

Growth Management in Fremont

Date Adopted: August 20, 2014

Fremont is a rural community southeastern New Hampshire has historically had a relatively stable population. However, during the period from 1970 to 2000 the town experienced rapid population growth of approximately twenty two (22) percent. This led to concerns about impacts on traffic, town services and tax rates, school enrollment, and Fremont's ability to accommodate new residents while maintaining its rural characteristics. The current Master Plan Growth Management chapter, adopted in 2001, largely focused on the implications of the rapid growth the town was experiencing during previous decades.

Today, the pace of growth has slowed in Fremont, but the impacts of having a larger population still exist. Fremont residents have continuously voiced their preference to maintain the town's rural character, while allowing for some growth and to maintain town services at a reasonable cost. Given the town's rural location, proximity to large employment centers (such as Manchester, Portsmouth, Exeter and Salem), and its lack of any major transportation routes, a potential demand for some development exists. This potential development may be limited to residential development and minimal commercial development due to Fremont's lack of access to major transportation routes and lack of public infrastructure (specifically water and wastewater systems). Careful planning is required to balance this potential development demand, particularly along the Route 107 (Main Street) corridor, while maintaining the town's characteristics and keeping town costs in check.

In New Hampshire, the state legislature has empowered local governments to influence the type and nature of growth through master plans, zoning ordinances, site plan and subdivision regulations, authoritative boards, and, specifically, growth ordinances. Along with information about the state of growth in Fremont, this chapter also contains an analysis of the status of the law in New Hampshire on growth management in Appendix A. This information outlines the directives and requirements of the New Hampshire Legislature and the New Hampshire Supreme Court, and illustrates what Fremont should consider prior to any actions to grow or manage growth.

Definition of Growth Management

Planning is no longer based simply on how large a community should grow in terms of hopeful aspirations, but should consist of realistic estimates based on sound planning principles. Planning and growth management should consider the availability and cost of service expansion, and a system to time that growth at a pace coordinated with facilities and service capacity expansion. For Fremont Master Plan and Growth Management chapter, the following definition is used:

| |
|---|
| <p>Growth management is a conscious government program intended to influence the rate, amount, type, location, and quality of future development linked to the adequate availability of services, facilities, natural resources, and infrastructure.</p> |
|---|

This is the operational idea that defines the goals of a comprehensive growth process for Fremont.

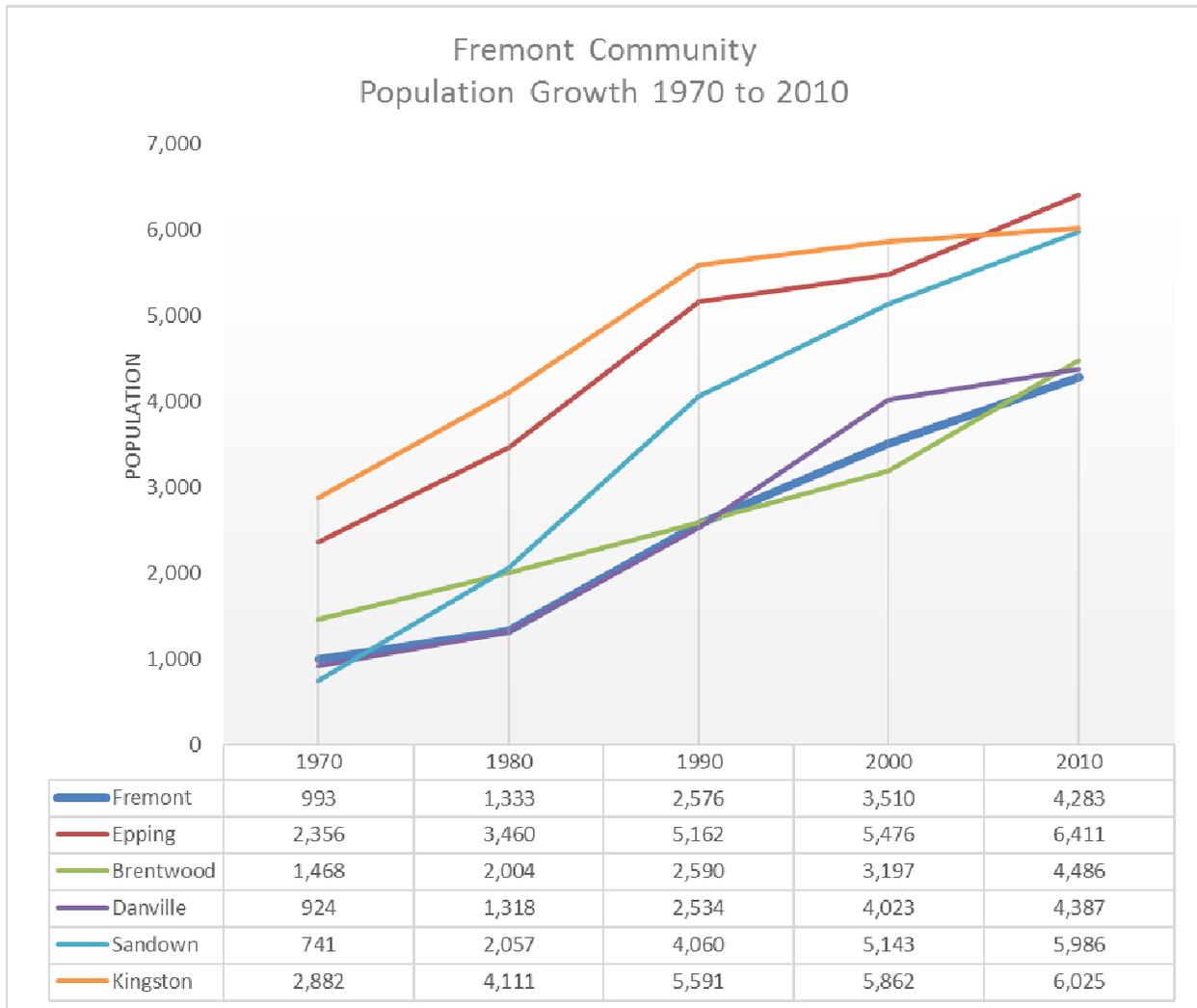
GROWTH IN FREMONT

As previously mentioned, growth in Fremont in recent decades was greater than historic patterns. This strained the town's ability to maintain its character while providing town services at a reasonable cost. However, in the last decade, the pace has slowed substantially and this slower pace is expected to continue into the near future. Prior to Fremont taking any actions to address growth, it is important to understand the current and projected growth in the town. The following sections outline recent and past changes in population growth, traffic, building permits, tax rates, and school enrollment. Discussion about the potential impacts of growth, specifically dramatic growth, on each of these areas, and their compounding affects, are also included.

Population Growth

The first way to analyze growth is to look at the overall population data. The most reliable data is from the decennial census collected by the U.S. Census Bureau. The New Hampshire Office of Energy and Planning (OEP) also publish annual population estimates based on the most recent US census data and building permit data collected from municipalities. This analysis allows one to appreciate the true impact of growth for the town of Fremont. These comparative numbers are presented in multiple formats below. These charts and tables show the population as reported through the US Census and the OEP. State, county and regional comparisons are also detailed.

An important factor is the determination of the surrounding regional trends compared to Fremont. These towns are Epping, Brentwood, Danville, Sandown, and Kingston. They were chosen due to their geographic proximity, rough similarity in available land for development, and similarities in demographic make-up. Fremont's planning and growth management efforts are in accordance with a balanced approach to both the town's needs and that of the community. This surrounding region was adopted as the Fremont "community" as defined in the Britton case discussed in Appendix A. This community will be most impacted by the town's actions and by choosing them to insure that our planning and growth management efforts are in accordance with a balanced approach of Fremont's needs and that of the larger community.

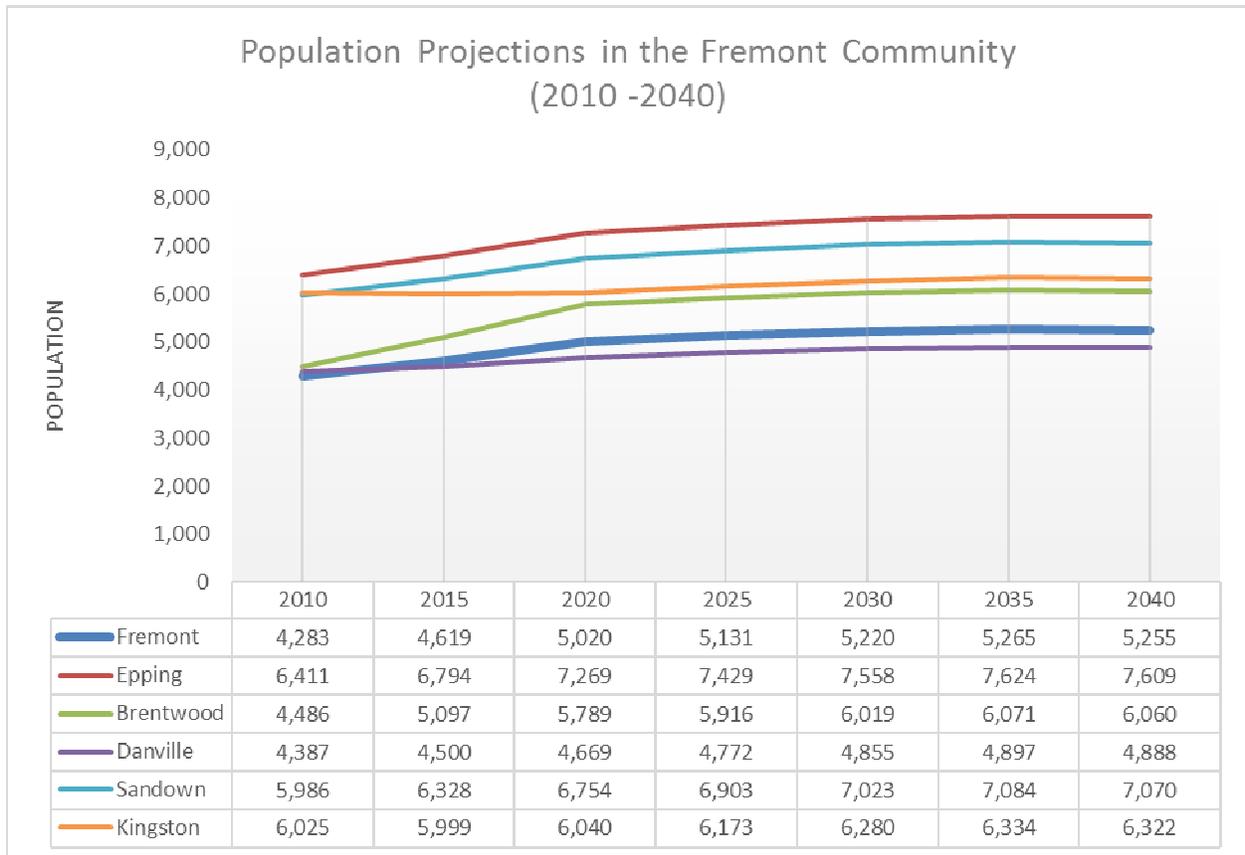


Source: U.S. Census Bureau

The above table and graph detail the pace of population growth for Fremont and its surrounding communities since 1970. According to the US Census Bureau, Fremont’s population grew by twenty two (22) percent (an increase of 773 individuals) from 2000 to 2010. Fremont has been growing at a faster annual rate than Rockingham County (6.4 percent) and the state (6.5 percent). The average annual percent growth rate for the Fremont community is eighteen (18) percent.

Projected Growth

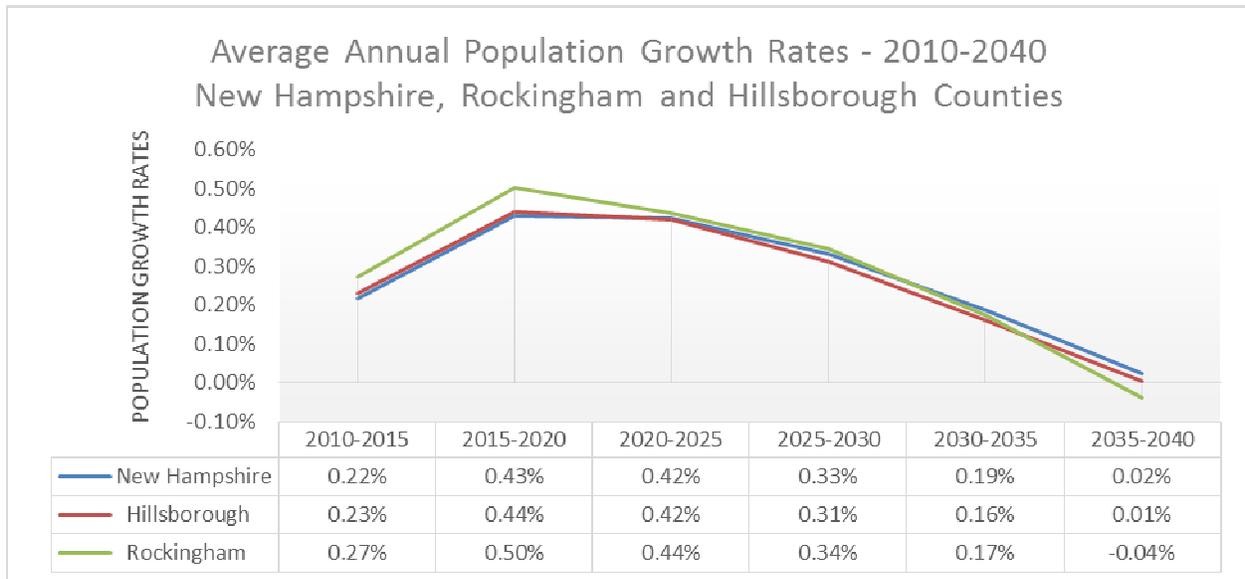
In 2012, Rockingham Planning Commission (RPC) produced population projections from 2010 through 2040 for the twenty six (26) municipalities in the RPC’s coverage area in southeastern Rockingham County. These projections were made utilizing NH Office of Energy and Planning methodology. The model projects a population for each community based on past and current age and gender distributions, expected birth and death rates, as well as expected in and out migration. As shown in the graph and figures below, the population projections for Fremont and the larger community begin to slow within the next decade and by 2040.



Source: Rockingham Planning Commission.

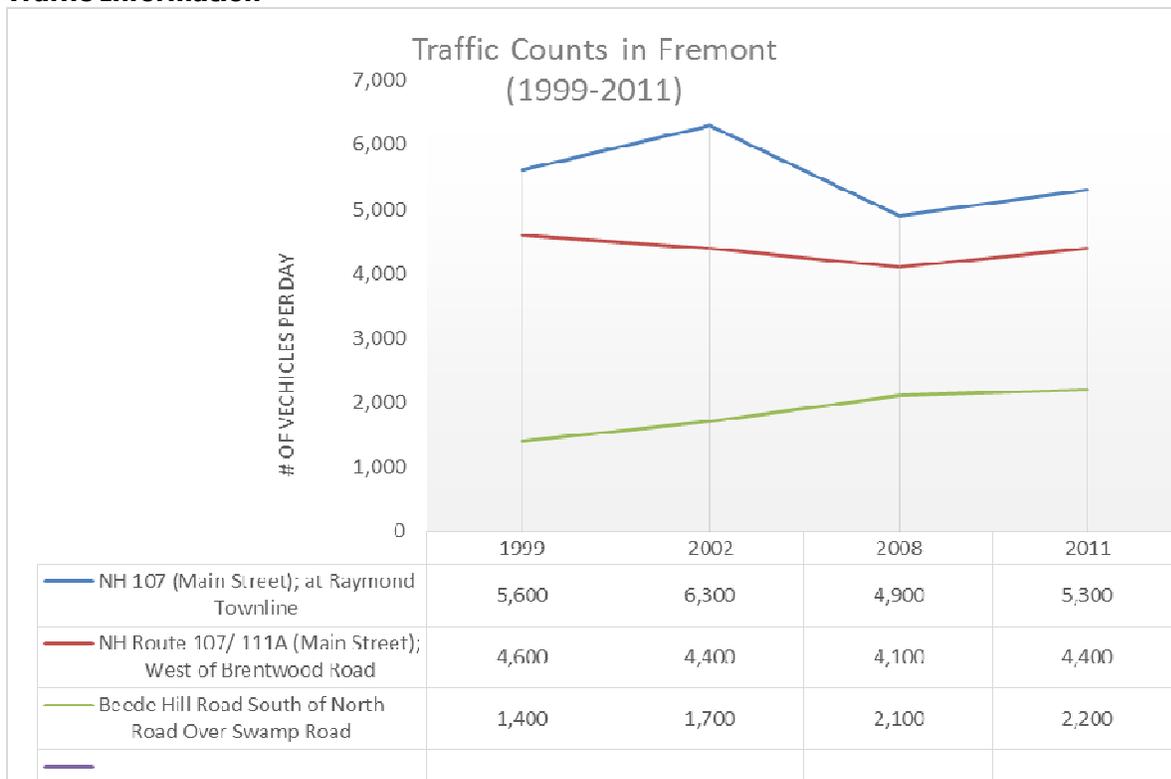
The above table and graph detail the projected population growth for Fremont and its surrounding communities from 2015 through 2040. Fremont’s population is projected to increase by twenty two (22) percent) from 2010 to 2040. Fremont’s projected population change is less than the Rockingham County, projected to increase by eight and eight tenths (8.8) percent. The average annual projected growth rate for the Fremont community is eighteen and four tenths (18.4) percent

In 2013, as part of a larger statewide effort, New Hampshire’s nine Regional Planning Commissions together with NH Office of Energy and Planning produced statewide and county level population projects from 2010 through 2040. Results of this projection, as indicated in the graph below, are highly consistent with the RPC’s projections. They show that population growth in the state and Rockingham County is expected to slow and decline. The methodology used for these projects is slightly different from that used for municipal projects indicated above. However, both reports show a slowing of the population growth in the region, and for Rockingham County specifically, a decrease in population. This shift in the population growth rate in recent decades will result largely from the ageing and mortality of the baby boom generation, which will temporarily, but significant increase in the population death rate. It will also have impacts on traffic, tax rates, town services and school enrollment for Fremont.



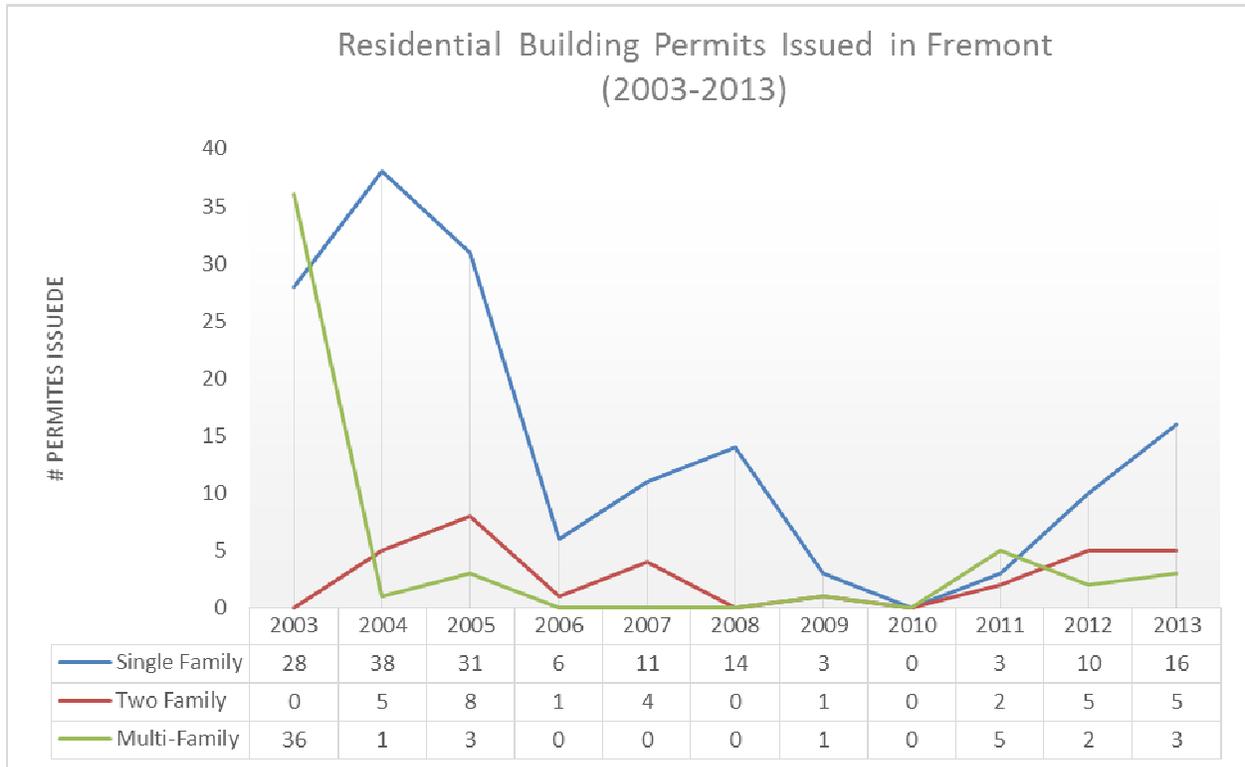
Source: New Hampshire Regional Planning Commissions (2013) *County Population Projections*.

Traffic Information –



Building Permit Information

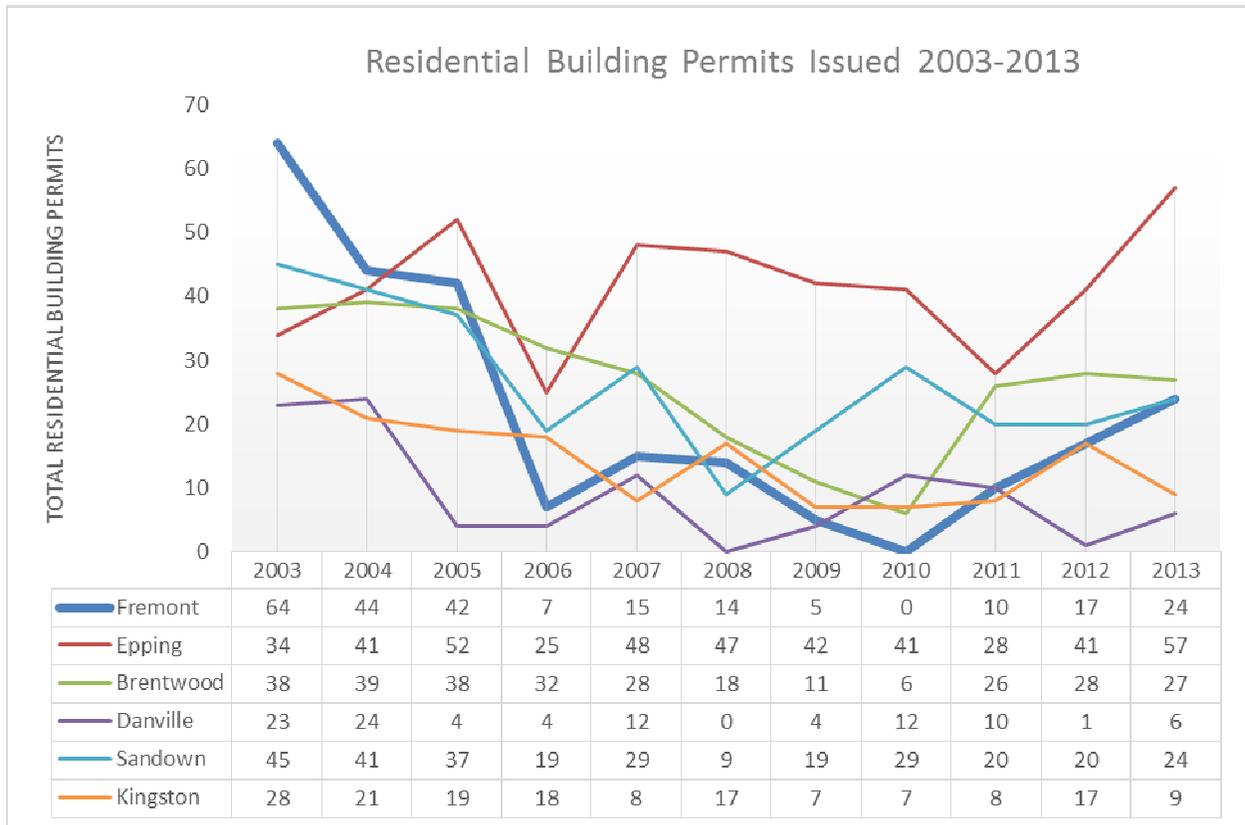
Another way to measure growth, and determine if any action is needed to accommodate such growth, is to analyze new housing units within Fremont. By comparing this to the surrounding communities it can be determined if Fremont is experiencing its fair share of growth or a disproportionate amount of growth as compared to the community, region and state. The following table and graph detail Fremont’s relatively typical decrease in the amount of residential building permits issued over the last decade.



Source: Town of Fremont, Building Department.

Note: Numbers of permits issued by residential unit type were unavailable for 2010.

When compared to other neighboring communities, shown in the graph and table below, the building permits issued in Fremont have decreased about the same rate as the rest of the surrounding towns. The decrease in building permits in Fremont and the surrounding communities is largely attributable to the economic recession in the latter half of the last decade until present. This coincided with a depression of the housing market for both existing and new homes, and a high foreclosure rate. This trend is expected to reverse as the housing market begins to recover. The housing recovery, the changing demographics of the population (due to the aging of the population), and land availability in Fremont will likely mean slower, but continued growth in new residential construction than was typical for Fremont during the early 2000s.

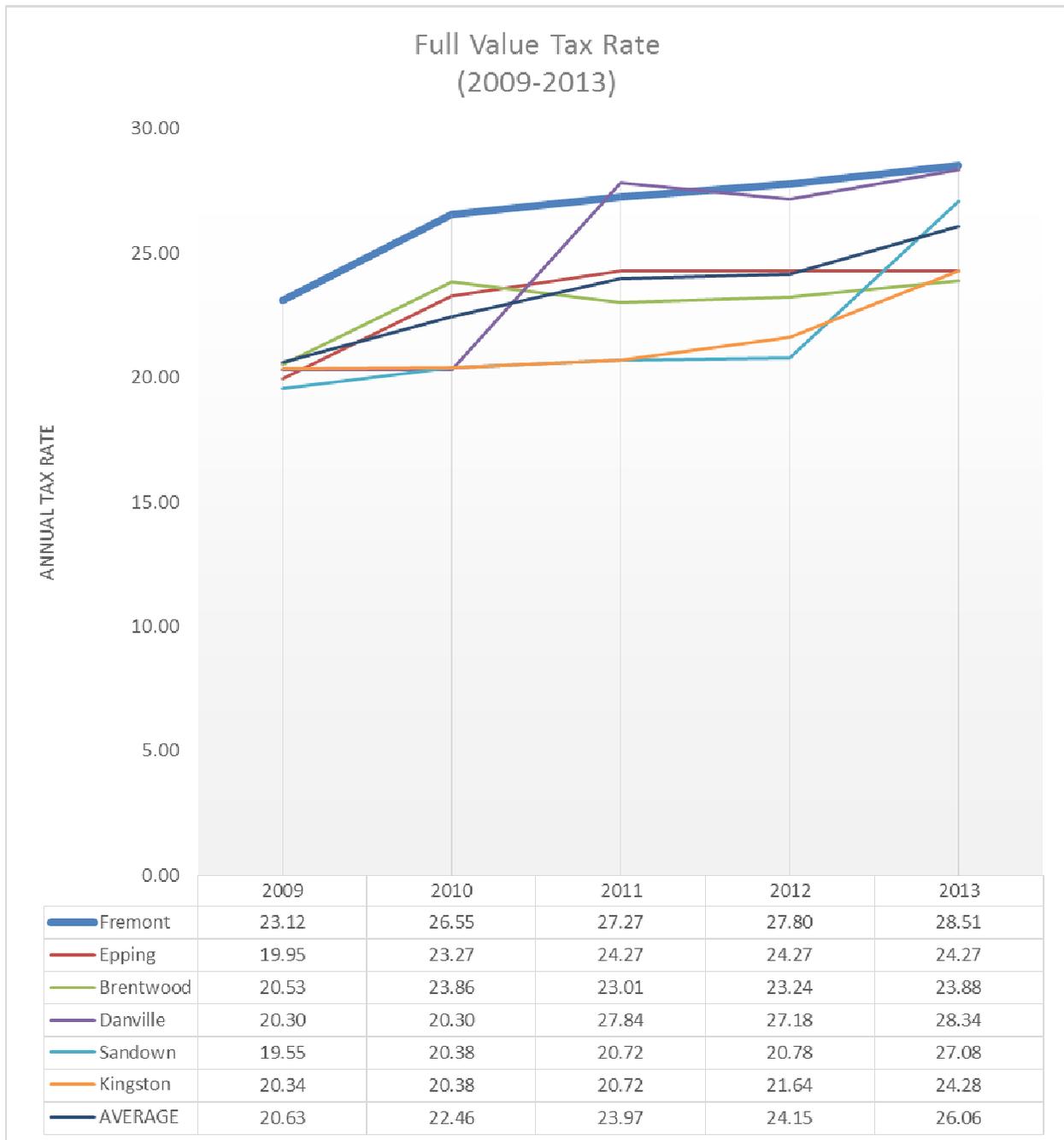


Source: US Census Bureau.

Taxation and Town Services

Uncontrolled and disproportionate growth can have a significant impact upon the residents of Fremont. Perhaps the most tangible effect is the increase in property taxes. Intimately related to the tax consequences is the decrease in town services. Although the impact on services may not be felt, the tax impacts are immediate. As the number of residents grows the services required to provide the quality of life that is a part of Fremont's heritage also increases. This quality of life includes safety in the form of quick response by fire and police officers, safe roads for commuting, recreational facilities, town office hours, library facilities and school facilities.

The following table shows the tax rate history in Fremont and surrounding communities between 2009 and 2013. Fremont has historically had one of the highest tax rates in Rockingham County, the tax rate as a percentage from 2009 through 2013 increased by twenty three and three tenths (23.3) percent. However, the average increase of Fremont's surrounding communities was actually higher at twenty six and three tenths (26.3) percent, with both Danville and Sandown experiencing higher tax rate percentage increases. This emphasizes how it is not just one of the factors isolated, which alone would justify planning for reasonable growth, but the combination of impacts upon Fremont that is so critical.



Source: New Hampshire Department of Revenue Administration.

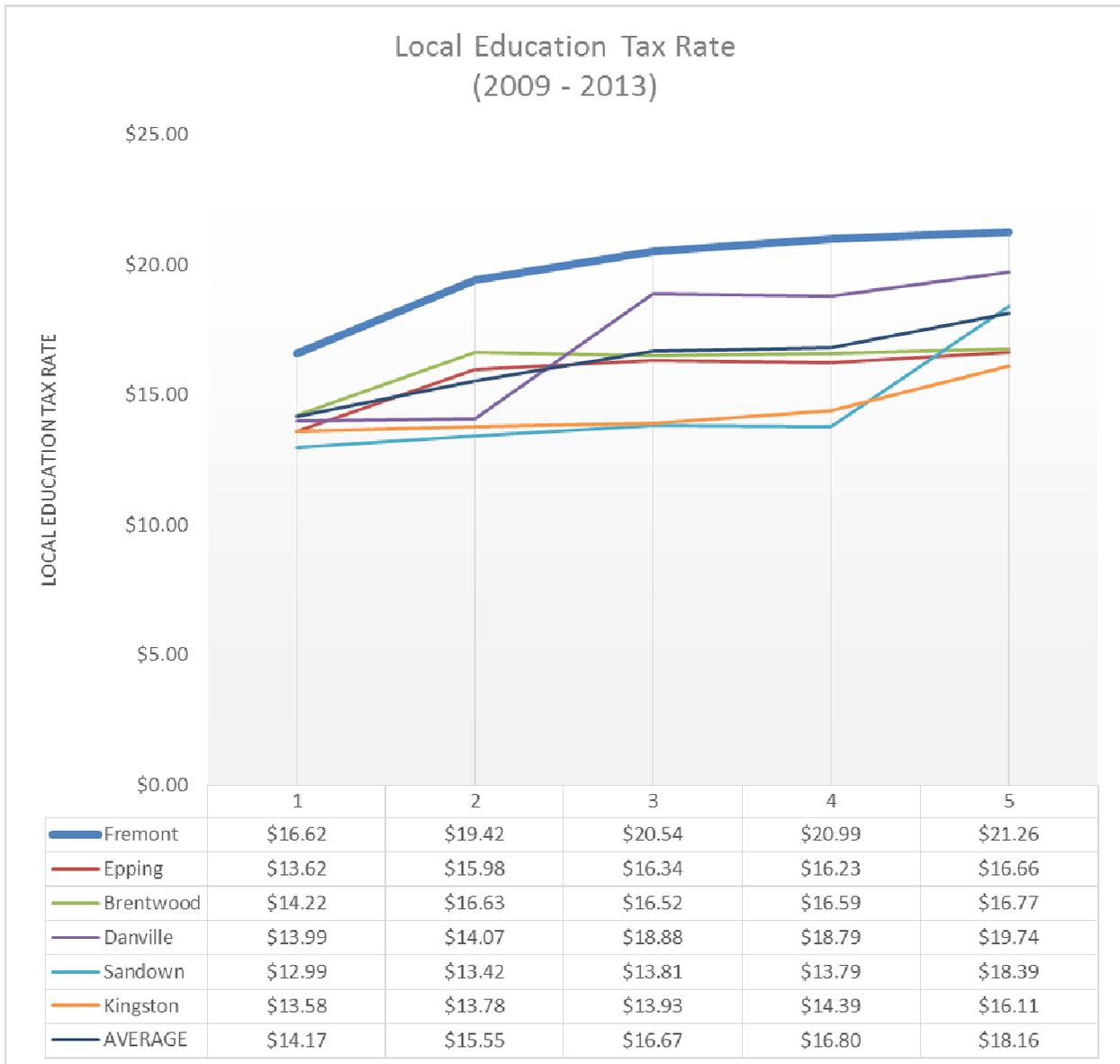
Taxation - While the town has had a relatively stable tax rate for the last five years, there have been periods when tax increases have occurred. The stable tax rate now is due to slower population growth, balancing town services and costs, and an increased tax based. It is part of the complex web of impacts that a town must balance when approaching growth management. When tax rates rise the impacts often felt on residents on restrictive and fixed incomes, specifically young families, elderly, and low and moderate income residents. Although this situation will happen whenever taxes rise, it is incumbent upon the town to try to minimize the adverse impacts upon residents.

As new development increases the level of service that is needed for the new citizens that reside in the town. If such growth occurs in an accelerated rate, the need surpasses the ability of the current citizens, or planning efforts, to accommodate the expense. The services needed can surpass the existing facilities by so much that the capital expenditures to meet these needs are disproportionate and unrealistic.

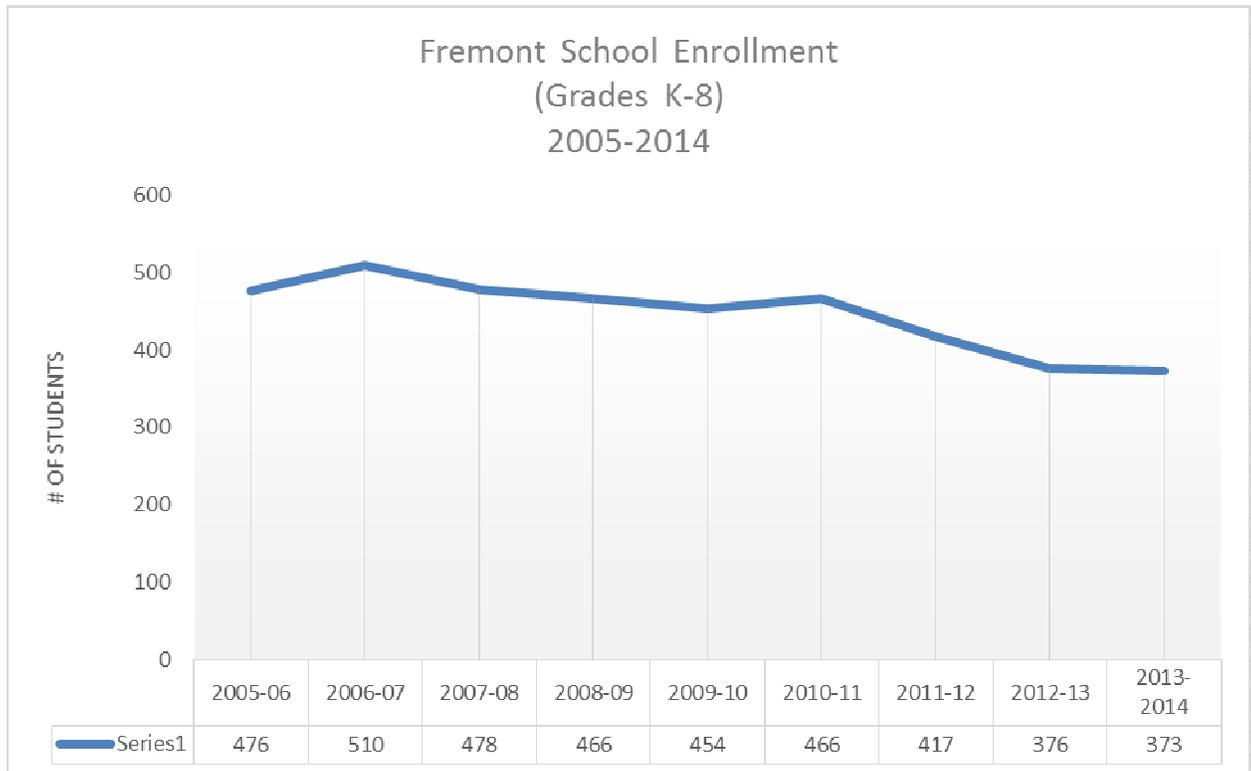
Town Services - There are two ways to address the impact on town services, one is to increase taxes and meet the needs of the citizenry, the other is to decrease services. Decreasing services, specifically emergency services, can threaten the safety and welfare of the community and should only be used as a last resort. Therefore, either new revenue must be generated or the added expense from abnormal and disproportionate growth must be brought under control. First, an examination of the nature of the problem must be undertaken. By looking at services, how they are impacted by growth, and the status of the facilities, it can be determine how growth will impact the ability of the town to provide these essential services. Also, the citizens themselves must be accounted for, both in their need for services, the impact of decreased services, and how increased tax rates continue to impact their lives.

Fremont School Enrollment -

In Fremont, like most communities in the state, the bulk of the town's costs are associated with educational services. The graph and table below show the growth in the educational tax portion of Fremont's tax rate as compared to surrounding communities. While Fremont has the highest educational cost, the costs are actually quite typical as a percent of the overall tax rate and the rate of increase, as compared to surrounding communities.



Source: New Hampshire Department of Revenue



Source: New Hampshire Department of Education.

IMPACTS OF UNREASONABLE GROWTH

There are a number of other impacts from uncontrolled and unreasonable growth. Destruction of valuable agricultural and forestry lands and natural resources, permanent modification of community character, destruction of historic resources, destruction of wildlife habitat, and loss of open space are issues that are not discussed in this chapter. Consistent among these issues is the need to plan for the reasonable protection of these resources. Decisions about Fremont’s future land use now will have lasting effects upon the future of the town and the quality of life for the citizens. Monitoring growth within the town and proactive planning to prevent negative impacts are essential.

CONCLUSION

This chapter of Fremont’s Master Plan illustrates the past effects growth has had on the town. The combination of impacts from population growth, increased traffic, development, tax rates and town services can compound each other resulting in negative consequences for all residents. In recent decades, Fremont has experienced growth that resulted in increases in tax rates and changes to the town’s character. However, this growth has largely subsided and long-term projections show minimal growth in the town.

Consideration of the impacts of growth, whether from increased residential development or commercial development, should be part of all planning decisions made by the town. Decisions made now can have long-term impacts about how a town does or does not grow and the impact on tax rates, town services, traffic, school enrollment, etc. The ultimate goal is to allow growth that maintains the community characteristics and quality of life for Fremont residents, while balancing landowners’ rights to utilize their property.

RECOMMENDATIONS

The Fremont Planning Board recommends the following actions be taken concerning growth management in the town:

1. No growth control ordinance should be enacted in Fremont at this time.
2. The planning board should consider the information provided in this chapter to determine how land use regulations may impact town services and associated costs for the short- and long-term.
3. The data found in this chapter (population growth, traffic volume, building permits issued, tax rates and school enrollment) should be updated by the planning board every five years to ensure that the information reflects the growth rate in Fremont accurately.

Appendix A - Growth Management in New Hampshire Statutes

A discussion of growth management in New Hampshire must include an examination of the power and legal authority that a municipality has to influence development. The basis for the power in the state legislature is found in the United States Constitution. This power, reserved to the states, is given to local governing bodies through “enabling statutes”.

Generally, the state legislature has decided that the municipality should have the authority to regulate the use of land for the health, safety and welfare of the people. This is known as the "police power" of the states. In New Hampshire, this power manifests itself in the ability for municipalities to adopt master plans, zoning ordinances, building codes, various commissions, authoritative boards, and other innovative techniques, and finally, growth control ordinances. The individual and property rights guaranteed in the United States and the New Hampshire Constitutions offset this power.

The first step of the analysis must examine the nature of the power that is given to the town. In RSA 672:1, the findings supporting, and purposes of, land use tools are laid out by the legislature. New Hampshire has favored local control of land use through local governments and boards and the inclusion of citizens in this process (RSA 672:1, IV). RSA 673 continues with the nature and administrative structure of the boards and commissions whose duty it is to enforce and maintain these tools.

Under RSA 674, the tools themselves are laid out. These statutes include how the tools are created, the limits to their use, and guidance for the town’s utilization of these powers.

The Planning Board and the Master Plan - The planning board has the duty to create and maintain the master plan (RSA 674:1). The planning board is authorized to advise the municipality on development issues, recommend ordinances to the legislative body, and additional powers as deemed necessary by the citizens(RSA 674:1). The purpose of the master plan, adopted by the planning board, is described in RSA 674:2, its preparation and adoption requirements are found in RSA 674:3 and 674:4 respectively. The master plan is the guiding document of the municipality that, per RSA 674:2. "shall generally be comprised of a report [and information]...designed to show, as fully as possible and practical, the planning board's recommendations for the desirable development of the territory legally and logically within its planning jurisdiction.” The master plan is advisory and is the foundation for further actions of the town. Once the master plan is adopted, the town will have the information necessary to begin planning efforts. The town may begin to adopt the familiar specific tools of land use controls and thus begin to formulate a growth management plan.

Growth management can be effected in a number of ways. Growth management can be indirectly effected through the various land use control methods available through the statutes, or it can be a limitation of growth specifically based on a timing of growth, also available through the statutes, but requiring certain other prerequisites and scientific findings. We will begin by describing the indirect statutory effects and mechanisms.

Capital Improvements Program - The capital improvements program, outlined in RSA 674:4-8, provides for a plan that addresses the estimated capital expenses for a planning period of six (6) years. This program, by limiting expenditures, can in turn have an effect on growth through limits on the necessary infrastructure to support for the scattered and premature

development if proposed. The New Hampshire Supreme Court has also mandated that “towns, acting in good faith must develop lands to insure that municipal services, which normal growth will require, will be provided for in an orderly and rational manner.” (Rancourt v. Town of Barnstead, 129 NH at 50 (1986), citing Beck v. Town of Raymond, 118 NH at 801 (1987).) These cases are discussed further below.

The Official Map - The official map, as authorized under RSA 674:9-15, permits municipalities to locate streets, both current and future. The official map thus limits development where it will interfere with the town's plan to build streets. However, most towns, Fremont included, have not had to build streets and instead must respond to developers who build streets for the town to serve their own developments. However, an official map may help to limit the number of dead-ends or "lollipops" that crop up by laying out future planned connections.

Zoning Ordinance - New Hampshire authorizes local governments to adopt zoning ordinances at RSA 674:16(I), the procedure for enactment is found in the requirements in RSA 675. According to RSA 674:18, before a town may enact a zoning ordinance, the planning board must adopt a general statement of objectives as well as the land use section of the master plan. The purposes of the zoning ordinance are found at RSA 674:17. Exclusionary and spot zoning are two major aspects of zoning that are often confronted in zoning issues. Exclusionary zoning is found in RSA 672:1, III-e that states that the purpose of zoning is to provide safe and affordable housing for low and moderate incomes families and individuals. Spot zoning is the unreasonable singling out a limited area for use inconsistent with the surrounding areas for the sole benefit of the limited area's owner(s).

Site Plan and Subdivision Regulation Statutes - The New Hampshire legislature has authorized planning boards to adopt site plan regulations under RSA 674:44 and subdivision regulations under RSA 674:36. Planning boards have the power to regulate site plans and subdivisions according to RSA 674:35 and RSA 674:43 respectively. Between these two statutes, the planning board is given broad discretion to ensure well-planned and appropriate growth. These statutes provide for the planning board to adopt regulations that include the following sections of RSA 674:44 and 674:36 (sections that are not relevant to this issue have been removed):

- (a) Provide for the safe and attractive development or change or expansion of use of the site and guard against such conditions as would involve danger or injury to health, safety or prosperity.
- (b) Provide for the harmonious and aesthetically pleasing development of the municipality and its environs.
- (c) Provide for open spaces and green spaces of adequate proportions.
- (h) Include such provisions as will tend to create conditions favorable for health, safety, convenience, and prosperity.

For subdivisions, RSA 674:36: III, the additional provisions are included:

- (a) Provide against such scattered or premature subdivision of land as would involve danger or injury to health, safety, or prosperity by reason of lack of water supply, drainage, transportation, schools, fire protection, or other public services, or necessitate the excessive expenditure of public funds for the supply of such

services.

- (f) ...park or parks suitably located for playground or other recreational purposes.

Both sections have provisions for setting conditions precedent that deal with the cost of facilities that the subdivision or site will require. The site plan regulations also contain a listing of what is required in the regulations.

The case law on these statutes is voluminous. Most of these cases examine the authority of the planning board in rejecting development based upon either of these mechanisms. The court has upheld town ordinances and actions under regulations enacted according to these statutes that were rationally based upon the enabling language in the statutes.

Innovative Land Use Controls - This statute is the most broad and exciting section of New Hampshire law. Found at RSA 674:21, the statute lists techniques that may be utilized by a municipality adopted according to RSA 674:16 and in accordance with RSA 675:2, II. This statute includes a list of potential growth management techniques beginning with “Innovative land use controls may include, but are not limited to”. This language gives broad authority for a municipality to adopt almost any technique under this section. Each technique that is mentioned in the master plan could, theoretically, be authorized through this statute. The remainder of the statute is devoted to a description of and requirements for impact fee ordinances RSA 674:21(v), their adoption, calculations, and administration.

Timing of Growth: RSA 674:22 and 674:23 (2008) – New Hampshire law specifically addressed managing the timing of growth in RSA 674:22. This can be achieved only after the Planning Board has adopted both a master plan and a capital improvement program. In 2008, The New Hampshire Legislature passed House Bill 1260 (Chapter 360, Laws of 2008) recodifying judicially imposed limits to growth management and interim growth management ordinances. Growth management ordinances, under RSA 674:22 are required to demonstrate a need to regulate the timing of development based analysis by or for the planning board, governing body or submitted by petition. This analysis must show a lack of capacity to meet anticipated growth based on competent evidence. Any growth management ordinance must have a specific termination date, although the length of implementing the ordinance is not indicated in the statute. Upon adopting a growth management, ordinance the planning board (or CIP committee) must promptly develop a plan for orderly and rational development of services needed to accommodate anticipated normal growth. An annual confirmation of reasonable progress of this plan must be presented to the local legislative body by the planning boards.

Additionally, RSA 674:23 was amended in 2008 to clarify the qualifications for implementing an interim growth management ordinance. Implementing such an ordinance may only be proposed by the planning board if unusual circumstances exist that affect the ability of the municipality to provide adequate services or that require prompt attention. The interim ordinance must contain a statement of circumstances giving rise to the need for the growth moratorium, the planning board’s findings and plan to correct them, the types of development affected by the ordinance, and the ordinance’s term. The ordinance term cannot be longer than one year; however, additional moratoria may be adopted for difference circumstances.

Growth Management and the Supreme Court of New Hampshire

The New Hampshire Supreme Court has turned a willing eye toward growth management, even going so far as to allow strict growth timing control ordinances. The following cases illustrate some of the court's reasoning and willingness to uphold such ordinances as long as they meet the

court's requirements. Most of the rules laid down by the court can be utilized as guidance for a town that wishes to enact such controls. Aside from allowing the town to withstand a legal challenge, these cases contain objective and sound advice for local governments and the issues that they may face. The language of these cases has been used to guide the development of Fremont's growth management policies.

Beck v. Town of Raymond, 118 N.H. 793 (1978) - This case is among the early New Hampshire Supreme Court rulings that examine growth control and limitations. The court stated that growth controls must be "reasonable and nondiscriminatory" and that they "should be the product of careful study and should be reexamined constantly with a view toward relaxing or ending them". The court stated that the controls should be accompanied by "[g]ood faith efforts to increase the capacity of municipal services [and] must not be parochial; that is controls must not be imposed simply to exclude outsiders, especially outsiders of any disadvantaged social or economic group." The court stated that towns "must develop plans to insure that municipal services, which normal growth will require, will be provided for in an orderly and rational manner."

Stoney-Brook Development Corp. v. Town of Fremont, 124 N.H. 583 (1984) - The court in this case examined a growth control ordinance under the prior statute. The statute was similar to the current law and the reasoning is still applicable. This case shows much of the New Hampshire court's attitude and disposition toward growth management. The court lays out the requirements and reasonable effects of growth control. The court stated that the growth rate must not be an arbitrary figure. The rate can only be decided after a "careful study". The rest of the case concerns the requirements for passing a growth timing control. The Town of Fremont had a comprehensive community plan which was not considered the equivalent of a master plan or a capital improvement program.

Rancourt v. Town of Barnstead 129 N.H. 45 (1986) - This is one of the most important cases concerning growth management and control. The case centers on the Town of Barnstead and its utilization of RSA 674:22, providing for timing of development. Through this case, the New Hampshire Supreme Court found statutory approval for urban growth control ordinances. In addition, the court has laid out a clear analysis of the evidence required for the ordinance to pass judicial scrutiny. This case is extremely useful in adopting a timing of development ordinance.

In Rancourt, the court struck down a town ordinance on growth limitations because "[s]cientific and statistical evidence of growth projections cannot function as the sole guide as to what constitutes a reasonable growth limitation established by a particular town". However, the court did provide a substantial amount of guidance for municipalities enacting such ordinances in the future.

Barnstead had an allowed three percent growth rate in its master plan as adopted by the planning board. There were no ordinances passed by the town in addition to this plan and its restriction on

growth. The board voted down a proposed subdivision because: 1) of the impact it would have on the growth rate; 2) impact on the schools; and 3) "a concern for natural resources". Id. at 47. The plaintiff attacked the refusal, claiming that the master plan's growth rate was not enacted in accordance with the statutory provisions. The court agreed with this argument, stating that the statute required the town legislative body to pass ordinances "which provide for a limited growth based on community and regional development needs." Id. at 48. The figures that the town relied upon for its growth projection were supplied by the [New Hampshire Office of Energy and Planning], which the court characterized as "unrealistic and...not reflect[ing] the actual growth experience in the town of Barnstead." Id. at 50.

The court found the authority for control or timing of development in RSA 674:22 and RSA 674:23 stating:

"[These] statutes enable a municipality to adopt an ordinance providing for controlled growth after its planning board has adopted a master plan and a capital improvement program designed to assess and balance community and regional development needs." (Rancourt, 129 N.H. at 48)

The court emphasized that growth limitation is not to be an ad hoc analysis by the planning board, but must be legislative in nature. Id. Once the ordinance has been passed, the court may strike it down only if it is unlawful or unconstitutional.

The court then moved to the examination of the three-percent growth rate. The court has held "that growth controls cannot be permanent or unreasonable...and [must be] continually re-examined in order to relax or eliminate them." Rancourt, at 49; citing 118 N.H. 793, 800 (1978). The court eloquently cited previous language stating, "towns may not refuse to confront the future by building a moat around themselves and pulling up the drawbridge." Beck. at 801. In light of the rigidity of the three-percent figure, and the finding that it was unrealistic, the court found the growth rate to be unreasonable.

The court has found that growth limitations are valid, but that the evidence upon which the ordinance rests must include considerations of the following:

"[T]he cost of extending municipal services, the capacity of the town's existing citizenry to adjust to the higher tax burden necessarily associated with an extension of municipal services, the probable use of the dwellings, the availability and suitability of undeveloped land in neighboring towns and the overall growth of the region in which the town is located." (Rancourt, at 51)

The court summarized the court's position stating, "Put simply, to date we have held that a growth control ordinance is valid only if it restricts projected normal growth no more than is necessary to allow for an orderly development of the general community."

Britton v. Town of Chester, 134 N.H. 434 (1991) - The court struck down an ordinance that limited 1.73 percent of the town's property for development as affordable housing. The court did not apply the statutory provisions at RSA 672:1, III-e; instead, it determined that the town had exceeded its authority to enact zoning for the "welfare of the community". The court found

that the word “community” in RSA 674:16 includes more than the limit of the town boundaries; the court found that the appropriate area includes the region in which the town is located. This is important when determining the scope of analysis to research the growth experienced by the town and the community it is in. The court concluded that the ordinance, in effect, wrongfully excluded development of low and moderate income housing. This exclusion constituted an invalid exercise of the municipality’s power to zone for the welfare of the community under the enabling legislation.

Ettlingen Homes, Inc. v. Town of Derry & a., 141 NH 296 (1996) - This court decision has serious ramifications regarding the analysis a planning board may engage in the determination of "scattered and premature" development, but provides useful discussion of growth management as it relates to school facilities.

The facts of this case involve a developer seeking subdivision approval in the town of Derry for dividing an 81-acre parcel into 23 residential lots. The planning board denied the application finding it to be scattered and premature as defined in their regulations. The provisions in Derry’s regulations mirrored an earlier form of NHRSA 674:36 and provided that the planning board could deny an application based on:

"such factors as scattered or premature subdivision of land as would involve danger or injury to health, safety, or prosperity by reason of lack of water supply, or prosperity by reason of lack of water supply, drainage, transportation, or other public services, or necessitate an excessive expenditure of public funds for the supply of such services." (Derry Land Development Control Regulations V, B (4) (1993); see RSA 36:21 (1970, repealed 1983))

The applicant argued that the disapproval exceeded the authority of the planning board and constituted illegal growth control. The trial court found that the applicant had not met the burden necessary to overturn the planning board decision. The applicant then brought this appeal to the Supreme Court, arguing that the planning board's decision was invalid under the scattered and premature language in the regulations and "constituted illegal growth control." The review by the court was limited, stating, "[o]ur inquiry...is whether the planning board exceeded its subdivision control authority in denying the plaintiff's application." If the court were to find that the evidence did not support the trial court's conclusion, or that conclusion was "legally erroneous" the court would reverse.

First, the Supreme Court stated that this case, like Zukis v. Fitzwilliam 135 NH 384 (1992), and Garipay v. Hanover, 116 NH 34 (1976) did not involve an examination of growth control provisions. Reviewing these cases, which involved the question of how existing roads that were inadequate could cause future development to be premature, the court quoted Garipay stating that the board's duty is to "ascertain what amount of development, in relation to what quantum of services available, will present the hazard described in the statute and regulations. At the point where such a hazard is created, further development becomes premature." The court’s view of the board’s inquiry is “the effect of the proposed development on the community, not the effect of further development in general on the community.”

Continuing, the court attempted to distinguish the analysis for scattered and premature and growth control. Citing Rathkopf's *The Law of Planning and Zoning*, the court distilled this

distinction to a difference between a balance of the development concerns of an entire community versus the more specific focus on a particular development, including consideration of the compatibility of the use of the land with surrounding development, the highest and best use of the land, and the financial interests of the purchaser, developer, and town. It seems that although the effect is exactly the same, namely that the growth is limited through "growth control" or "scattered and premature", the means to reach this end is critical.

The court admits that any denial of approval will limit growth. In terms of "premature" the court stated that the board must consider current as well as anticipated realities. The board in this case considered the "realities" of the schools. The court recognized that this is a legitimate and statutorily permitted inquiry. However, citing to the testimony provided by a planning board member at trial, the court found that the board's concern that the town could not afford the expansion in services that the development required were considerations for growth control regulation not as "scattered and premature".

Although the court legitimized the concern for expenditures as found in the statute, the provision does not serve to replace comprehensive growth control regulation. Thus the court concluded that "the circumstances of the school facilities...do not constitute a 'danger to health, safety, or prosperity by reason of the lack of...schools.'"

It seems that this decision eliminates the possibility that the conditions of schools can be the sole reason for finding that development is scattered and premature. However, there are many questions left unanswered. Why are schools mentioned in the statute if they are not an appropriate aspect for the analysis to determine "scattered and premature"? Also, what happened to last part of the statute which provides that the planning board can provide against scattered and premature subdivision that will "necessitate the excessive expenditure of public funds for the supply of such services"?

In its analysis, the court cites to cases involving unsafe roads. The court seems to conclude that there must be a hazard or danger to health, safety, or prosperity without providing any guidance or analysis as to how inadequate school facilities do not present such a danger. The court fails to mention the effect of increased expenditure of public funds for increases in school facilities. More property taxes is one such anticipated reality. Also, school crowding and poor education facilities can be unhealthful, unsafe, and even dangerous to the long term prosperity of the students and the community.

It would be difficult to imagine a situation where consideration of schools would allow for a finding of scattered and premature. The only possibility is that the bus route may be too far away, or too dangerous, but these concerns are not excessively expensive or fall under the analysis for the road situation as in Zukis and Garipay. However, the language is clear in the decision that schools are an appropriate consideration for a comprehensive growth management plan.

Weare Land Use Association v. Town of Weare, 153 N.H. 510 (2006) - At the town meeting in 2004 the town of Weare adopted a one year interim growth control ordinance pursuant to RSA 674:23. The ordinance prohibited the planning board and the ZBA from formally accepting or acting upon "any site plan applications for single family housing, multi-family housing, mobile

home parks or condominiums proposed . . . or any other major subdivision applications creating a total of more than 3 lots.” The ordinance applied to applications formally accepted after the 2004 town meeting, but not to those formally accepted prior to that date. The ordinance also limited the number of town issued building permits for new dwellings to 60 during the one-year period.

In response to the ordinance, the Weare Land Use Association filed suit, advancing a number of constitutional and statutory challenges. After some maneuvering in court, the case boiled down to the claim that the ordinance was invalid “because RSA 674:23 does not authorize the town to

suspend the legal protection and effect of RSA 676:4 [planning board’s procedures on plats] and RSA 676:12 [building permits] nor deny access to the Board of Adjustment.” In essence, the Association argued that the interim growth control ordinance interfered with the statutory authority (and obligation) of the planning board to accept and review plats and applications, the authority of the town to issue building permits, and the rights of persons to seek relief from the ZBA.

In rejecting the Association’s argument, the superior court stated: The purpose of the interim growth management ordinance, RSA 674:23, as previously codified at RSA 31:62-b, is to provide "a town [with] reasonable time to develop [or alter] a master or comprehensive plan and to provide for phasing in growth." *Conway v. Town of Stratham*, 120 N.H. 257, 258-59 (1980); RSA 674:23, I. This purpose would likely be defeated if RSA 676:4, I(c)(1), and RSA 676:12, VI — both of which concern plats or applications that have been formally accepted by the Planning Board — were interpreted in the manner suggested by the Association. Moreover, interpreting RSA 676:4, I(c) (1), and RSA 676:12, VI, in that fashion would have the effect of rendering RSA 674:23 rather meaningless. The Court "will not interpret the statute to produce such an illogical result." *Appeal of Soucy*, 139 N.H. 110, 116 (1994). The Association appealed, but the NH Supreme Court agreed completely with the superior court’s common sense ruling.