictions
 - ▣ Accounts for existing housing stock
 - View this as only an *affirmative defense*
 - ▣ Restrictions may be imposed for environmental protection, water supply, sanitary disposal, traffic safety, and fire and life safety protection

Workforce Housing



- Appeals—RSA 674:61
 - ▣ Denial or conditions that have a substantial adverse effect on the project's viability. *Burden of proof is on developer*
 - ▣ Hearing on the merits within 6 months
 - ▣ If the “builder’s remedy” is imposed by court, it shall include affordability restrictions
 - Affordability restrictions may be required by the planning board as a condition

Workforce Housing



□ Inclusionary Zoning

- The best way to address the law (RSA 674:59, I)
- Defined: RSA 674:21—incentives to voluntarily induce developers to create affordable housing
- Don't inadvertently create barriers with unrealistic requirements (e.g., 10% density bonus, but all units must be affordable)—it has to be “economically viable” (see RSA 674:59, II)
- Do ensure for long-term affordability
- Model created by DES and RPCs

What's Been the Local Response?

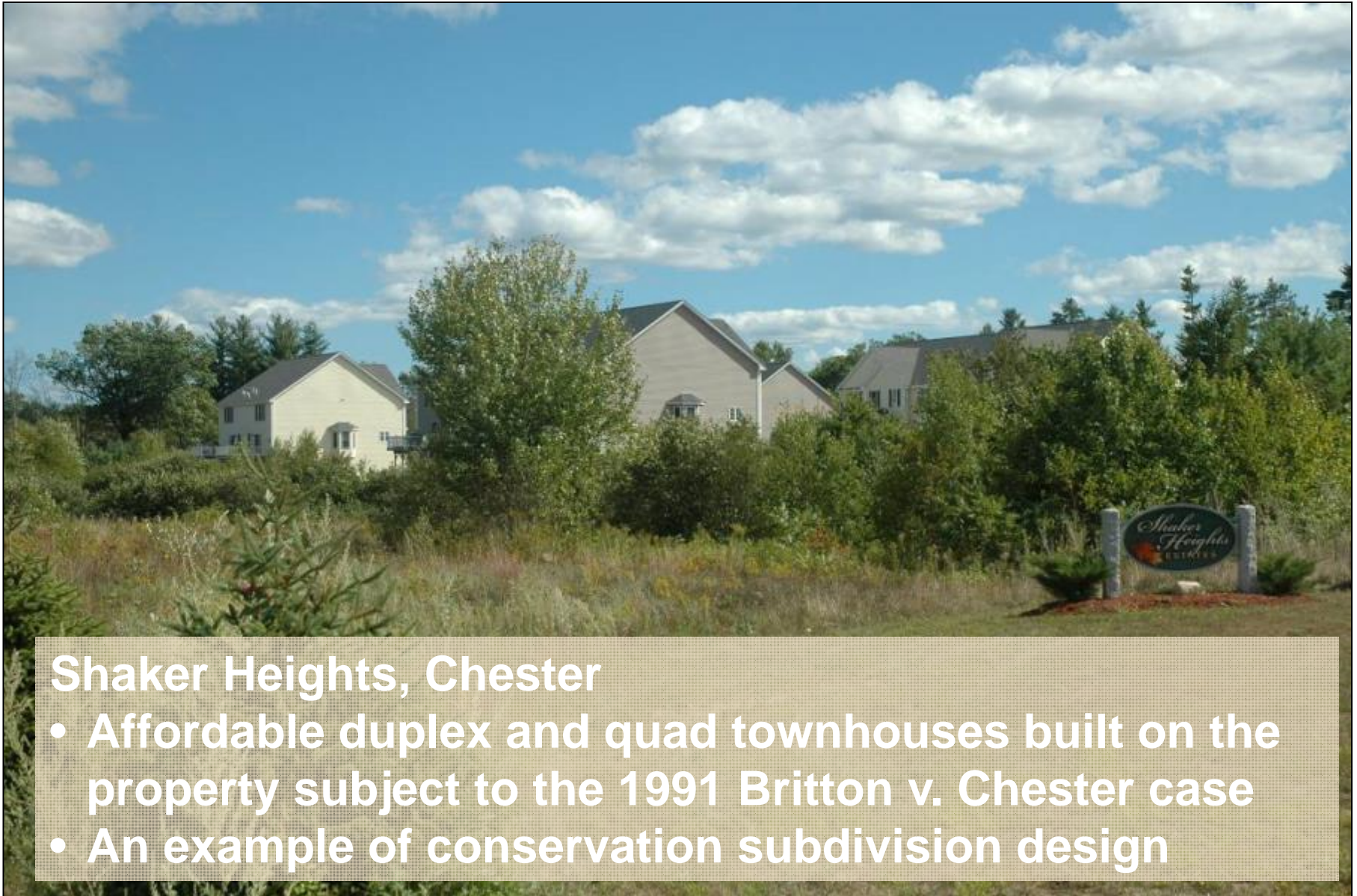


□ Town Meeting Actions

▣ Over 50 communities have taken action

- Overlay districts
- Inclusionary zoning
- Multi-family districts
- Solutions as varied as the towns proposing them – a reflection of the law, providing “maximum feasible flexibility” for communities

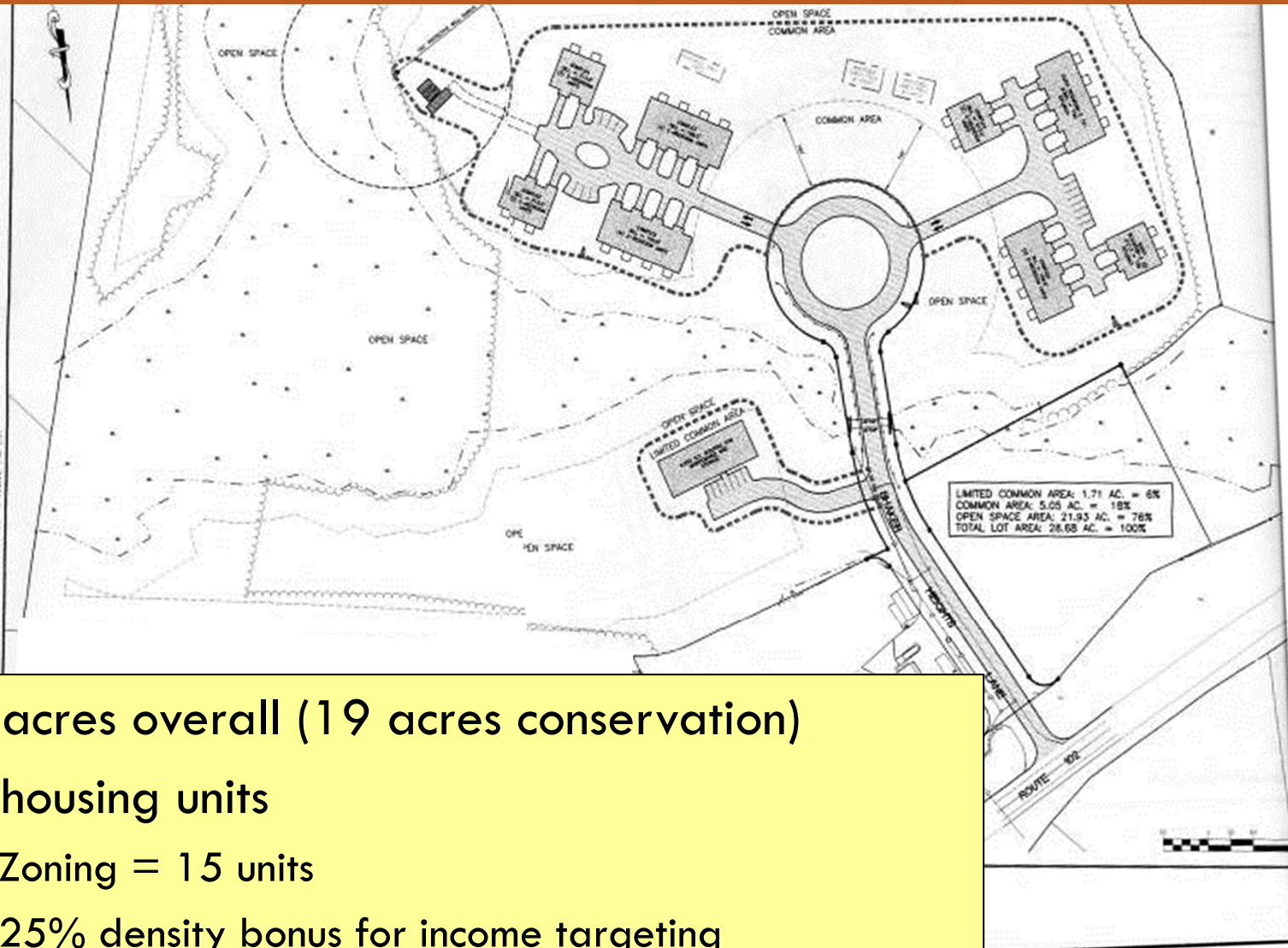
Conservation Subdivisions



Shaker Heights, Chester

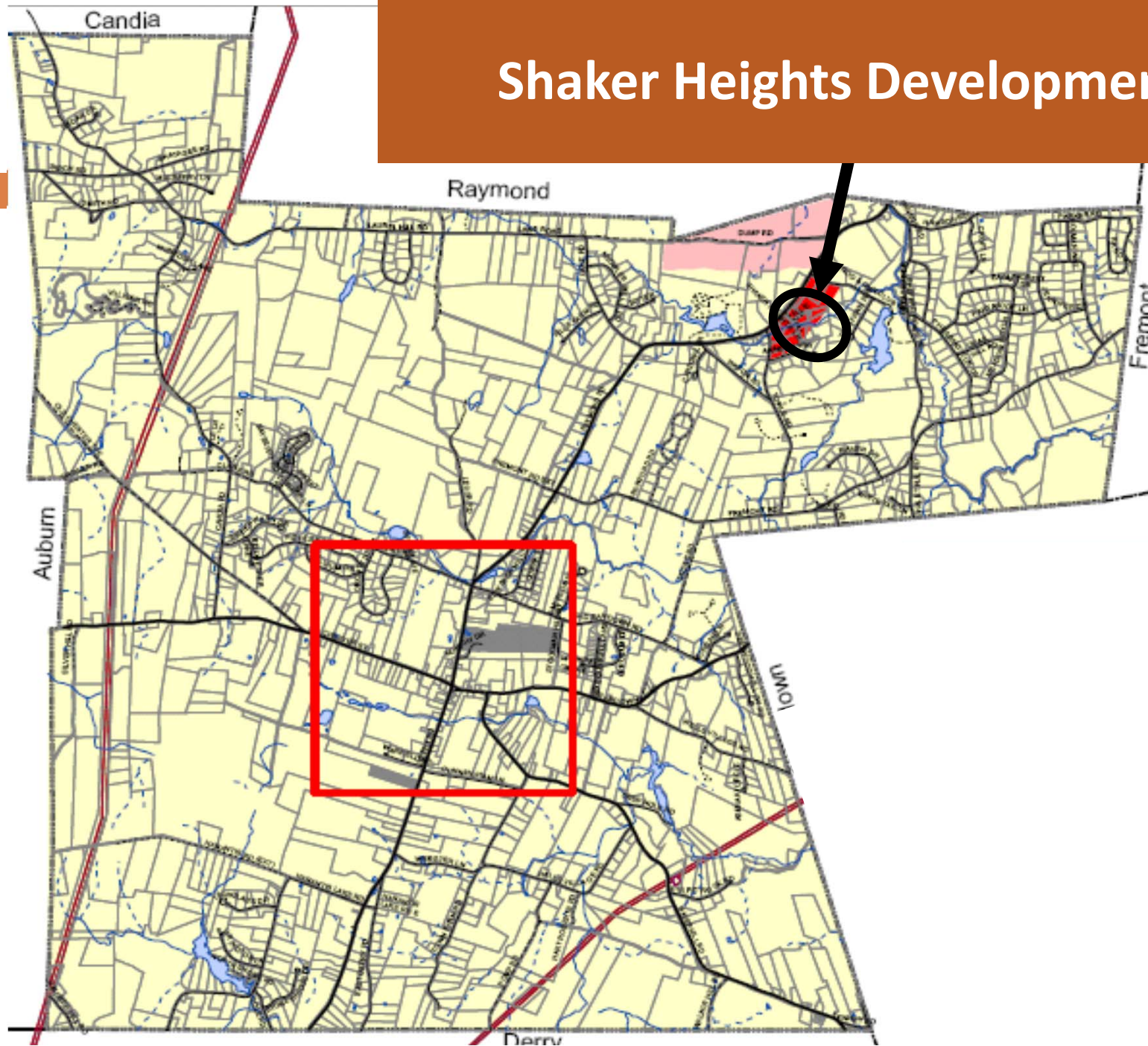
- Affordable duplex and quad townhouses built on the property subject to the 1991 Britton v. Chester case
- An example of conservation subdivision design

Shaker Heights—Chester



- 23 acres overall (19 acres conservation)
- 22 housing units
 - Zoning = 15 units
 - 25% density bonus for income targeting
- Moderate income targeting (mid \$200K's)

Shaker Heights Development



Mixed-Use Infill Development



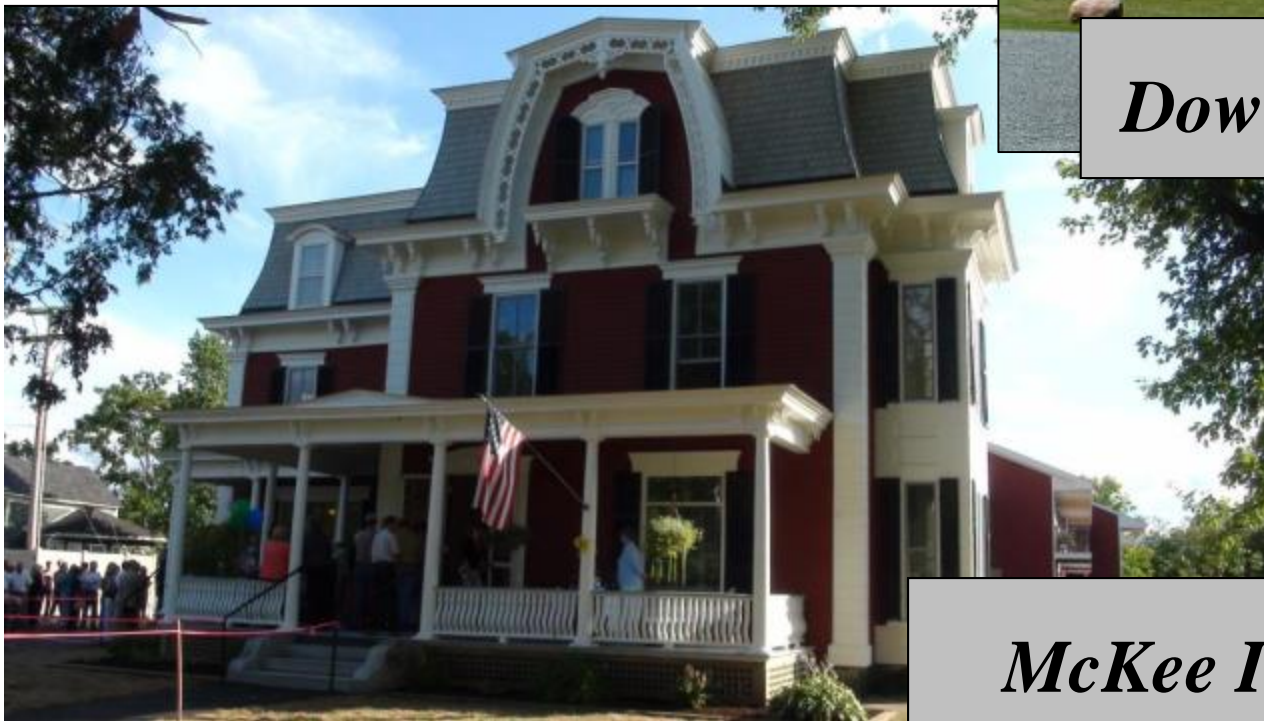
Adaptive Re-use

Flexible zoning;

**RSA 79-E: Community
Revitalization Tax Relief
Incentive**



Dow Academy, Franconia



McKee Inn, Lancaster

Adaptive Re-use

Converted Farmhouse,
Hopkinton



Bellamy Mill, Dover

Affordable Single-Family Homes



*Peacock Brook,
Amherst, NH*

*Pepperidge Woods,
Barrington, NH*



Affordable Multi-Family Developments

Hidden Pond,
Amherst, NH



Accessory Apartments

*Accessory
Apartment,
Warner, NH*



Master Plan
Conservation and Open Space Map
Town of Exeter
2005

Forest Ridge
Watson Valley

Scale 1:35,000

900 0 900 1800 2700 3600 4500 Feet

THIS MAP IS BASED ON THE BEST AVAILABLE AERIAL PHOTOGRAPHY AND FIELD SURVEY DATA. IT IS NOT A GUARANTEE OF ACCURACY. THE TOWN OF EXETER ASSUMES NO LIABILITY FOR ANY ERRORS OR OMISSIONS. THE MAP IS FOR INFORMATIONAL PURPOSES ONLY.

Forest Ridge and Watson Woods



Exeter - Forest Ridge and Watson Woods



Watson Woods



Forest Ridge "Cottages"

Why Do We Still Need This?

- Housing affordability is a long-term issue, and economic growth depends on it
- Local Workforce Housing regulations may help insulate a municipality against Fair Housing Act liability
- Communities need to prepare for a changing housing market. What we've wanted may not be what our children will want.
 - ***What do we want for our communities?***
 - ***What will our children choose?***

Tools and Resources*

- ▣ NH Analysis of Impediments to Fair Housing
 - ▣ NH municipalities' Als
 - ▣ HUD Fair Housing Planning Guide
 - ▣ HUD Guidance of Disparate Impact
 - ▣ NH Fair Housing and Planning Guidebook
(due out in Fall 2013)
 - ▣ Workforce Housing Guidebook
 - ▣ Poverty and Race Research Action Council: www.prrac.org
- *Many of these at www.nhhfa.org/housing-data-cpg.cfm