LEGAL Q&A: What Municipalities Need to Know About “Workforce Housing”

By Natch Greyes, Municipal Services Counsel
It’s no secret that New Hampshire has long suffered from a lack of housing inventory. The issue was first broached in 1991 when the New Hampshire Supreme Court ruled in *Britton v. Town of Chester*, 134 N.H. 434, that every municipality has an obligation to provide for its “fair share” of a region’s current and prospective need for affordable, workforce housing.

In the intervening decades, the legislature has attempted to clarify the Court’s decision and provide guidance to municipalities about how to meet their obligations to provide affordable, workforce housing. As data from the New Hampshire Housing Finance Authority (NHHFA) continues to demonstrate the challenges in finding workforce housing and as businesses report that a workforce shortage continues to hamper the New Hampshire economy, new attention has been brought on the legal requirements of a municipality’s obligation to provide for its “fair share” of a region’s current and prospective need for affordable, workforce housing.

What is meant by the term “workforce housing”?

A: RSA 674:58, IV defines the term “workforce housing” under two different categories: housing for sale and housing for rent. Housing for sale qualifies as “workforce housing” if it is “affordable to a household with an income of no more than 100 percent of the median income for a 4-person household for the metropolitan area or county in which the housing is located as published annually by the United States Department of Housing and Urban Development.” Rentals, in contrast, qualify as “workforce housing” if they are “affordable to a household with an income of no more than 60 percent of the median income for a 3-person household for the metropolitan area or county in which the housing is located as published annually by the United States Department of Housing and Urban Development.”

There are several exclusions contained within these definitions. Housing developments which contain restrictions excluding minors from more than 20 percent of the units – think senior-only housing – or in which more than 50 percent of the dwelling units have fewer than two bedrooms – think apartments designed for singles or couples – do not constitute workforce housing.

How does a municipality know how much workforce housing it is obligated to provide?

A: The New Hampshire Supreme Court left that answer up to the legislature in *Britton*. In 2008, after several studies and attempts at coming to a compromise, the legislature passed RSA 674:59. That statute states that municipalities which adopt zoning ordinances must "provide reasonable and realistic opportunities for the development of workforce housing, including rental multi-family housing." Municipalities must also "allow workforce housing to be located in a majority, but not necessarily all, of the land area that is zoned to permit residential uses within the municipality."

In other words, there is no state-mandated definition of how much workforce housing a municipality must allow to be developed, but it must adopt rules which do not prohibit the development or workforce housing in a majority of its residential zones. Further a municipality may not adopt "voluntary inclusionary zoning provisions that rely on inducements that render workforce housing developments economically unviable." RSA 674:59.

"Reasonable and realistic opportunities for the development of workforce housing"? What does that mean?

A: RSA 674:58 defines the term "reasonable and realistic opportunities for the development of workforce housing" as "opportunities to develop economically viable workforce housing within the framework of a municipality's ordinances and regulations adopted pursuant to this chapter and consistent with RSA 672:1, III-e." RSA 672:1, III-e states that local regulations shall not prohibit or unreasonably discourage the establishment of housing which is decent, safe, sanitary and affordable to low and moderate income persons and families.

In other words, municipalities must "make feasible" the development of workforce housing within the majority of its residential zones consistent with RSA 674:59 in order to meet their obligation to provide "reasonable and realistic opportunities for the development of workforce housing."

Are there any special rules for developers who want to build "workforce housing" which would put a municipality on notice that "workforce housing" is being developed?

A. There are special rules which developers may – but do not have to – follow in order to put a municipality on notice that the developer is working on a workforce housing project. RSA 674:60 - :61 spell out those rules and the implications that they have for the development process.

In short, if the developer files a written statement of intent to that the development is to be "workforce housing" as part of the application, the developer receives different appeal rights - detailed in RSA 674:61 - than in the ordinary course of development. Those rights include a direct appeal to the Superior Court with special rules on how the court should evaluate the proposal.

In addition, if the planning board approves the application subject to conditions, it must give the developer an opportunity to establish the cost of complying with the conditions

and restrictions and the effect of compliance on the economic viability of the proposed development. There is then a process to ensure that those conditions do not eliminate the economic viability of such a project.

What assurances do municipalities have that new developments created as "workforce housing" will stay "workforce housing"?

A. Under RSA 674:60, IV, A municipality may require that a developer record restrictive covenants which limit the ability of the development to be sold or rented to a household which exceeds the income limitations in the definition of "workforce housing" under RSA 674:58, IV. Those covenants are in force for the term specified in the zoning regulations and the municipality has the authority to adopt regulations to ensure compliance with those covenants. Those regulations may allow either the municipality or a third party to require the production of annual income verification for renters and non-owner occupiers.

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