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NHPA CONFERENCE RECORD ATTENDANCE!

The NHPA Annual Conference took place in Portsmouth May 10-11, 2007 and for the first time ever, we had over 90 participants and speakers attending two days of learning and networking opportunities. Sarah James of Cambridge Mass. opened the conference Thursday morning with an enlightening talk on eco-municipalities in Sweden and the four sustainability objectives that the American Planning Association developed. This could be an interesting model for NH communities to follow!

The ten sessions offered on Thursday and Friday covered a wide array of topics including energy efficiency, affordable housing, stormwater management, New Urbanism, and Village Design. Thursday afternoon conference attendees hit the road and visited the Portsmouth Library and the UNH Stormwater Center. For a complete listing of sessions and copies of handout materials visit the Annual Conference page on the NHPA website.

During Thursday night reception at the Blue Mermaid, we honored Karen White with the NHPA President's Award for her outstanding contributions to the science and practice of planning in New Hampshire. Karen will be retiring and moving to Florida in August of 2007. She began her planning career in Nashua and has been a tremendous influence upon many young planners and has made many contributions to the profession over the years. Mark Fougere, Al Turner, and Dave Danielson, who have all worked with Karen at points ranging from her first to last days in planning in NH, had great things to say about Karen's work. Karen's husband also

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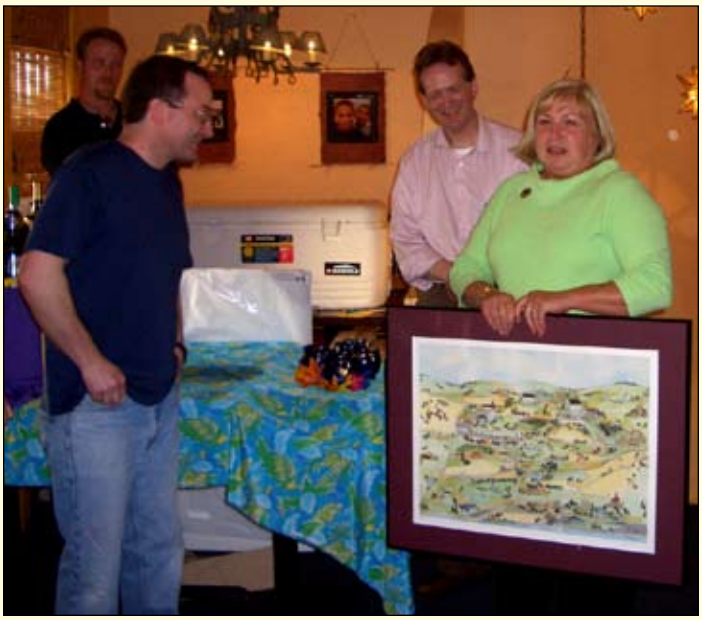

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took a moment to express his gratitude. Thank you, Karen, and congratulations.

We also honored Clay Mitchell for being the "most talked about planner in NH". No, seriously! Clay was part of the NH Union Leader "Forty under Forty", which honors 40 up and coming people, all under the age of 40, who are making a difference in our state. Clay, now the town planner for Epping, has put forth an ordinance for the 2007 Town Meeting that addresses issues of alternative energy production, sustainable design, and methods to achieve these goals while at the same time, stabilizing costs. This ordinance is one of the first of its kind in N.H. and the United States. Good job Clay!

The conference concluded with a speech from Portsmouth Mayor Steve Marchand who discussed how the ideas of an improved downtown Portsmouth have come to reality Since taking office, the Mayor has lead efforts on building re-use, energy efficiency, and saving the Portsmouth Naval Shipyard for the City.

We would like to once again thank our generous sponsors, all the local businesses that donated great raffle prices, and the many speakers who volunteered their time.

Jennifer Czysz
Sandrine Thibault, AICP
NHPA Conference Co-Chairs

ARE YOU PLANNING TO REDUCE GREENHOUSE GAS EMISSIONS?

By Roger Stephenson

Town meetings this past March were replete with discussions and decisions on new fire stations, capital improvement projects, planning ordinances and budget priorities. Voters in 180 towns also had the opportunity to discuss global warming, its impact on New Hampshire and issue a call for action by the next president of the United States to require emissions reductions and support a robust R&D program to foster new and available technologies.

By the end of March, 169 towns presented the New Hampshire Climate Change Resolution for a vote and 158 passed the resolution (8 towns will vote May 8 and 9). The New Hampshire Climate Change Resolution was endorsed by the NH Planners Association, the North Country Council, the NH Association of Regional Planning and over thirty other organizations and 9 New Hampshire newspapers.

The resolution contained a provision important locally: "…. and we ask our Selectmen to consider the appointment of a voluntary energy committee to recommend local steps to save energy and reduce emissions." A sub-group of the Carbon Coalition has been meeting bi-weekly since March 29th to talk about these local energy committees. This subgroup, which includes NH Planners Association vice president Christa Koehler, Clay Mitchell, Wesley Gollum and Maura Adams from the Jordan Institute is working on a handbook that will be available to all local energy committees. Meanwhile, please go to the Carbon Coalition resource page www.carboncoalition.org/community/LocalCommittees.php to find information on starting local energy committees. The Community Toolkit constructed by Clean Air Cool Planet and Jeffrey Taylor Associates is a resource, and the Carbon Coalition would like to add more resources to the list.

Members of the coalition will be holding five regional workshops for people interested in starting local energy committees. The first workshop will be on June 2, from 9-12 am at the Audubon Center on Silk Farm Road in Concord. There will be one other Saturday workshop and three weeknight workshops - places and dates to be determined. Check the Carbon Coalition website in the next couple of weeks for more details.

Please send along your suggestions for more resources to Christa Koehler at ckoehler@cleanair-coolplanet.org and she'll have the Carbon Coalition add to the webpage.

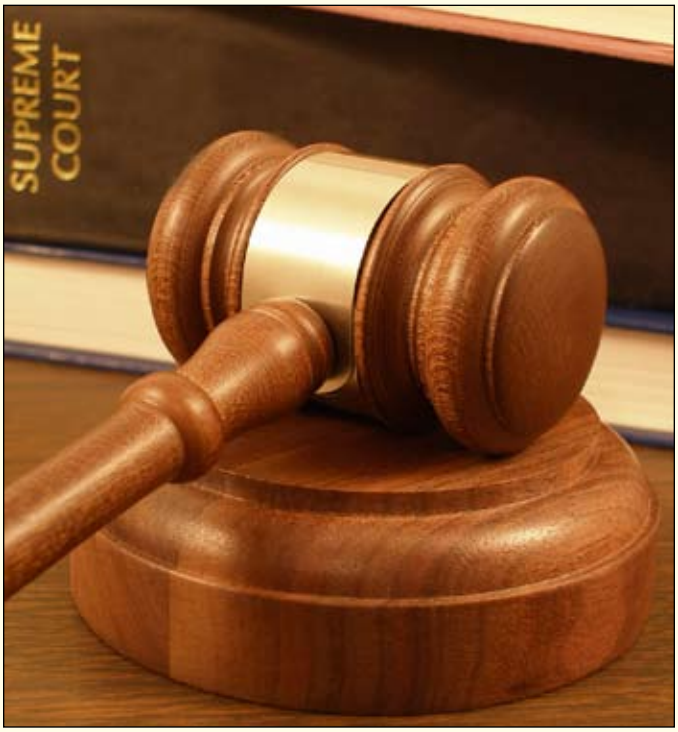
SUPREME COURT REWRITES EQUAL PROTECTION STANDARDS

In the Summer 2006 NHPA Newsletter, I wrote the following with regard to the new constitutional test for substantive due process outlined in *Boulders at Strafford v. Strafford,* 153 N.H. 633 (2006):

> Of course, property owners may still pursue an equal protection claim, which presents a different constitutional inquiry. Although the Court recognized the need to reexamine the entire suite of constitutional tests and to impart greater clarity to them, the justices simply invited future litigants to help them figure things out, rather than to provide clear paths in all directions at this time.

Another path has opened, in the form of *Community Resources for Justice, Inc. v. City of Manchester,* 2006-609 (decided January 24, 2007). In this case, the N.H. Supreme Court has given us a new test under the New Hampshire Constitution for equal protection challenges to governmental actions, which will have important implications for land use planning and regulation statewide.

Community Resources for Justice, Inc. (CRJ) is a private company that contracts with the federal government to provide "halfway houses" for residential transition of criminal offenders back into society. CRJ purchased a building on Elm Street in Manchester's central business district for that purpose, intending to convert two floors to its use. The City denied the building permit because it deemed the use to be a "correctional facility," which is not a permitted use in any of the City's zoning districts. CRJ appealed the denial, and also applied for a variance. Both were denied by the City's zoning board of adjustment. After the ZBA denied motions for rehearing, CRJ appealed to superior court, which reversed the denial of the variance and remanded to the ZBA for rehearing under the *Simplex* hardship standard. Again, the ZBA denied the variance, and again denied a motion for rehearing. In a return trip to superior court, CRJ again prevailed on its variance request. This decision was appealed by the City to the Supreme Court. Note that because the superior court's original decision upholding the City's interpretation of CRJ's proposed use as a "correctional facility" was not appealed, then the Supreme Court was compelled to regard that interpretation as correct.



Reviewing the record below, the Supreme Court applied the post-*Simplex* language of its recent decisions in *Harrington v. Town of Warner* and *Garrison v. Town of Henniker*, in which cases it gave guidance on what was meant by "the property's unique setting in its environment." In *Harrington*, the Court held that the zoning restriction must burden the property "in a manner that is distinct from other similarly situated property." In *Garrison*, the Court similarly held that the proposed site must be unique, in comparison to surrounding lots. Here, the Court found that the record did not support the trial court's conclusion that the *Simplex* test had been met, namely that the property was not uniquely burdened and was generally indistinct from surrounding properties, and that hardship arose from special conditions of the land. As a result, the Supreme Court reversed the trial court's decision and upheld the ZBA's denial of the variance.

But at trial, CRJ had also argued that the City's zoning ordinance banning private correctional facilities anywhere (1) exceeded the authority of the state zoning enabling act; and (2) was unconstitutional because it violated CRJ's right to substantive due process or violated its right to equal protection.

Addressing the question of state zoning authority, CRJ invoked the Court's 1991 decision in *Britton v. Town of Chester*, suggesting that the general welfare provision of RSA 674:16 was contravened by the City's absolute ban on the proposed use. The Supreme Court addressed this argument

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favorably. But because the trial court had made its decision on other grounds and had not held an evidentiary hearing on this point, the Supreme Court simply remanded the issue for further proceedings.

The Court then made quick work of CRJ's assertion that its substantive due process rights had been violated. Citing its *Boulders* decision, the Court applied the "rational basis test, which "requires that legislation be only rationally related to a legitimate governmental interest," and that it "contains no inquiry into whether legislation unduly restricts individual right." As thresholds go, this is as low as they come, and it is almost inconceivable that a governmental action would fail this test. Referring to the City's argument that a transitional residential facility would pose some threat to the neighborhood, the Court agreed that this was a legitimate governmental interest that supported the zoning restriction.

Turning to the equal protection claim, the Court recognized this as a challenge to the zoning ordinance as applied to CRJ's proposed use (rather than a claim that the ordinance was invalid on its face). Consistent with federal law, the Court found that equal protection challenges come in three categories: for governmental actions that affect suspect classes (e.g., race or national origin) or fundamental rights (e.g., free speech, voting, religion), strict scrutiny is applied; for actions that affect important substantive rights (e.g., gender), intermediate scrutiny is applied; and for all others, rational basis is applied.

Strict scrutiny calls for governmental action to be justified by a compelling governmental interest, that the action should be narrowly tailored to meet its ends, and that the action be limited to the least restrictive means possible. Meeting these three prongs is required because the action is impacting upon rights or concerns that go to the heart of American's civil liberties. Rational basis on the other hand, as demonstrated in the area of substantive due process in the *Boulders* case, is a threshold that calls for little demonstration of proof. It is obvious that the intermediate scrutiny test is somewhere in the middle—but exactly where is the issue.

Prior to this case, and as observed by the Court in *Boulders*, there was some overlap among the three classifications, particularly between intermediate scrutiny and rational basis. Here, the Court extensively reviewed its own past treatment of these test and compared its standards with those that have evolved in the federal judiciary. In an effort to both impart clarity to state law and also to make it consistent with federal law, the Court enunciated the following new standard for intermediate scrutiny: *the challenged governmental action must be substantially related to an important governmental objective; and the burden to demonstrate that the challenged action meets this test rests with the government, not with the challenger to it*. Previously under an intermediate scrutiny challenge the burden rested with the challenger.

So what does all this mean in the planning and land use realm? Unlike federal law where intermediate scrutiny in equal protection challenges is limited to questions of disproportionate impact of governmental action based on gender, in New Hampshire intermediate scrutiny is applied to a broader range of "important substantive rights," including "the right to use and enjoy property." This important distinction means that, as a result of this case, municipalities should expect to be defending against an increasing number of equal protection challenges, and they will likely find that they have a harder time winning in court.

MORE GOOD NEWS ABOUT LOW IMPACT DEVELOPMENT DESIGN FROM UCONN

By Pierce Rigrod, Drinking Water Source Protection Program, NH DES

A new research paper from the CT NEMO program at the University of Connecticut is continuing to show that low impact development (LID) techniques hold significant promise in terms of reducing nutrient pollution to surface waters, wetlands, and other water resources. The research paper, authored by Dr. Michael Dietz and Dr. John Clausen was published within the Journal of Environmental Management (March 2007) and presents a comparison of a traditional subdivision versus a similar low impact development (LID) in terms of stormwater generation and nutrient loading. Both developments are in Connecticut contributing to a small estuary, Jordan Cove.

The results, with respect to stormwater generation (volume) and nutrient loading (concentration of nitrogen, phosphorous), are dramatically different between the two types of development. In the traditional development, total runoff volume increased by several orders of magntitude as impervious area increased to 32% while in contrast there was no statistical relationship between impervious cover and runoff volume in the LID, having an impervious area total of 21%. To determine nutrient loading from stormwater, an automated sampler was used to collect weekly samples that were then analyzed for total kjeldahl nitrogen (TKN) and total phosphorous (TP). The research found nutrient loading increased exponentially as the traditional subdivision was build out while the low-impact subdivision showed no statistical relationship between nutrient loading and development.

The low-impact subdivision's design featured slightly smaller lots with greater open space retained to preserve the pre-development stormwater hyrograph. Other LID techniques integrated into the low-impact design included: a narrower road (6.5 m) that used Ecostone pavers and grassed swales; a main bioretention area at the cul-de-sac as well as bioretention (rain gardens) within each lot to infiltrate roof and lot runoff; Ecostone pavers were used on several driveways; and reduced lawn areas to reduce lawn irrigation.

The Environmental Protection Agency (EPA) has estimated that about 30 percent of known pollution to our nation's waters is attributable to stormwater runoff. Smart growth principles and LID designs hold significant promise in reducing the harmful effects of stormwater upon water resources. The research paper oncludes that, "*LID techniques on a watershed scale can significantly reduce the impacts of development on downstream water bodies*". The research provides another science-based rationale to integrate smart growth design and LID stormwater techniques into local development codes.

Links to bioretention stormwater system university research is online at http://www.ence.umd.edu/~apdavis/other-universities.htm. Or, if you are looking for commercial or residential bioretention designs options, try an interactive tool developed by the Low Impact Develoment Center, Inc. see http://www.lid-stormwater.net/intro/homedesign.htm.