

BUFFER OPTIONS FOR THE BAY: **NEW HAMPSHIRE TAKINGS LAW AND THE NATURAL LAW BASIS OF PROPERTY RIGHTS & GOVERNMENT REGULATION**

CHRISTOS TSIAMIS

GREAT BAY NATIONAL ESTUARINE RESEARCH RESERVE, 2018

THE LEGAL RESOURCES COMPONENT OF THE *BUFFER OPTIONS FOR THE BAY* PROJECT, FUNDED IN PART BY THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA) THROUGH THE UNIVERSITY OF MICHIGAN NATIONAL ESTUARINE RESEARCH RESERVE SCIENCE COLLABORATIVE, WAS LED BY CHRISTOS TSIAMIS (GBNERR), WITH SUPPORT FROM CORY RILEY (GBNERR), STEVE MILLER (GBNERR), AND LISA GRAICHEN (UNH COOPERATIVE EXTENSION AND N.H. SEA GRANT), PROJECT TEAM MEMBERS (IN PARTICULAR, CORY RILEY, JILL FARRELL, AND DOLORES LEONARD) AND ADVISORY COMMITTEE MEMBERS (IN PARTICULAR, JOHN COON AND JULIA PETERSON, WHO PROVIDED INPUT DURING PLANNING, REVIEW, AND REVISION). THE OPINIONS HEREIN ARE NOT LEGAL ADVICE. THIS DOCUMENT FOLLOWS FROM THE VERMONT LAW SCHOOL LAND USE CLINIC STUDY OF JUNE 2012 (AT <https://goo.gl/q3Cp4X>), FUNDED BY NOAA TO LOOK AT LEGAL AUTHORITY AND CONSEQUENCES OF BASING MUNICIPAL POLICY DECISIONS IN N.H. ON BEST AVAILABLE SCIENTIFIC MODELS.

SUMMARY: WHILE INDIVIDUAL PROPERTY RIGHTS AND MUNICIPALITIES' AUTHORITY TO ENACT BUFFER REGULATIONS MAY SEEM LIKE COUNTERVAILING FORCES AT OPPOSITE ENDS OF A POLITICAL SPECTRUM IN NEW HAMPSHIRE, THEY BOTH ARISE FROM EXPRESS GRANTS UNDER CIVIL LAW, THEY BOTH ORIGINATE FROM THE NATURAL LAW OF REASON, AND THEY BOTH REPRESENT THE STRUGGLE BETWEEN SELF-LOVE AND PUBLIC GOOD THAT YIELDS WHAT AMERICA'S FOUNDERS' CALLED OUR "LIBERTY." IN GENERAL, THEN, THE RISK OF MUNICIPAL TAKING LIABILITY IS LOW IN NEW HAMPSHIRE, PROVIDED THAT THE REGULATION ADVANCES A LEGITIMATE STATE INTEREST (LIKE FLOOD RISK ATTENUATION) AND MUNICIPALITIES FOLLOW SOUND PLANNING PRINCIPLES (SEE RECOMMENDATIONS IN SECTION IV, CONCLUSION, BELOW).

I. INTRODUCTION

To benefit from the ecosystem services and values buffers provide, towns may wish to enact regulations and ordinances to protect them. The resulting restriction of property rights, however, raises the potential for regulatory takings lawsuits.

A **taking** is the total or near total governmental deprivation of private property requiring payment of "just compensation" to the owner.

This fact sheet focuses on the most common concerns regulatory takings related concerns (**Appendix 1**) we heard from watershed professionals and residents in New Hampshire, almost all of which were from a property rights perspective, and more than half of those simply concerned the "taking" definition itself, to which this synthesis and annotated list of legal resources on N.H. takings law (**Appendix 2**) attend.

II. HISTORICAL BACKGROUND

The evolution of takings law sums as the quest to find that “reasonable” balance between the “natural right” (Box 1) of property ownership, upon which individual liberty depends, and the purpose and authority of our consent-based state and federal governments (Boxes 3 and 4,

Box 1. The natural law basis of natural right of self-preservation

Declaration of Independence (1776), in part:

“When... it becomes necessary for one people to... assume... the separate and equal station to which the **Laws of Nature and of Nature's God** entitle them,... they should declare the causes which impel them to the separation.

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain **unalienable Rights**, that among these are **Life, Liberty and the pursuit of Happiness....**”

[The first] Constitution of New Hampshire (1776), in part:

“WE... [h]ave taken into our serious consideration the... many grievous and oppressive acts of the British Parliament, depriving us of our **natural... rights** and... destroying the **lives and properties** of the colonists....”

N.H. Constitution, Article 2 (1784), in part:

“All men have certain **natural**, essential, and inherent **rights** - among which are, the enjoying and defending **life and liberty**; acquiring, possessing, and protecting, **property**; and, in a word, of **seeking and obtaining happiness....**”

respectively) (for “natural rights” see, e.g., Cicero, 44 BC; Locke, 1689; Sidney, 1698; Gordon, 1720; Madison, 1787; Adams, 1851; Boyd, 1903; Farber et al., 1993; McConnell, 1998; BarBri, 2005; LOC, 2017; and for “consent-based government” see, e.g., Plato, ca. 380 BC; Montesquieu, 1749; Blackstone, 1769; Hobbes, 1651; Spinoza, 1670; Mill, 1859; Salzman and Thompson, 2014). The formula for that evolution might look like this:

Natural law →

Natural rights →

Society →

Liberty →

Consent to government →

Government authority →

Constitutional civil laws →

Civil property rights +

Governmental regulatory powers →

Taking lawsuit →

Court: Protected property right? →

Court: Compensable taking?

Natural rights

Our unalienable, natural right to survive—expressed variously as the rights of life, liberty, property, and pursuit of happiness in the New Hampshire Constitution and the Declaration of Independence (Box 1)—derives from nature and the natural law, which is that all organisms behave in ways that they perceive will benefit them (Locke,

1689; Lasswell, 1977).

Purpose and formation of society

Yet, when people enter **society (Box 2)**, they must consent to suspend the full enjoyment of some of their natural rights to ensure one another's security. In other words, they swap pure individual *freedom* for the security—the individual *liberty*—that community affords, because reason tells us that individual liberty increases when community security also

Box 2. Constitutional declaration of the purpose of society

N.H. Constitution, Article 3 (1784):

“When men **enter into** a state of society, they surrender up some of their natural rights to that society, **in order to** ensure the protection of others; and, without such an equivalent, the surrender is void.”

Box 3. Constitutional declarations of the purpose of government

N.H. Constitution, Article 1 (1784), in part:

“...all government of right... is... **instituted for** the general good.”

N.H. Constitution, Article 10 (1784), in part:

“Government being **instituted for** the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one... or class...”

U.S. Constitution, Preamble:

“We the People of the United States, **in Order to** form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

Box 4. Constitutional authority of our consent-based government

N.H. Constitution, Article 1 (1784):

“All men are born equally free and independent; therefore, all government of right originates from the people, is founded in **consent**, and instituted for the general good.”

Declaration of Independence (1776), part:

“...That to secure these rights, Governments are instituted among Men, deriving their just powers from the **consent** of the governed[...].”

increases. The Founders and their influences deemed this positive feedback loop between “self-love” and social-love natural, logical, and most of all useful (Lucretius, ca 55 bc; Hobbes, 1651, Locke, Gordon, 1721; Hume, 1738; Franklin, 1745; Madison, 1787; Jefferson, 1814; Mill, 1859; Mill, 1863; Hayek, 1960; Stewart, 2014). The same logic applies to the natural synergy between

individual property rights and a community's interest in a healthy environment. For instance, landowners and their communities benefit from buffers that enhance water quality, slow erosion, and soak up floodwaters.

Purpose of government

Thusly into the security and collective harmony of liberty that society affords, people consented to government (**Box 3**) designed to ensure the common good and security of the whole of society.

Government formed by consent

We, the People, either expressly or tacitly, still **consent (Box 4)** to that form of government today. Thus, all legitimate government authority in America derives from and is limited to the people's consent, *including* the government's regulatory authority under the **police power (Box 6)**.

III. CONSTITUTIONAL BACKGROUND

A. Federal takings law

The civil laws and court decisions rendered in colonial America and the early United States of America make evident the importance of property rights (LOC, 2017). Indeed, our **takings protections (Box 5)** emanate from the highest civil (as opposed to natural) laws in the nation and state: the U.S. and N.H. Constitutions.

The U.S. Constitution and N.H. Constitution and laws further limit the police power by requiring public use (interpreted as public *purpose*) of taken property and payment of just compensation to property owners under certain circumstances (U.S. Const., amends. V and XIV; N.H. Const., Art. 12; N.H. RSA 498-A; *Heiss Case (1892)*; *Boom Co. v. Patterson (1879)*; *United States v. Carmack (1946)*;

Box 5. taking clauses in U.S. & N.H. Constitutions

Fifth Amendment of the United States Constitution:

*"No person shall [...] be deprived of life, liberty, or **property**, without due process of law; nor shall private **property** be **taken** for **public use**, without **just compensation**."*

Article 12 of the New Hampshire Constitution:

*"Every member of the community has a **right** to be protected by it, in the enjoyment of his **life, liberty, and property**; [...] but no part of a man's **property** shall be **taken** from him, or applied to **public uses**, without his own **consent**, or that of the representative body of the people[.]" (N.H. statute RSA 498-A Eminent Domain Procedure Act supplies the **just compensation** requirement.)*

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984); VLS, 2012:82; Cornell, 2017a; and Cornell, 2017d).

While the Supremacy Clause of Article VI of the U.S. Constitution establishes the precedence of the federal Constitution and federal laws over state laws and constitutions (Cornell, 2017c; Salzman, 2014), the 10th Amendment establishes that the States retain all rights not delegated to the federal government or prohibited to them by the Constitution. Among those rights is the States' undoubted **police power (Box 6)** to promote the "*public health, safety, and welfare*" (*Wisconsin* at 220), which includes the power to regulate the "*bundle of rights*" that comprise the right of property ownership (Lucas at 1027; LOC, 2017; Cornell, 2017b).

To this end, the U.S. Supreme Court has stated that "[i]t seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers (Lucas at 1027)[.]" As the Court has "long recognized, some values are enjoyed under an implied limitation and must yield to the police power (Pennsylvania Coal Co. at 413)"; indeed, of all the powers of local government, the police power is "one of the least limitable" (*Lambert* at 228; *District of Columbia* at 149). N.H. jurisprudence clearly evinces this sentiment, as well; thus, an exercise of the state's police power that protects public health, welfare, and safety will not likely constitute a compensable taking (VLS, 2012:117).

Box 6. Definition of police power

The **police power** is the inherent power of any independent government to enact laws that protect public health, safety and welfare. Police powers are reserved to the states by the Tenth Amendment of the U.S. Constitution.

N.H. RSA 674:16 (2011) grants police powers to municipalities by granting "the local legislative body of any city, town, or county ... [the authority] to adopt or amend a zoning ordinance ... for the purpose of promoting the health, safety, or the general welfare of the community."

Box 7. What's the **purpose** of regulation?

"The publicity of the rules of an institution ensures that those engaged in it know what limitations on conduct to expect of one another and what kinds of actions are permissible. There is a common basis for determining mutual expectations" (Rawls, 1971).

Though inherent to sovereignty, governments may only exercise the power to take private property pursuant to legislation (Cornell, 2017). In N.H., RSA 674:16 (Grant of Power) enables a municipality's authority to zone and the power to adopt a zoning ordinance—i.e., to properly regulate land uses (**Box 6**).

Municipal authority to *properly* regulate land uses thus exists as a balance between private

property rights (**Box 1 and Box 5**) and the purpose (**Box 3**) and power (**Box 6**) of government to promote the public health, welfare, and safety.

The question, then, is... **when?** When does a land use regulation become so burdensome that it crosses the threshold into a **compensable taking** of property by the government?

B. New Hampshire takings law

N.H. takings cases are fact-specific and generally follow federal law, although neither N.H. nor federal courts have established a “bright line” beyond which a regulation becomes a taking (VLS, 2012:99,105).

The N.H. Supreme Court determines the legality of regulations based on N.H. state law, using federal precedent only for comparison and to determine whether the Fifth Amendment provides any additional protection (*State v. Ball*, 1983:232). While N.H.’s highest state court has stated that the “Federal Constitution affords the plaintiffs no greater protection than does the [N.H.] Constitution (*Webster* at 438),” regulatory takings claims in New Hampshire should be examined under the N.H. and U.S. Constitutions (VLS, 2012).

In N.H., a **governmental regulation** can be a taking, even if the land is not physically taken, if it is an arbitrary or unreasonable restriction that substantially deprives the owner of the economically viable use of his or her property in order to benefit the public (*Burrows* at 597-98; *Smith* at 346; *Lucas* at 1015; *Bio Energy* at 157). However, when a municipal ordinance is challenged, there is a strong presumption that the ordinance is valid and, consequently, not lightly to be overturned by N.H. courts (VLS, 2012:61).

Step one: Court determines if the regulation affects a protected property right

The first step, then, for a New Hampshire and federal takings analysis is to determine whether the regulation affects a protected property right (VLS, 2012:100).

The N.H. Supreme Court defines **property** as “refer[ring] to a person’s right to ‘possess, use, enjoy and dispose of a thing and is not limited to the thing itself” (*Burrows* at 597; *Metzger* at 502).

If the regulation merely prohibits a land use that was never part of the owner’s property rights in the first place, such as a nuisance activity or other prohibition under common law, the regulation will not result in a compensable taking (*Lucas* at 1029; VLS, 2012:100).

Step two: Court tests to determine whether the regulation constitutes a compensable taking

If the regulation does affect a property right, a municipality can be subject to a compensable “per se taking” claim in the rare situation where a regulation restricts “all economically beneficial or productive use of land,” thereby effecting a complete or per se taking; or when a regulation goes “too far” and infringes on private property rights, effecting a partial taking ((Penn Central at 127; VLS, 2012:82).

Per se taking test

If the regulation restricts “all economically beneficial or productive use of land,” there is a compensable per se (complete) taking (Lucas at 1015). This is equally true under the New Hampshire Constitution: especially onerous, arbitrary or unreasonable restrictions which substantially deprive the owner of the ‘economically viable use of his land’ in order to benefit the public in some way constitute a taking within the meaning of our New Hampshire (Burrows at 598).

Partial taking test

N.H. courts use a case-specific, fact-based partial taking test (based on the federal “Penn Central test” named for the landmark 1978 partial taking case in which the U.S. Supreme Court used “fairness factors” in its analysis Penn Central Transp. Co. v. New York City) that tends to favor regulation over compensation. Partial takings claims are evaluated based on: (1) the economic impact on the property owner; (2) the degree of interference with the owner’s reasonable investment-backed expectation; and (3) the character of the occupation.

(1) Economic impact on the property owner

Similar to most federal courts who employ a “with or without” test that looks at the value of a property with or without the regulation, N.H. courts use a “before and after” comparison to measure the degree to which a government regulation diminishes a property’s economically viable use (Quirk at 130-32). This test attempts to determine fair market value immediately before and immediately after the regulation (VLS, 2012). For most properties, N.H. courts use a comparable-sales approach to assess fair market value (VLA, 2012:106). For income-generating properties, N.H. courts may use a market-capitalization approach, or it may combine the methods (VLS, 2012:106).

(2) Owner’s reasonable investment-backed expectations

N.H. courts have also indirectly applied the federal courts’ rate-of-return approach to determining diminution of value of regulated income and investment properties (VLS, 2012:109). This approach assesses value based on the purpose for which the property had been purchased.

Once a court has determined a landowner has an initial expectation to use the property for a purpose that is prohibited by the regulation, it will ordinarily inquire into whether the expectation is objectively reasonable (VLS, 2012:112). The U.S. Supreme Court has adopted a three-part test to determine whether an expectation is reasonable and whether the regulation was foreseeable at the

time of the acquisition of the property (Appolo Fuels Inc. at 1349). Under this test, individuals who claim property rights in a “heavily regulated field” typically have a difficult time establishing they have an objectively reasonable expectation the state will not enact new regulations that will affect their property. (Federal Housing Administration at 91). Thus, for example, N.H. legislation that identifies the Lamprey River as “Protected River” could influence the court’s decisions on whether there was a reasonable investment-backed expectation regarding certain types of development in the Lamprey River watershed (VLS, 2012).

The rate-of-return approach may, to a lesser extent, attempt to account for a property owner’s ability to recoup the original cost-basis under the regulation (Burrows at 601; VLS, 2012:). This method also applies to “existing use” cases and may favor the state in cases where property has significantly appreciated over time (VLS, 2012:109).

Finally, N.H. courts will look to the regulatory scheme currently in place to determine whether a claimant could have reasonably anticipated government action (Palazzolo at 633; Claridge at 752-53; VLS, 2012:114).

(3) Character of the government action

Like federal courts, N.H. courts evaluate the character of the government action by weighing the public interest served by the regulation against the private burden on an affected landowner (*Keystone Bituminous Coal Association* at 492; *Mugler* at 665; *Claridge* at 752; VLS, 2012:115-16). This definition of character is essentially a determination of whether a government action constitutes a taking based on whether the burden on a private property interest should be carried by the landowner or the public at large (VLS, 2012:115).

In sum, while the particular diminution of value measure that the court may use is difficult to predict, it will likely be tied to the factual attributes of the property in question and the regulatory circumstances behind the government action (VLS, 2102:110).

IV. CONCLUSION

The risk of municipal takings liability is low, so long as municipalities follow sound planning principles (VLS, 2013; Wake, 2013; SWA, 2013; RPC, 2013). Moreover, the federal government *encourages* communities to enact certain types of regulations designed to reduce floodplain hazards (VLS, 2013; RPC, 2013; Wake, 2013). Under federal floodplain guidelines, states and municipalities are encouraged to establish more stringent regulations above and beyond minimum federal requirements (VLS, 2013; Wake, 2013).

Additional Guidance

- A taking claim must be “ripe” for judicial review before the court will determine whether a regulation constitutes a compensable taking (VLS, 2012:90,120). That is, the claimant must at least have applied for and been denied a variance or special use permit before a court will hear the case.
- "Erroneous board decisions based on mistaken interpretations of valid regulations differ materially from technically precise applications of invalid ordinances; a mistaken board decision does not effect a taking when the erroneous decision resulted from misconstruction of otherwise valid restrictions" (*Dumont* at 10).

Recommendations

- Whether towns have the requisite **enabling authority** depends on the specifics of the regulation being imposed; municipalities should clearly identify the enabling statute that allows the enactment of the ordinance or regulation (VLS, 2012:9).
- **Regulation creation:**
 - Indicate that the purpose of the regulation is to promote hazard mitigation and habitat and biological conservation, and make this clear in **the master plan** (VLS, 2012:10).
 - Enact regulations in a way that preserves some **economically viable use** of the land (VLS, 2012:10).
 - In New Hampshire, **scientific data is very rarely needed** to justify the enactment of ordinances. As long as you have a reasonable justification [for using climate projection maps, the maps will be upheld] (VLS, 2012:10).
 - A municipality might consider using the principle of **No Adverse Impact** as a standard when creating floodplain regulations to avoid takings claims (VLS, 2012:90,120). NAI is the principle that the action of one property owner may not adversely impact the flooding risk for other property owners.
- **Master plan:**
 - The **master plan** provides the **rational nexus** between the goals and needs of a community and the regulatory tools that can be implemented to achieve those goals.
 - **Acknowledge scientific uncertainty upfront** in your master plan (VLS, 2012:36). By addressing the uncertainty of flood hazards in comprehensive plans, municipalities have the opportunity to acknowledge the unpredictability of future conditions, while at the same time emphasizing the importance of taking action despite uncertainty (VLS, 2012:36). Comprehensive plans can specifically address the impacts of increased storm intensity and the presence of flood hazards in the municipality (VLS, 2012:36). If a municipality chooses, it can also base all planning on future conditions, such as fully built-out watersheds (VLS, 2012:36). **The foundation**

for any proposed regulatory or non-regulatory flood hazard strategy must be provided in the master plan (VLS, 2012:36).

- If necessary, amend your master plan to:
 - include goals and policies for floodplain management that integrates buffers and other green infrastructure approaches (VLS, 2012:10), and
 - indicate that the purpose includes the “health, safety, and welfare” of citizens in the community (see **Box 6**) (VLS, 2012:10).

APPENDIX 1:

Most common takings-related concerns heard from participants in the [Community Assessment](#) of the *Buffer Options for the Bay* project

Definition of a regulatory taking:

- Confusion over definition of “reasonable use” = 4 mentions
 - Confusion over definition of “regulatory taking” = 1 mention
 - Confusion over “long-standing use” = 1 mention
- Subtotal* = 6 mentions

Definition of property rights:

- Nature and extent of N.H. municipalities’ authority to set regulatory standards = 2 mentions
 - Confusion over extent to which future regulations might interfere with private property rights = 1 mention
- Subtotal* = 3 mentions

Total = 9 mentions

APPENDIX 2:
Annotated bibliography & legal resources related to N.H. takings law

United States Constitution

U.S. Constitution, amend. V. (“No person shall [...] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”)

U.S. Constitution, amend. X. (Powers not delegated by the states to the United States and not forbidden to states are retained by states.)

U.S. Constitution, amend. XIV. (Amendment by which the taking and due process clause *inter alia* of the Fifth Amendment applies to the states.)

Federal statutes

Federal Water Pollution Control Act (a.k.a. Clean Water Act). 33 U.S.C. §1251 et seq. (1972). (Protects water quality by requiring monitoring and controlling discharges. The scope of the Act is limited to “navigable waters,” but this has been broadly defined to include wetlands and areas directly adjacent to navigable waters.)

Rivers and Harbors Act of 1899. 33 U.S.C. §§ 401, 403 (1976). (Sections 9 and 10 grant the United States Army Corps of Engineers control over obstructions to “navigable waters.”)

New Hampshire Constitution

N.H. Const., Art. 1. 1784. Equality; origin and object of government.

N.H. Const., Art. 2. 1784, revised 1974. Natural rights.

N.H. Const., Art. 3. 1784. Society, its organization and purpose.

N.H. Const., Art. 10. 1784. Right of revolution.

N.H. Const., Art. 12. 1784. Protection and taxation reciprocal.

N.H. Const., Art. 12-a. 1784. Power to take property limited.

New Hampshire statutes

General Authority and Administration

N.H. Rev. Stat. Ann. Ch. 31. Powers and Duties of Towns.

N.H. Rev. Stat. Ann. § 31:41-b. Hazardous Embankments.

N.H. Rev. Stat. Ann. § 31:92 Taking of Land.

N.H. Rev. Stat. Ann. § 31:92-a. Water Pollution.

N.H. Rev. Stat. Ann. § 149-I:1-25. Sewers.

N.H. Rev. Stat. Ann. § 432:3. State Plan.

N.H. Rev. Stat. Ann. § 483:2. [New Hampshire Rivers Management and Protection] Program Establish; Intent.
N.H. Rev. Stat. Ann. § 483:15. Rivers Designated for Protection.
N.H. Rev. Stat. Ann. § 483-B. Shoreland Water Quality Protection Act.
N.H. Rev. Stat. Ann. § 483-B:8. Municipal Authority.
N.H. Rev. Stat. Ann. § 483-E:3. Coastal Risk and Hazards Commission.
N.H. Rev. Stat. Ann. § 485-A:13. Water Discharge Permits.
N.H. Rev. Stat. Ann. § 498-A:1-31. Eminent Domain Procedure Act.
N.H. Rev. Stat. Ann. § 674:16. Grant of [Police] Power.
N.H. Rev. Stat. Ann. § 674:20 Districts.
N.H. Rev. Stat. Ann. § 674:21-a. Development Restriction Enforceable.

Regulation and Planning

N.H. Rev. Stat. Ann. § 21-O. New Hampshire Department of Environmental Services water quality responsibilities.
N.H. Rev. Stat. Ann. § 483:10. Rivers Corridor Management Plans.
N.H. Rev. Stat. Ann. § 485-A:17. Terrain Alteration.
N.H. Rev. Stat. Ann. § 674:2. Master Plan Purpose and Description.
N.H. Rev. Stat. Ann. § 674:3. Master Plan Preparation.
N.H. Rev. Stat. Ann. § 674:16. "Flexible and Discretionary" Zoning.
N.H. Rev. Stat. Ann. § 674:17. Purposes of Zoning Ordinances.
N.H. Rev. Stat. Ann. § 674:21. Innovative Land Use Controls.
N.H. Rev. Stat. Ann. § 674:21(j). "Environmental Characteristics" Zoning.
N.H. Rev. Stat. Ann. § 674:36. Subdivision Regulations.
N.H. Rev. Stat. Ann. § 674:44. Site Plan Review Regulations.
N.H. Rev. Stat. Ann. § 674:55. Wetland Regulations.
N.H. Rev. Stat. Ann. § 674:56(I). Floodplain Zoning.
N.H. Rev. Stat. Ann. § 674:56(II). Fluvial Erosion Hazard Zoning.
N.H. Rev. Stat. Ann. § 674:57. FEMA Flood Insurance Rate Maps (and 44 C.F.R. 67.5).

Environmental

N.H. Rev. Stat. Ann. § 483:2. Fill and Dredge in Wetlands.
N.H. Rev. Stat. Ann. § 483-B:9. Minimum Shoreland Protection Standards.
N.H. Rev. Stat. Ann. § 674:55. Wetlands.
N.H. Env-Wt. Administrative Rules.

Federal case law

Agins v. Tiburon, 447 U.S. 255, 260 (1980). ("Land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land.")

Appollo Fuels, Inc. v. U.S., 54 Fed. Cl. 717, 1349 (2002).

Armstrong v. United States, 364 U.S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960). (The Fifth Amendment's guarantee that private property shall not be taken for a public use

without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.)

Boom Co. v. Patterson, 98 U.S. 403, 406 (1879). (“Eminent domain “appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty.”)

Chicago, Burlington & Quincy RR. Co. v. Chicago, 166 U.S. 226 (1897).

District of Columbia v. Brooke, 214 U.S. 138, 149 (1909). “[T]he police power, one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.”

Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

Federal Housing Administration v. Darlington, Inc., 358 U.S. 84, 91 (1958).

Heiss Case, 141 Ill. 35, 31 N.E. 138, 141 Ill. 35 (1892).

Kaiser Aetna v. United States, 444 U.S. 164, 261, 262 (1979). (“[N]o precise rule determines when property has been taken.”)

Kelo v. New London, 545 U.S. 469, 489 (2005). (“We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline.”)

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 488, 492 (1987). (Recognizing that property law restricts use of property that is to the detriment of the public at large or individual property interest (citing *Mugler*, 123 U.S. at 665) and that determining the legitimacy of state action “necessarily requires a weighing of private and public interests” (citing *Agins*, 447 U.S. at 260-261).).

Lambert v. California, 355 U.S. 225 (1957). (Of all the powers of local government, the police power is “one of the least limitable.”)

Lucas v. South Carolina Coastal Council, 505 U.S.1003, 1015-1019, 1024, 1027, 1029-31 (1992). (1015-1019: Established a bright line rule for the relatively rare *per se* or complete taking, which is where a state regulation deprives an owner of all economically beneficial use of his property. 1027: “Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the [...] proscribed use interests were not part of his title to begin with. This accords, we think, with our “takings” jurisprudence [...] and] the understandings of our citizens regarding the content of, and the State’s power over, the “bundle of rights” that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers;

"[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power.")

Metzger v. Town of Brentwood, 117 N.H. 497, 502 (N.H. 1977).

Mugler v. Kansas, 123 U.S. 623, 665 (1887). ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.")

Nectow v. Cambridge, 277 U.S. 183, 188 (1928). (The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests.)

Nollan v. California Coastal Commission, 483 U.S. 825 (1987). ("We have long recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land" quoting *Agins v. Tiburon*, 447 U. S. 255, 260 (1980)).

Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001). (O'Connor, J., concurring) ("the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.")

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127, 138, n.36 (1978). (The case which established the court's economic balancing test to determine occurrence of a taking. "[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose.")

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922). (A case in which the U.S. Supreme Court held that whether a regulatory act constitutes a taking requiring compensation depends on the extent of diminution in the value of the property. The decision thereby started the doctrine of regulatory taking.)

Pennsylvania Mutual Life Insurance Co. v. Heiss, 141 Ill. 35, 31, N.E. 138 (1892). (Eminent domain is "an essential attribute of sovereignty, inherent in every independent government, and to be exercised in the discretion of the sovereign power, to promote the general welfare of the people.")

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984). (Public use requirement is coterminous with the scope of police power.)

United States v. Carmack, 329 U.S. 230, 241–42 (1946). ("The Fifth Amendment ... says 'nor shall private property be taken for public use, without just compensation.' This is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power.")

United States v. Lopez, 514 US 549, 591 fn. 4 (1995).

United States v. Willow River Power Co., 324 U.S. 499, 502 (1945). (“It is clear, of course, that head of water has value and that the Company has an economic interest in keeping the [river dammed up]. But not all economic interests are “property rights”; only those economic advantages are “rights” which have the law back of them, and only when they are so recognized may courts compel other to forebear from interfering with them or to compensate for their invasion.”)

Village of Euclid, et al. v. Ambler Co., 272 U. S.365, 395-397 (1926). (The seminal decision on the weighing of private and public interests where, despite alleged diminution in value of the owner's land, the Court held zoning laws facially constitutional, because they bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner.)

Wisconsin v. Yoder, 406 U.S. 205, 220 (1972). (“It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers (at 220).”

New Hampshire case law

Asselin v. Town of Conway, 137 N.H. 368, 371, and 371-372 (1993); *Boulders v. Town of Strafford*, 153 NH 633, 903 A. 2d 1021; *see also* RSA 674:16(l) (1996). (“The State zoning enabling act grants municipalities broad authority to pass zoning ordinances for the health, safety, morals and general welfare of the community. Furthermore, a municipality may exercise its zoning power solely to advance aesthetic values because the preservation or enhancement of the visual environment may promote the general welfare.”)

Biggs v. Town of Sandwich, 124 N.H. 421, 427, 470 A.2d 928 (1984). (The master ruled that the plaintiffs could not properly make a claim for inverse condemnation because of their prior knowledge of the proposed ordinance and their lack of good faith in proceeding with construction of the septic system, and because the repurchase agreement protected them from suffering any compensable damage. The record indicates that any hardship the plaintiffs may have suffered was self-imposed.)

Burrows v. City of Keene, 121 N.H. 590, 597-98 (1981). (Keene's designation of plaintiffs' property as part of a conservation district constituted a taking requiring compensation under the State Constitution, because [a] the right to just compensation for a taking of property necessarily limits the police power and [b] that the government cannot, through regulation, indirectly effect a taking without paying compensation.)

Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 580, 883 A.2d 1034 (2005). (“Our standard of review is well-settled: We will uphold the trial court's decision unless the evidence does not support it or it is legally erroneous. For its part, the trial court must treat all factual findings of the ZBA as prima facie lawful and reasonable. RSA 677:6 (2008). It may set aside a ZBA decision if it finds by the balance of probabilities, based on the evidence before it, that the ZBA's decision was unreasonable.”)

City of Portsmouth v. Boyle, 8 A.3d, 37 (2010). (City commenced a zoning enforcement action against Boyle alleging that he unlawfully clear cut trees within a wetlands buffer zone. The city sought an injunction and an order to conduct restoration efforts (see RSA 676:15) and requested civil penalties, attorney's fees, and costs (see RSA 676:17, I, II, Supp.2009). The court affirmed that City had failed to demonstrate that Boyle's clear cutting activity violated the city's zoning ordinance.)

Claridge v. Wetlands Board, 125 N.H. 745, 747-48, 485 A.2d 287, 291-92 (N.H. 1984). (Noting that land that could be sold to abutters supported the conclusion that the property continued to have economic value. Upheld a finding that filling the salt marsh in question would destroy much of the ecological value of the land by "irreparably diminish[ing] the marsh's nutrient-producing capability for coastal habitats and marine fisheries" (485 A.2d at 292). Court also held that because the owners had both constructive and actual notice when they bought the property of State and municipal regulations which might interfere with their intended use of the property, the board's denial of their petition did not thwart substantial, justified expectations (125 N.H. at 751-52; 485 A.2d at 291-92). Moreover, the court "did not consider the plaintiffs' burden to be unreasonably onerous since they were in the same position as other wetlands owners who were unable to build upon their property without extensive landfill. The burden upon the plaintiffs in *Claridge* was simply the type of risk "which [they] chose to take in buying this lot with notice of regulatory impediments (125 N.H. at 753; 485 A.2d at 292)."

Dugas v. Town of Conway, 125 N.H. 175, 182, 480 A.2d 71 (1984). ("Reasonable regulations, aimed at promoting the health, safety and general welfare of the community, may not require compensation[.]" "The police power is restricted by the express provisions of State statutes and by the specific guarantees of the Bill of Rights of our State Constitution (125 N.H. at 182)."

Dumont v. Town of Wolfeboro, 137 N.H. 1, 10-11 (1993). ("Erroneous board decisions based on mistaken interpretations of valid regulations differ materially from technically precise applications of invalid ordinances; a mistaken board decision does not effect a taking when the erroneous decision resulted from misconstruction of otherwise valid restrictions.")

Fischer v. New Hampshire State Building Code, 914 A. 2d 1234, 1237 (2006). ("As the Washington Supreme Court aptly stated: 'There is no such thing as an inherent or vested right to imperil the health or impair the safety of the community.... It would be a sad commentary on the law, if municipalities were powerless to compel the adoption of the best methods for protecting life in such cases simply because the confessedly faulty method in use was the method provided by law at the time of its construction.' We concur with this analysis.")

Funtown v. Town of Conway, 127 N.H. 312, 318, 499 A.2d 1337 (1985). (Plaintiff's affidavit claimed abutters were interested in buying his property, thereby failing to demonstrate that a genuine issue of material fact existed as to whether the value of his property has been substantially destroyed.)

Huard v. Town of Pelham, 986 A.2d 460, 159 N.H. 567 (2009).

Lachapelle v. Goffstown, 107 N.H. 485, 489 (1967). ("Zoning by its nature restricts and regulates the use of land and that is one of the reasons why this court has consistently placed a strict construction on provisions under which attempts are made to expand, multiply or perpetuate nonconforming uses.")

Loundsbury v. City of Keene, 122 N.H. 1006 (1982). ("Certainly, a town may proscribe harmful property-related activity without providing compensation." "A provision requiring the discontinuance of a nonconforming use will be deemed unreasonable if no public purpose supports it. Additionally, even when a valid public purpose [does] exist[], the application of a zoning provision which is not directed at harmful activity and which substantially deprives an owner of the use of his land constitutes a "taking" requiring the payment of just compensation (122 N.H. at 1010).")

McKenzie v. Town of Eaton Zoning Board, 917 A. 2d 193, 154 N.H. 773 (2007).

Pennichuck Corp. v. City of Nashua, 152 N.H. 729, 733-34, 886 A.2d 1014 (2005). ("Limitations on use create a taking if they are so restrictive as to be economically impracticable, resulting in a substantial reduction in the value of the property and preventing the private owner from enjoying worthwhile rights or benefits in the property.")

Quirk v. Town of New Boston, 140 N.H. 124, 129, 130-32 (N.H. 1995). ("In enacting a zoning regulation, a town may consider the knowledge of town selectmen and planning board members concerning such factors as traffic conditions and surrounding uses resulting from their familiarity with the area involved (140 N.H. at 129).") "While there are several methods to measure the degree to which a government regulation diminishes a property's economically viable use, N.H. courts use a "before and after" comparison, which attempts to determine the market value immediately before and immediately after the regulation is imposed on the property (140 N.H. at 130-32).")

Richardson v. Town of Salisbury, 123 N.H. 93, 96, 455 A.2d 1059, 1061 (1983); RSA 31:78 (Supp. 1983). ("Moreover, the trial court must let the board's denial stand unless it finds "by the balance of the probabilities, on the evidence before it, that the decision was unlawful or unreasonable.")

Sibson v. State, 115 N.H. 124, 248, 336 A. 2d 239 (1975). (Court recognized the environmental uniqueness of wetlands and its importance to the public health and welfare. And that, unlike many other property regulation situations, the filling of wetlands alters the property itself and changes its basic character, to the detriment of the public good. "An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." "Sibson recognized that the validity of a regulation is determined by balancing the importance of the public benefit against the seriousness of the restriction on private rights.")

Smith v. Town of Wolfeboro, 136 N.H. 337, 346, 615 A.2d 1252 (1992).

State v. Ball, 124 N.H. 226, 232 (1983). (“[A]ny decision we reach based upon *federal* law is subject to review by the United States Supreme Court, whereas we have unreviewable authority to reach a decision based on articulated adequate and independent State grounds. Since this court is the final authority on New Hampshire law, initial resolution of State constitutional claims insures that the party invoking the protections of the New Hampshire Constitution will receive an expeditious and final resolution of those claims. Therefore, we will first examine the New Hampshire Constitution and only then, if we find no protected rights thereunder, will we examine the Federal Constitution to determine whether it provides greater protection.”)

Taylor v. Town of Plaistow, 152 N.H. 142 (2005). (“In enacting a zoning regulation, a town may consider the knowledge of town selectmen and planning board members concerning such factors as traffic conditions and surrounding uses resulting from their familiarity with the area involved.”)

Webster v. Town of Candia, 146 N.H. 430, 438 (2001). (“[T]he Federal Constitution affords the plaintiffs no greater protection than does the [NH] Constitution (146 N.H. at 438).” “If it can be and is reasonably determined by the selectmen that the atmosphere of the town ... will be maintained if the proposed structure is erected on the land bordering the town common, then they are bound to approve it. If it is reasonably determined that that atmosphere will not be maintained, or if it cannot reasonably be determined that it will, then the structure is prohibited.”)

Permits:

New Hampshire Programmatic General Permit, Department of the Army. N.H. PGP (III): "Activities Covered: Work and structures that are located in, or that affect, navigable waters of the United States...(regulated by the Corps under Section 10 of the Rivers and Harbors Act of 1899); The discharge of dredged or fill material into waters of the U.S. (regulated by the Corps under Section 404 of the Clean Water Act)." *N.H. PGP (IX)20):* "Bank Stabilization: Projects involving construction or reconstruction/maintenance of bank stabilization structures within Corps jurisdiction should be designed to minimize environmental effects, effects to neighboring properties, scour, etc. to the maximum extent practicable. Applicants must use the least intrusive method to stabilize the bank... and the following sequential minimization process: diversion of water, vegetative stabilization, stone-sloped surfaces, and walls. Vertical bulkheads should only be used in situations where reflected wave energy can be tolerated. This generally eliminates bodies of water where the reflected wave energy may interfere with or impact on harbors, marinas, or other developed shore areas. A revetment is sloped and is typically employed to absorb the direct impact of waves more effectively than a vertical seawall. It typically has a less adverse effect on the beach in front of it, abutting properties and wildlife." *N.H. PGP (IX)(25):* "Environmental Functions and Values: The permittee shall make every reasonable effort to 1) carry out the construction or operation of the work authorized herein in a manner that minimizes adverse impacts on fish, wildlife and natural environmental values..."

Note: Section 404 of the Federal Water Pollution Control Act (a/k/a Clean Water Act) deals specifically with filling, both temporary and permanent, into “waters of the United States.”

Note: Section 10 of the Rivers and Harbors Act of 1899 typically requires an Army Corps of Engineers (ACOE) permit. ACOE’s focus is on existing and prevailing navigational uses. “Navigable waters” are subject to ebb and flow of the tide.

New Hampshire Programmatic Specific Permit, Department of the Army.

Publications

Adams, J. “Discourses on Davila,” in Charles Francis Adams (ed.) *The Works of John Adams*, Vol. 6 (1851), pp. 280-81. (“Property must be secured or liberty cannot exist.”)

BarBri. 2005. *Multistate Bar Review*, by Elizabeth L. Snyder, Roger W. Meslar, Steven J. Levin, Paul T. Phillips, Erin Johnson Remotigue (eds.). Thompson Publishing.

Becker, C. 1942. *The Declaration of Independence: A Study in the History of Political Ideas*. 2nd ed. New York: Harcourt, Brace and Company. (In-depth analyses of the Founders’ natural rights philosophy and text of the drafts of the Declaration of Independence.)

Blackstone, W. 1769. *Commentaries on the Laws of England*. Boston: Beacon Press, 1962. (A survey of English law studied by America’s Founders as the template of the American common law system.)

Boyd, J.P. 1903. *The Declaration of Independence: An Evolution of the Text*. (Rev. ed.). Gerard W. Gawalt (ed.). Washington: The Library of Congress and Thomas Jefferson Memorial Foundation, Inc., 1999. (Featuring photographic reproductions of all known drafts of the Declaration of Independence and accounting of its known revisions; George Mason’s Virginia Bill of Rights of 1776; Thomas Jefferson’s “first ideas” on the Virginia Constitution, 1776; and Richard Henry Lee’s Resolution of Independence, May 5, 1776.)

Cicero, M.T. (ca. 51 BC). *The Republic; and The Laws*. Jonathan Powell (intro. and ed.) and Niall Rudd (intro. and transl.). Oxford: Oxford World Classics, 1998, pp. xxix, xxx, xxi, 4. (On the natural law.)

Cicero, M.T. (44 BC). *On Obligations: De Officiis*. P.G. Walsh (transl.). Oxford: Oxford University Press, 2008, pp. 8-14. (On right of property ownership as emanating from the natural law and civil laws.)

Connecticut Sea Grant. 2017. *Climate Adaptation Academy Fact Sheet #1: CTSG-17-02*. Groton, Connecticut, February 2017.

Cornell University Law School Legal Information Institute. “National Eminent Domain Power.” *CRS Annotated Constitution*. Web. 4 September 2017.

<https://www.law.cornell.edu/anncon/html/amdt5bfrag4_user.html#amdt5b_hd23> .
(Cornell, 2017a)

Cornell Law School Legal Information Institute. "Police powers." *Legal Information*. Web. 4 September 2017. <https://www.law.cornell.edu/wex/police_powers>. ("The fundamental right of a government to make all necessary laws. The police power comes from the Tenth Amendment, which gives states the rights and powers 'not delegated to the United States.' States are thus granted the power to establish and enforce laws protecting the welfare, safety, and health of the public.") (Cornell, 2017b)

Cornell Law School Legal Information Institute. "Supremacy Clause." *Legal Information*. Web. 4 September 2017. <https://www.law.cornell.edu/wex/Supremacy_Clause>. (Cornell, 2017c)

Cornell Law School Legal Information Institute "Takings: An Overview." *Takings*. 2017. Web. 4 September 2017. <<https://www.law.cornell.edu/wex/takings>>. (Cornell, 2017d)

Farber, D.A., Eskridge, W.N., Jr., and Frickey, P.P. 1993. *Cases and Materials on Constitutional Law Themes for the Constitution's Third Century*. St. Paul, Minnesota: West Publishing Co. (Law school textbook on Constitutional law.)

Franklin, B. "Poor Richard, 1745" in *An Almanack For the Year of Christ 1745*. Richard Saunders (ed.). Philadelphia: American Antiquarian Society. Web. 4 December 2017. <<http://franklinpapers.org/franklin//digital.jsp>>. ("Self Love but serves the virtuous Mind to wake, As the small Pebble stirs the peaceful Lake; The Centre mov'd, a Circle strait succeeds, Another still, and still another spreads, Friend, Parent, Neighbour, first it will embrace, His Country next, and next all human Race[.]")

Gordon, T. 1720. "No. 3. Saturday, November 19, 1720. The pestilent Conduct of the South-Sea Directors, with the reasonable Prospect of publick Justice" in *Cato's Letters, Or, Essays on Liberty, Civil and Religious, and Other Important Subjects [1720-1723]* (vol. 1) by John Trenchard and Thomas Gordon. Alexandria: Library of Alexandria, 1995. (Stating the inherent connection between the rights of liberty and property.)

Gordon, J. 1721. "Considerations on the Weakness and Inconsistencies of Human Nature (No. 31, Saturday, May 27, 1721; by Thomas Gordon)." In *Cato's Letters, or Essays on Liberty, Civil and Religious, and Other Important Subjects*. John Trenchard and Thomas Gordon (authors). 1720–1723. Ronald Hamowy (ed. and ann.). Indianapolis: Liberty Fund. 1995.

Hayek, F.A. 1960. *Constitution of Liberty: Definitive Edition*. Ronald Hamowy (ed.). Chicago: Chicago University Press, 2007, pp. 129, 130, 206, 313, 323, 529, 530. (Championed liberty via spontaneously generate order. Held that the personal "sphere of protection" of rights springs from threat of coercion by government.)

Hobbes, T. 1651. *Leviathan*. Macpherson, C.B. (ed.). Harmondsworth, England: Penguin Books, 1985. (Painted a dark view of human nature and, contrary to Locke, saw the state

of nature as one of war, rather than reason, that impels formation of the social contract. Directly influenced America's Founders.)

Hume, D. 1738. *A Treatise of Human Nature*. New York: Reading: Penguin Classics, 1987. (Investigation of the moral good based on notions of causation and innate human nature via a radically empiricist view of knowledge, where truth is sought via experience, observation, and reflection. This method of reasoning influenced the Founders' conceptions of the natural law, virtue, justice, and good government.)

Jefferson, T. 1774-1776. *The Papers of Thomas Jefferson*. Vol. 1, 1760-1776. Princeton: Princeton University Press, 1950, pp. 117-143, 177-471, 544-551. (Correspondence and letters of Thomas Jefferson from 1774, 1775, and 1776, related to the ideological motives and legislative acts that led to the American Revolution. Utility as the test of virtue.)

Jefferson, T. 1814. "To Thomas Law Esq., Poplar Forest, June 13, 1814." In *The Writings of Thomas Jefferson*. Vol. 14. Albert Ellery Bergh (ed.). Washington: Thomas Jefferson Memorial Association of the United States, 1907, pp. 140-143. (On the question of the virtue of social-love versus self-love, Jefferson shift focus to utility, stating that "nature has constituted *utility* as the standard and test of virtue).

Ketcham, R. "The Revolutionary Background of American Constitutional Thought" in *The Anti-Federalist Papers and the Constitutional Convention Debates: The Clashes and the Compromises That Gave Birth to Our Form of Government*, by Ralph Ketcham (intro. and ed.). New York: Signet Classic, May 2003. (Collected writings of the revolutionary period, with editorial commentary.)

Lasswell, H.D. 1971. *A Pre-view of Policy Sciences*. New York: American Elsevier, p.16. (Lasswell's maximization postulate, that "living forms are predisposed to complete acts in ways that are perceived to leave the actor better off than if he had completed them differently," is little but a restatement of the Epicurean-Spinozoan-Lockean natural law of reason.)

Library of Congress. "Property Law." *American Memory*. Web. 4 September 2017. <<https://memory.loc.gov/ammem/awhhtml/awlaw3/property.html>>. (Property fundamental to American liberty.) (LOC, 2017)

Locke, J. 1689. "Two Treatises of Government," in Ian Shapiro (ed.) *Two Treatises of Government and A Letter Concerning Toleration*. New Haven: Yale University Press, 2003. (Distilled the life-liberty-property triad and theories on liberty, natural law and rights, the social contract, and human nature that directly influenced America's Founders, including Thomas Jefferson.)

Lucretius, T. *De Rerum Natura (On the Nature of Things)*. Alicia E. Stallings (ed.). New York: Penguin Classics, 2007. (Didactic poem that preserved Epicurus's ethical philosophy that placed "self-love" central to the natural rights of life, liberty, free thought, and pursuit of happiness that helped inspire the Enlightenment and America's Founders and their influences, such as Jefferson and Spinoza.)

Madison, J. 1787. "The Same Subject Continued; The Union as a Safeguard Against Domestic Faction and Insurrection From the New York Packet. Friday, November 23, 1787" in *The Federalist Papers* [1787-1788] by Alexander Hamilton, James Madison, and John Jay (authors) and Mary Carolyn Waldrep and Jim Miller (eds.). Mineola: Dover Thrift Editions, 2016. (Following Locke's work theory, Madison states that property rights originate from the diversity in the faculties of humans, and the protection of the ability to acquire diverse kinds of property that result therefrom is the purpose of government. Also, "As long as the connection subsists between [man's] reason and his self-love, his opinions and his passions will have a reciprocal influence on each other.")

McConnell, M.W. 1988. *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*. 76 Cal. L. Rev. 267, 270, 271, 273-276 (1988). <<http://scholarship.law.berkeley.edu/californialawreview/vol76/iss2/1>>. (Property rights are fundamental to American liberty.)

Mill, J.S. 1859. *On Liberty*. London: Dover Publications, Inc., 2002. (Theory of liberty based on utilitarianism and 19th century Scottish Whig moral philosophy that expounds on public consent to laws and government. Alerts to dangers of the power of public opinion coupled with majority rule.)

Mill, J.S. 1863. *Utilitarianism*. (Description of American ethics in the 19th century as an Epicurean economic liberalism.)

Montesquieu, C. 1749. *The Spirit of the Laws*. Anne M. Cohler, Basia C. Miller, and Harold S. Stone (translators and eds.). Cambridge: Cambridge University Press, 2012. (America's Founders incorporated his early republican concepts governmental restraint by a system of checks and balances and separated powers. Espoused social formation and natural rights as effects of the natural law and human nature.)

Plato. ca. 380 B.C. *Republic. Second Edition*. Desmond Lee (trans. and intro.). London: Penguin Group, 2003. (Discussions of the origins of society and justice, virtue, philosophies of government, and philosophy of government.)

Rawls, J. 1971. *A Theory of Justice*. Cambridge: The Belknap Press of Harvard University Press, p.56. (Quote in Box 7.)

Rockingham Planning Commission. "The Legal Basis in New Hampshire: Adopting Stormwater Zoning Ordinances and Land Development Regulations." Exeter, NH: NH Green Infrastructure for New Hampshire Coastal Communities, 2014. (RPC, 2014)

Salzman, J. and Thompson, B.H., Jr. 2014. *Concepts and Insights Series: Environmental Law and Policy, 4th Edition*. St. Paul: LEG, Inc., d/b/a West Academic.

Sidney, A. 1698. *Discourse Concerning Government*. Thomas G. West (ed.). Philadelphia: Liberty Fund, 1996. (Espoused a Lockean conceptions liberty and natural rights that directly influenced America's Founders, particularly, Thomas Jefferson, who said the

Declaration of Independence was founded on works of public right by Aristotle, Cicero, Locke, Sidney, and others.)

Southeast Watershed Alliance. Model Stormwater Standards for Coastal Watershed Communities. Exeter, NH: University of New Hampshire Stormwater Center and Rockingham Planning Commission, 2013. (SWA, 2013)

Spinoza, B. 1670. Theological-Political Treatise (Cambridge Texts in the History of Philosophy) by Jonathan Israel (ed. and trans.) and Michael Silverthorne (trans.). New York: Cambridge University Press, 2007. (Dutch moral philosopher whose theories of the mind and the natural law of reason directly influenced America's Founders.)

Sullivan, E.J. and Power, K. (2014). The "Parcel as a Whole" in Context: Shifting the Benefits and Burdens of Economic Life - or Not. Touro Law Review. 30(2):13, pp.432, 452. (The task of the court is to weigh and balance an open-ended number of factors to achieve an optimum constellation of property rights, fairness, and investment-backed expectations.)

Stewart, M. 2014. *Nature's God: The Heretical Origins of the American Republic*. New York: W.W. Norton & Company, Inc. (Discussing the influence of materialism and natural philosophy on America's Founders).

United Nations. 1948. *Universal Declaration of Human Rights*, 10 December 1948, Resolution 217 A(III), art. 17. Web. 5 September 2017. <http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf>. ("Everyone has the right to own property alone as well as in association with others[.] No one shall be arbitrarily deprived of his property.")

United States Environmental Protection Agency. "What About Takings?" *Section 404 of the Clean Water Act*. 23 August 2017. Web. 4 September 2017. <<https://www.epa.gov/cwa-404/what-about-takings>>.

Vermont Law School Land Use Clinic. 2012. New Floodplain Maps for a Coastal New Hampshire Watershed and Questions of Legal Authority, Measures and Consequences. University, MS: National Sea Grant Law Center. Web. 4 September 2017. <http://100yearfloods.org/resources/pdf/2012_VermontLawSchool_LampreyRiverReport.pdf>. (Important NOAA-funded survey of N.H. takings law history that produced the nonlegal guidance on which this Tsiamis (2018) nonlegal guidance is based.)
(VLS, 2012)

Yale Law School Lillian Goldman Law Library. 2008. "[The first] Constitution of New Hampshire -1776." *The Avalon Project: Documents in Law, History and Diplomacy* ("natural rights") *citing*: "The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America. Compiled and Edited Under the Act of Congress of June 30, 1906 by Francis Newton Thorpe, Washington, DC: Government Printing Office, 1909."]. Web. 26 August 2017. <http://avalon.law.yale.edu/18th_century/nh09.asp#1>.

Wake, C. 2013. Assessing the Risk of 100-year Freshwater Floods in the Lamprey River Watershed of New Hampshire Resulting from Changes in Climate and Land Use: A Final Report Submitted to The NOAA/UNH Cooperative Institute for Coastal and Estuarine Environmental Technology (CICEET). Durham: CICEET, January 2013.

Yale Law School Lillian Goldman Law Library. 2008. "Declaration and Resolves of the First Continental Congress, October 14, 1774." *The Avalon Project: Documents in Law, History and Diplomacy* ["immutable laws of nature"] citing: "Documents Illustrative of the Formation of the Union of the American States. Government Printing Office, 1927. House Document No. 398. Selected, Arranged and Indexed by Charles C. Tansill."]. Web. 26 August 2017. <http://avalon.law.yale.edu/18th_century/nh09.asp#1>