

An aerial photograph of a town nestled in a valley, surrounded by rolling hills and mountains. The town features a grid-like street pattern and a central building. The image is in grayscale and serves as the background for the conference title.

New Hampshire Municipal Association
Land Use Law Conference

Holiday Inn, Concord, NH
October 5, 2019

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CONFERENCE AGENDA

REGISTRATION AND BREAKFAST:

8:00 AM – 8:40 AM..... Bartlett/Webster Room

WELCOME AND INTRODUCTION:

8:40 AM – 8:45 AM.....Stephen C. Buckley, Legal Services Counsel, NHMA

PLENARY SESSION:

8:45 AM – 9:00 AM.....Michael Klass, Principal Planner, NHOSI

Overview of NHOSI: Where We Came From and What We Do

As many of you already know, the Planning Division of the Office of Strategic Initiatives (OSI) provides varied planning-related assistance and resources to local land use boards and citizens across all of New Hampshire. However, it may surprise some to learn that planning at the state level officially began more than 85 years ago when the State Planning Board was created in 1933. Here's a quick history of planning at the state level, followed by a reminder of some of the resources that the OSI Planning Division provides today.

SESSION BREAK:

9:00 AM – 9:15 AM

CONCURRENT SESSIONS:

9:15 AM – 10:45 AM

The Legal Authority of a Planning Board in New Hampshire.....Bartlett

Laura Spector-Morgan, Esquire, Mitchell Municipal Group, P.A.

This session is for planning board members who want a refresher course on the legal authority of the Planning Board in New Hampshire. Topics for discussion include Subdivision and Site Plan Review, Excavations, Innovative Land Use under RSA 674:21, Capital Improvement Planning, Master Plans and more.

Roles and Responsibilities of the Zoning Board of Adjustment.....Webster

Christopher L. Boldt, Esq., Donahue, Tucker & Ciandella PLLC, Meredith, NH

This session will provide a detailed look at the statutory responsibilities of the ZBA including appeals of administrative decisions, special exceptions, and variances. This session will also provide an in-depth discussion of how the case law interprets the five variance criteria. Time will be devoted to participant questions.

SESSION BREAK:

10:45 AM – 11:00 AM

CONCURRENT SESSIONS:

11:00 AM – 12:30 PM

Planning Board Procedural Basics.....Bartlett

Stephen C. Buckley, Legal Services Counsel, NH Municipal Association

This session is for planning board members who want a refresher course on procedural basics. Topics for discussion include what is a completed application, the timeline for planning board review, conducting meetings and public hearings, the use of third-party consultants, the zoning amendment process, off-site exactions, conflicts of interests, the Right-to-Know law and more.

ZBA Decision Making Process.....Webster

Christine Fillmore, Esq., Drummond Woodsum, Manchester, NH

Matthew Serge, Esq., Drummond Woodsum, Manchester, NH

You've notified abutters, held the public hearing, heard hours of testimony, and now it's time to make a decision. What do you do? Do you need to decide right then and there? What if you only have four members present? Can there be conditions of approval? Do you vote on each of the criteria separately? Do you need to vote on anything at all? If these and other questions have plagued your ZBA, this session is for you.

LUNCH AND NETWORKING:

12:30 PM – 1:30 PM

CONCURRENT SESSIONS:

1:30 PM – 3:00 PM

Legal Update.....Bartlett

Benjamin D. Frost, Esq., AICP, New Hampshire Housing, Bedford, NH

This session will review recent New Hampshire Supreme Court decisions involving land use issues and the impact they have on municipal planning and zoning. Recently enacted legislation that affects the responsibilities and authority of municipal planning and zoning boards will also be discussed.

Land Use Board Boot Camp.....Webster

Tim Corwin, Esq., AICP, Senior Planner, Lebanon, NH

Shawn Tanguay, Esq., Drummond Woodsum, Manchester, NH

Appropriate for beginning members, seasoned veterans, as well as land use administrators, this session will provide an overview on the mechanics of a land use board meeting. Discussion will touch on the requirements for legal notice, meeting procedure and conduct, conflicts of interest, Right-to-Know Law issues, and more. The session will conclude with Q&A.

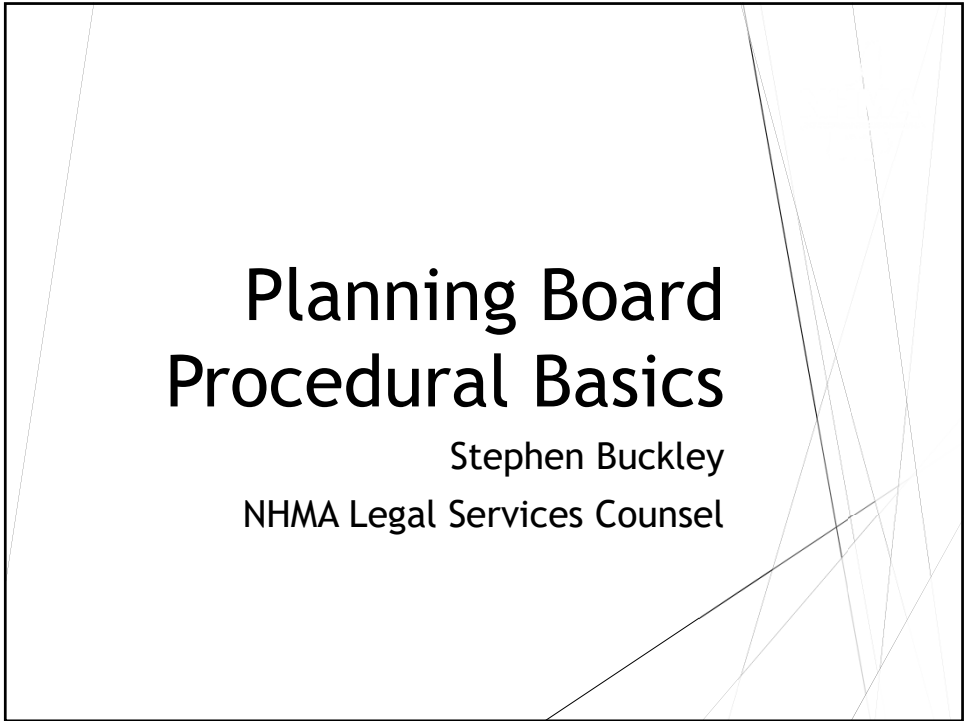
***NHMA would like to extend a special thank you to
our Partners and Presenters:***



DrummondWoodsum

ATTORNEYS AT LAW





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THE PLANNING BOARD IS A PUBLIC BODY

- ▶ Meetings require notice, minutes, and public access
 - “Work sessions” are meetings
- ▶ Hearings have additional requirements



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MINUTES

- ▶ Kept and made available upon request within 5 business days
- ▶ Include members present, people participating, summary of subject matter and decisions made, and, stating persons making and seconding motions



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<h3>Consultation with Legal Counsel</h3> <p>RSA 91-A:2, I(b)</p> <ul style="list-style-type: none"> ▶ Counsel must be present ▶ Contemporaneous dialogue ▶ Non-meeting 	<h3>Consideration of Legal Advice</h3> <p>RSA 91-A:3, II(l)</p> <ul style="list-style-type: none"> ▶ Legal advice previously given ▶ Orally or in writing ▶ To one or more members ▶ Legal counsel doesn't need to be present ▶ Nonpublic session
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NONPUBLIC SESSIONS

-  Only for a specific reason → 91-A:3, II
-  Begin in public
-  Vote to enter nonpublic
-  Conduct the session
-  Return to public session
-  Vote on sealing minutes if appropriate

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COMMUNICATIONS OUTSIDE A MEETING



▶ No electronic meetings!
Don't hit reply all

- ▶ No "meetings" by email string
- ▶ Public bodies may only deliberate in properly held meetings
- ▶ May occur accidentally

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PLANNING BOARD PROCEDURES

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Planning Board Basic Organization



- Quorum. Majority of membership - RSA 673:10, III
- At least one regular meeting per month. RSA 673:10, II
- Chair and other officers elected from non-ex officio members for one-year term - RSA 673:8, 9
- Members appointed by governing body or elected
- One ex-officio select board member, up to 5 alternates (appointed board – town meeting must vote to allow alternates)
- Rules of procedure. RSA 676:1
- RSA 676:4 mandates procedures for applications.

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Preliminary
Review:

Conceptual
consultation

Design
review

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**DEVELOPMENTS OF REGIONAL IMPACT
DRI DECISION PROCESS - RSA 36:54 - :57**

Is it a DRI? Use RSA 36:55.I-VI (may include but not limited to):

- Relative size or number of dwelling units as compared with existing stock.
- Proximity to the borders of a neighboring community.*
- Transportation networks.
- Anticipated emissions such as light, noise, smoke, odors, or particles.
- Proximity to aquifers or surface waters which transcend municipal boundaries.
- Shared facilities such as schools and solid waste disposal facilities

If voted NO, not a DRI, proceed with application

If voted YES, considered a DRI then:

- ✓ Stop reviewing application, continue acceptance to next meeting
- ✓ Notice RPC and abutting town by certified mail, send minutes
- ✓ Resume consideration at next meeting with RPC and abutting
Towns deemed to be abutters

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**Formal
Application,
RSA 676:4, I**



Completed application



Regulations specify what is completed application.



Checklist can specify types of plans, studies, designs, etc. to minimize review and revisions.

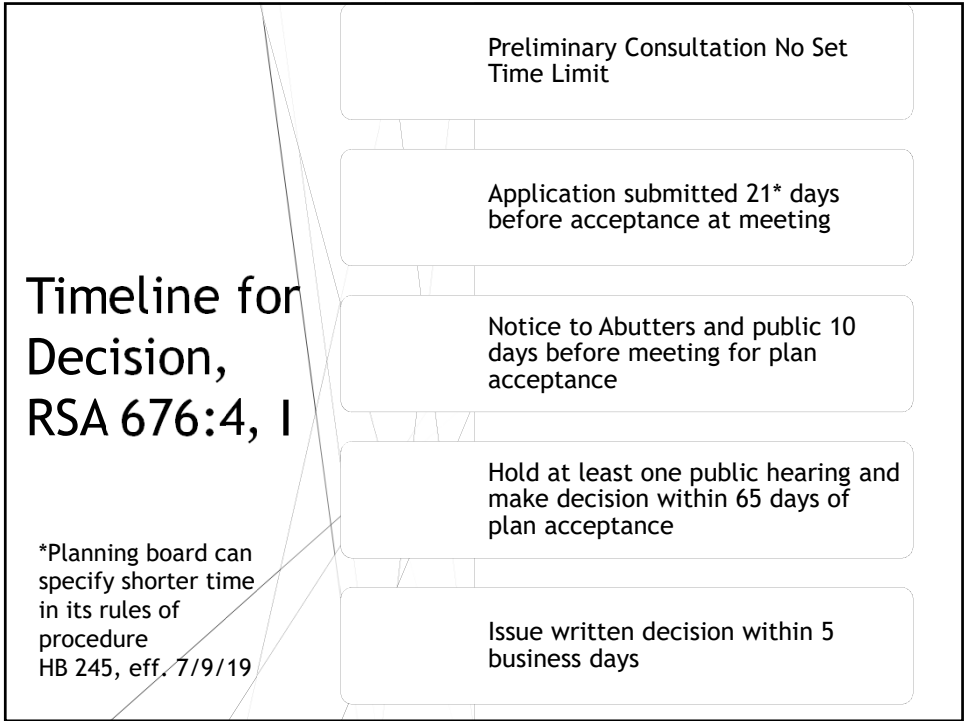


Fees for costs & consultants' studies; detailed accounting. RSA 676:4-b



Application accepted by vote at meeting, with abutter and published notice.

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Workforce Housing Statute RSA 674:58 - :61

- ✓ Applicant submits written statement seeking approval of a workforce housing project
- ✓ Board grants conditional approval with conditions or restrictions
- ✓ Applicant establishes costs of complying with conditions and effect on economic viability of the workforce housing project
- ✓ If the Applicant requests modification of those conditions to preserve the economic viability of the workforce housing project and the Board declines to modify those conditions the Applicant can appeal under the statute to the Superior Court and seek a builder's remedy

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674:54 Governmental Land Uses

- ▶ In general, municipal land use regulations do not apply to state, county, city, town or village district construction projects, when in furtherance of an essential function of government
- ▶ When a governmental entity proposes a use of property that constitutes a substantial change in use or a substantial new use it must comply with the provisions of RSA 674:54
- ▶ Written notice of the project, along with plans and specifications, must be provided to the governing body 60 days prior to the commencement of construction
- ▶ Upon receiving that notice the governing body or the Planning Board can then hold a public hearing on the proposed project, with details about the project provided and at that hearing by the governmental entity.
- ▶ After the public hearing the governing body or Planning Board "may issue nonbinding written comments relative to conformity or nonconformity of the proposal with normally applicable land use regulations to the sponsor of the governmental use within 30 days after the hearing."

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Merged Lots - 674:39-a

Merger of 2 or more *contiguous* preexisting approved or subdivided lots or parcels.

No public hearing or notice shall be required.

No new survey plat need be recorded,

Notice of the merger endorsed by the planning board recorded at registry of deeds.

If any lot is under a mortgage, lender must consent.

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Zoning Amendments 675:3

- ▶ Planning Board proposes initial zoning adoption
- ▶ Planning Board & Select Board may propose amendments
- ▶ At least one public hearing by Planning Board
- ▶ Another hearing 14 days later if proposal substantively modified
- ▶ Deliver final proposal to town clerk 5th Tuesday before town meeting
- ▶ Petitioned Amendments RSA 675:4, Planning Board states approval or disapproval on ballot

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Third Party Consultants

- ▶ RSA 676:4-b
- ▶ May require applicant to pay for third party consultant review and construction monitoring
- ▶ Cannot substantially duplicate same review at ZBA

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Public Hearing Procedures



- ▶ 676:4, I (e) hear from applicant, abutters, others with direct interest, and others as permitted by board
- ▶ Impartially follow rules of procedure
- ▶ Site visits are public meetings
- ▶ Riggins Rules

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Deliberation & Weighing the Evidence



- Get all necessary information before closing public hearing.
- Board can deliberate and vote at later meeting.
- Avoid *ex parte* contacts with parties or deliberation among members outside meeting.
- Board may rely on personal knowledge of the area; and not bound to accept conclusions of experts, *Vannah v. Bedford*, 111 N.H. 105 (1971), only if some evidence and explained in written decision. *Malachy Glen Associates, Inc. v. Chichester*, 155 N.H. 102 (2007)
- But not in the face of uncontradicted expert testimony, unless board can adequately explain in written decision. *Condos East Corp. v. Conway*, 132 N.H. 431 (1989)

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Dartmouth v. Hanover ***NH Supreme Court*** ***November 6, 2018***

- ▶ *Planning Boards cannot rely upon lay opinions and anecdotes refuted by uncontroverted expert evidence.*
- ▶ *Planning Boards cannot supplant the specific regulations and ordinances that control the site plan review process with their own personal feelings.*

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New Case - Girard v. Plymouth NH Supreme Court August 30, 2019

- ▶ *Planning Boards are not preempted from considering wetlands when determining whether to impose conditions upon a subdivision application*
- ▶ *Reaffirmation that the reversal of a planning board's actions by judicial decree only when procedural defects create serious impairment of opportunity for notice and participation. RSA 676:4, IV*

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Written Notice of Decision



- ✓ Written decision is required, and written reasons in event of disapproval. RSA 676:3, I.
- ✓ RSA 676:4, I (c) (1) also requires decision to approve, approve with conditions or disapprove.
- ✓ Decision and meeting minutes must be on file for public inspection within 5 business days of vote. RSA 676:3, II.
- ✓ A tie vote is not a decision.

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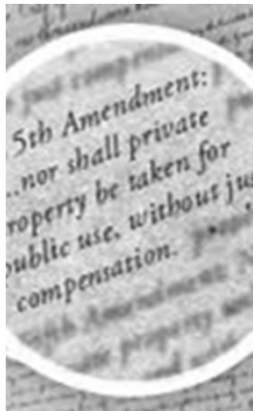
Conditional Approval

- ▶ *Representations by applicant are not binding unless clearly made a condition of approval*
- ▶ *Conditions must reasonably relate to ensuring compliance with relevant criteria*
- ▶ *Standard conditions*
- ▶ *Conditions precedent*
- ▶ *Conditions subsequent*
- ▶ *Compliance hearing*

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“Grandfather Rights”



- Planning Board Regulations may define “substantial completion of improvements etc.” and “active and substantial development etc.” RSA 674:39, III.
- Failure to define “active and substantial development” awards 5-year exemption automatically.

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THANK YOU
*Attending Our
Land Use Law
Conference!*

The New Hampshire Municipal Association is a nonprofit, non-partisan association working to strengthen New Hampshire cities and towns and their ability to serve the public as a member-funded, member-governed and member-driven association since 1941. We serve as a resource for information, education and legal services. NHMA is a strong, clear voice advocating for New Hampshire municipal interests.

25 Triangle Park Drive, Concord, NH 03301
www.nhmunicipal.org or
legalinquiries@nhmunicipal.org
603.224.7447 or NH Toll Free:
800.852.3358

nhmainfo@nhmunicipal.org / 800.852.3358
/ www.nhmunicipal.org

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The ZBA in NH

NHMA/OSI Conference – October 5, 2019

Christopher L. Boldt, Esq.
Donahue, Tucker & Ciandella, PLLC
Meredith, Exeter, Portsmouth & Concord, NH
(603) 279-4158
cboldt@dtclawyers.com

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dtclawyers.com

- More extensive materials on Who, Where, When and How questions not addressed today.
- <http://dtclawyers.com/resource-article/attorney-boldts-osi-presentation/>
- Today:
 - What:
 - Appeals of Administrative Decisions
 - Special Exceptions
 - Variances
 - Equitable Waivers of Dimensional Criteria

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Appeals of Administrative Decisions

- RSA 674:33, I(a) and RSA 676:5
 - hear appeals “taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer”
- RSA 676:5, II(a),
 - “administrative officer” = “any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility.”
- RSA 676:5, II(b)
 - “decision of the administrative officer” is further defined to include “any decision involving construction, interpretation or application of the terms of the [zoning] ordinance” but does not include “a discretionary decision to commence formal or informal enforcement proceedings”.
- Sutton v. Town of Gilford, 160 N.H. 43 (2010) (challenges to building permit must first be made to ZBA).

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Appeals of Administrative Decisions

- RSA 676:5, III,
 - includes reviewing Planning Board decisions or determinations
 - which are based upon the construction, interpretation or application of the zoning ordinance,
 - unless the ordinance provisions in question concern innovative land use controls adopted under RSA 674:21 and those provisions delegate their administration to the PI Bd.
 - a planning board decision regarding a zoning ordinance provision is ripe and appealable to the ZBA when such a decision is actually made. See, Atwater v. Town of Plainfield, 160 N.H. 503, 509 (2010) . The planning board need not complete its consideration of the planning issues involved in a site plan review for a zoning issue to be ripe and appealable to the ZBA. Id. at 510.

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Appeals of Administrative Decisions

New Hampshire Alpha of SAE Trust v. Town of Hanover (issued March 26, 2019)

- Second case on Dartmouth Frat House
- Z.O. req'd "in conjunction with an institutional use"
- College suspended charter & CEO issued violation
- ZBA initially found Frat existed on its own prior to ZO
- College moved for rehrg & showed only existed prior "in conj. w college"
- ZBA reverse, Trial Court upheld, Sup. Ct. aff'd in part, vacated in part & remanded "Unconstitutional delegation of ZBA authority" to have College have the sole dispositive factor/say
- Remand to see if Frat an "institution" in its own right
- Lack of prior enforcement does not prohibit current enforcement
- ZBA free to accept or reject evidence as long as decision is reasonable and can reverse itself
- Member is not bias via request to have College notified

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Appeals of Administrative Decisions

- **Batchelder v. Town of Plymouth, 160 N.H. 253 (2010)**
 - Pl Bd interpretation of ZO allowing placement/removal of fill being "incidental to lawful construction"
- **Dartmouth Corporation of Alpha Delta v. Town of Hanover, 169 N.H. 743 (2017)**
 - Z Officer's interpretation of ZO provision limiting student housing to "in conjunction with another institution" and meaning of "non-conforming use")
- But see, Accurate Transportation, Inc. v. Town of Derry, 168 N.H. 108 (2015)(mere vote to accept Site Plan as complete is not enough to trigger obligation to bring appeal to ZBA).

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Appeals of Administrative Decisions

- definition of “a reasonable time” should be contained in the ZBA’s Rules of Procedure and should be referenced in any decision of an administrative officer to provide fair notice to the potential appellant.
- As short as 14 days. See, Daniel v. Town of Henniker Zoning Board of Adjustment, 134 N.H. 174 (1991); see also, Kelsey v. Town of Hanover, 157 N.H. 632 (2008) (ordinance definition of 15 days sufficient).
- In the absence of such definition, however, the Superior Court will determine whether the time taken by the appellant is reasonable.
 - Tausanovitch v. Town of Lyme, 143 N.H. 144 (1998) (appeal brought within 55 days was held to be outside a reasonable time);
 - 47 Residents of Deering, NH v. Town of Deering et al., 151 N.H. 795 (2005)(provision of zoning ordinance authorized ZBA to waive deadline for administrative appeal);
 - Property Portfolio Group, LLC v. Town of Derry, 154 N.H. 610 (2006)(affirming dismissal of declaratory judgment action brought five months after planning board’s site plan determination); and
 - McNamara v. Hersh, 157 N.H. 72 (2008) (affirming dismissal of declaratory judgment action brought eight months after ZBA denial of neighbor’s appeal of administrative decision).

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Appeals of Administrative Decisions

- Applicant may be given “second bite” when developer comes in to amend previously approved application.
 - Harborside v. City of Portsmouth, 163 N.H. 439 (2012)(ZBA’s decision to uphold Planning Board’s amendment of site plan which allowed change of use within approved space from retail to conference center after parking regulations had been modified reversed on appeal.)
- Also, ZBA has authority to determine that unappealed CEO’s decision that variance is needed was error.
 - Bartlett v. City of Manchester, 164 N.H. 634 (2013) (“contained in every variance application is the threshold question whether the applicant’s proposed use of property requires a variance”)
- RSA 676:6, an appeal to ZBA stays the action being appealed,
 - unless, upon certification of the administrative officer, the action concerns “imminent peril to life, health, safety, property, or the environment”.

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Appeals of Administrative Decisions

- Dembiec v. Town of Holderness, 167 N.H. 130 (2014)
 - Assertion of a municipal estoppel claim for the first time in the trial court is not barred by the exhaustion of administrative remedies doctrine
 - the applicable statutes do not confer jurisdiction upon ZBA to grant relief under the equitable doctrine of municipal estoppel.
 - also noting that although prior cases including Thomas v. Town of Hooksett involved municipal estoppel claims that were initially asserted at the ZBA, the Court did not address whether the ZBA had jurisdiction to decide those claims.
- Forster v. Town of Henniker, 167 N.H. 745 (2015)
 - Weddings are not a valid “accessory use” under statutory definitions of agriculture or agritourism
 - “Accessory use” is “occasioned by” and “subordinate to” principle use
 - Must be “associated with a frequency that is substantial enough to rise above rarity
 - Petitioner failed to prove proposed uses have “commonly, habitually and by long practice been established as reasonably associated with the primary use in the local area.”
 - Watch for Legislative changes!

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Appeals of Administrative Decisions

- De Novo Review
 - Ouellette v. Town of Kingston, 157 N.H. 604 (2008) (ZBA allowed to conduct *de novo* review under RSA 674:33 of Historic District Commission denial of certificate for supermarket).
 - But not required to do so.
- CBDA Development, LLC v. Town of Thornton, 168 N.H. 715 (2016)
 - the Fisher Standard applies to Planning Board decisions as well
- RSA 677:15 (see p. 6)
- The appeal to the ZBA should come first; and if a “dual track” appeal is brought to the Superior Court before the ZBA proceedings have concluded, then the Superior Court matter will be abated.

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Special Exceptions

- Different from Variances:
 - Variance seeks permission to do something that is NOT allowed by ZO
 - Spec. Exception seeks permission to do something that IS allowed by ZO IF ALL conditions met
 - ZO should provide checklist of conditions
- ZBA may not vary or waive any of the requirements set forth in the ordinance. See, Tidd v. Town of Alton, 148 N.H. 424 (2002); Mudge v. Precinct of Haverhill Corner, 133 N.H. 881 (1991); and New London Land Use Assoc. v. New London Zoning Board, 130 N.H. 510 (1988).
- But applicant may ask for a *variance* from one or more of the requirements. See, 1808 Corporation v. Town of New Ipswich, 161 N.H. 772 (2011).
- Applicant has the burden of presenting sufficient evidence to support a favorable finding on each requirement. The Richmond Company, Inc. v. City of Concord, 149 N.H. 312 (2003); Tidd v. Town of Alton, 148 N.H. 424 (2002); and McKibbin v. City of Lebanon, 149 N.H. 59 (2002).

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Special Exceptions

- Additionally, if the conditions are met, the ZBA must grant the special exception. Fox v. Town of Greenland et al., 151 N.H. 600 (2004); Cormier, Trustee of Terra Realty Trust v. Town of Danville ZBA, 142 N.H. 775 (1998); see also, Loughlin, Vol. 15 Land Use Planning and Zoning (3rd Ed., 2000), Section 23.02, p. 365.
- As with variances, special exceptions are not personal but run with the land. Vlahos Realty Co., Inc. v. Little Boar's Head District, 101 N.H. 460 (1958); see also, Loughlin, §23.05, p. 369;
 - but see, Garrison v. Town of Henniker, 154 N.H. 26 (2006) (Supreme Court noted without comment the restriction on the variance that it would terminate if the applicant discontinued the proposed use).

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Special Exceptions

- RSA 674:33, IV
 - Sp. Exceptions “shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause,
 - provided that no such special exception shall expire within 6 months after the resolution of a planning application filed in reliance upon the special exception.”
 - A similar provision was inserted concerning variances. See, RSA 674:33, I-a.

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Special Exceptions

- 2018 Amendment to RSA 674:33, I-a(b) and IV(c)
- Muni may amend Z.O. to provide for termination of Spec. Ex. and/or Var granted prior to 8/19/13 that have not been exercised.
- Once Z.O. is amended, Pl Bd “shall post notice at the City or Town Hall for one year and shall state the expiration date of the notice” and that spec. ex/var granted prior to that date shall be valid if exercised w/in 2 yrs “of the expiration date of the Notice”
- ZBA can further extend date for good cause

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Special Exceptions

- Per RSA 674:33, VII, “neither a special exception nor a variance shall be required for a collocation or a modification of a personal wireless service facility, as defined in RSA 12-K:2.”
- Effective June 1, 2017, RSA 674:71 et seq. are added to require municipalities that adopt a zoning ordinance to allow accessory dwelling units as a matter of right, or by either conditional use permit pursuant to RSA 374:21 or by special exception, in all zoning districts that permit single-family dwellings.

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Variance Criteria

- Result of 2009 SB 147
- Effective January 1, 2010
- Purpose was to do away with the Boccia distinction between “use” and “area” variances for unnecessary hardship
- “Returns” to Simplex;
- “Revives” Governor’s Island

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Variance Criteria #1 - 4

- (1) The variance will not be contrary to the public interest;
- (2) The spirit of the ordinance is observed;
- (3) Substantial justice is done;
- (4) The values of surrounding properties are not diminished; and

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Variance Criterion #5 A

- (5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.
- (A) For purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:
 - (i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
 - (ii) The proposed use is a reasonable one.

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Variance Criterion # 5 B

- (B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.
- The definition of “unnecessary hardship” set forth in subparagraph (5) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

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Variance Criteria

- Per Bartlett v. City of Manchester, 164 N.H.634 (2013) may be asked to determine if variance even needed.
- Three key cases:
 - Harborside v. Parade
 - Malachy Glen v. Town of Chichester
 - Farrar v. City of Keene

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Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011)

- ZBA granted 2 sign variances
- ZBA made specific findings in support
- T.Ct. affirmed one and reversed the other
- Sup. Ct. upheld ZBA on both using the “new” criteria
 - “similar to but not identical with” Simplex and Governor’s Island
- On public interest/spirit of the ordinance criteria, Court cited Farrar and Chester Rod & Gun Club
 - these two criteria are considered together
 - determine whether variance would “unduly and in a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives.”
- “Mere conflict with the terms of the ordinance is insufficient.”

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Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011)

- The Court noted that it has “recognized two methods for ascertaining” whether such a violation occurs:
 - (1) whether the variance would “alter the essential character of the neighborhood” or
 - (2) whether the variance would “threaten public health, safety or welfare.”
- T. Ct. erred by focusing on whether allowing the signs would “serve the public interest”
- Sup. Ct. considered record to support ZBA’s factual findings
- T. Ct. rev’d on these two criteria
- On substantial justice criterion, Sup. Ct. restated position from Malachy Glen, Harrington and Daniels:
- “the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice.”
- T. Ct. erred in focusing on “only apparent benefit to public would be ability to identify [Parade’s] property from far away”
- ZBA correctly focused on whether public stood to gain from denial

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Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011)

- Since record supported ZBA's factual findings, T. Ct. was rev'd on this criterion; but Sup. Ct. rem'd parapet sign variances back to T. Ct. to "consider unnecessary hardship criteria in first instance."
- On marquee sign, Sup. Ct. noted ZBA used only 1st of new statutory definitions for Unnecessary Hardship
- Agreed with ZBA that "special condition" of property was its sheer mass and its occupancy by hotel
- The Court rejected Harborside's argument that size is not relevant based on the concurrence in Bacon v. Enfield
 - Concurrence does not have precedential value
 - Parade is not claiming that signs are unique but that hotel/conference center property is

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Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011)

- Ct. rejected Harborside's argument of no unnecessary hardship since Parade could operate with smaller sign:
 - "Parade merely had to show that its proposed signs were a 'reasonable use'....Parade did not have to demonstrate that its proposed signs were 'necessary' to its hotel operations."
- Ct. rejected Harborside's argument that Parade could not meet public interest, spirit of ord. or substantial justice criteria because it could have achieved "same results" by installing smaller signs:
 - "Harborside's argument is misplaced because it is based upon our now defunct unnecessary hardship test for obtaining an area variance" under Boccia.

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Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011)

- Finally, Ct. rejected Harborside's argument of no evidence on no diminution of surrounding property values other than statement of Parade's attorney
 - "it is for ZBA...to resolve conflicts in evidence and assess credibility of offers of proof" and
 - ZBA was "entitled to rely on its own knowledge, experience and observations."
 - Variance for marquee sign upheld

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Malachy Glen Associates, Inc. v. Town of Chichester,

155 N.H. 102 (2007)

- ZBA denied v's from buffer setbacks for previously approved storage units (but granted for driveway crossing); T.Ct. rev'd
- Remand when ZBA has not addressed factual issues; Render when "reasonable fact finder" could only reach one result
- Chester case - contrary to public interest is "related to" consistent with spirit of ord. & to be contrary ...v must unduly, and in marked degree conflict with zoning objectives
- uncontroverted evidence of surrounding uses & protections to wetlands
- reason for v request, cannot be used by ZBA to deny v
- Vigeant case - proposed project is presumed reasonable if it is a permitted use, that area v may not be denied because ZBA disagrees with proposed use, & whether property can be used differently from what proposed is not material
- Reducing the project by 50% would result in financial hardship and no reasonable trier of fact could have found otherwise
- Consideration of economic viability of scaled down version is not proper analysis under 'substantial justice' factor

26

Farrar v. City of Keene,
158 N.H. 684 (2009)

- ZBA granted use & area v's for mixed use of historic 7K sq.ft. home in district that allows res. & office uses but silent on mix
- T. Ct. found no conflict w/ chair, aff'd area but rev'd use v based on lack of evid of 2nd & 3rd prongs of Simplex hardship
- Harrington v. Warner, for “non-dispositive factors”: interference with reasonable use, hardship caused by unique setting of property, and whether essential character of neighborhood would be altered
- Size of lot, size of house, allowed uses, adjacent historic homes now offices with higher traffic volume
- ZBA could reasonably find that although the property could be converted into office space consistent with the ordinance, zoning restriction still interferes with [applicant]'s reasonable use of property as his residence
- 3rd prong – that v would not injure public/private rights - is coextensive with 1st & 3rd criteria for use v – namely that v not contrary to public interest and v is consistent with spirit of ord.
- Substantial justice = “any loss to the individual that is not outweighed by a gain to the general public is an injustice.”

27

Variances

- Appendix A on web materials
- Status of “Use” and “Area Variances”
 - Although eliminated by statute, it appears the New Hampshire Supreme Court still finds the “use” and “area” variance distinction to be useful in certain contexts. See, 1808 Corporation v. Town of New Ipswich, 161 N.H. 772 (2011) (Sup. Ct., disagreeing with petitioners' argument that they were entitled to expand an office use based on expansion of non-conforming use doctrine, reasoned that because use was permitted per special exception and variance granted was “area” not a “use” variance, expansion of non-conforming uses doctrine does not apply).

28

Disability Variances

- RSA 674:33, V authorizes variances without a finding of unnecessary hardship “when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises”.
 - Requires that the v. “shall be in harmony with the general purpose and intent” of the ordinance. RSA 674:33, V(a).
 - ZBA is allowed to include a finding that the v. shall survive only so long as the particular person has a continuing need to use the premise. RSA 674:33, V(b).

29

Equitable Waivers of Dimensional Requirements

- RSA 674:33-a, ZBA can grant equitable waivers from
- physical layout, mathematical or dimensional requirements imposed by ZO
 - but not use restrictions – see, Schroeder v. Windham, 158 N.H. 187 (2008)

30

Equitable Waivers of Dimensional Requirements

- Owner has burden of proof on four (4) criteria:
 - that the violation was not noticed or discovered by any owner, agent or municipal official, until after the violating structure had been substantially complete, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value. RSA 674:33-a, I(a);
 - that the violation was not an outcome of ignorance of the law, failure to inquire, obfuscation, misrepresentation or bad faith on the part of the owner or its agents, but was instead caused by either a good faith error in measurement or calculation made by the owner or its agent, or by an error of ordinance interpretation or applicability by a municipal official in the process of issuing a permit over which he has authority. RSA 674:33-a, I(b);

31

Equitable Waivers of Dimensional Requirements

- that the physical or dimensional violation does not constitute a public or private nuisance, nor diminish surrounding property values, nor interfere with or adversely affect any present or permissible future use of any such property. RSA 674:33-a, I(c); and
- that due to the degree of construction or investment made in ignorance of the violation, the cost of correction so far outweighs any public benefit to be gained such that it would be inequitable to require a correction. RSA 674:33-a, I(d).

32

Equitable Waivers of Dimensional Requirements

- If the violation has existed for more than 10 years and that no enforcement action, including written notice of violation, has commenced during such time by the municipality or any person directly affected, then Owner can gain a waiver even without satisfying the first and second criteria. RSA 674:33-a, II.
- Property shall not be deemed a “non-conforming use” once the waiver is granted
- Waiver shall not exempt future use, construction, reconstruction, or additions from full compliance with the ordinance. RSA 674:33-a, IV.
- Does not to alter the principle of an owner’s constructive knowledge of all applicable requirements, nor does it impose any duty on municipal officials to guarantee the correctness of plans reviewed or property inspected by them. Id.

33

Equitable Waivers of Dimensional Requirements

- RDM Trust v. Town of Milford ___ N.H. ___ (Docket No. 2015-0495; Issued March 31, 2016)
 - 3JX decision reversed Tct’s affirmance of ZBA’s grant of equitable waiver where the error was not based on the owner’s error in measurement but rather on a conscious decision to hold the non-conforming line of the existing house

34

Equitable Waivers of Dimensional Requirements
Dietz v. Town of Tuftonboro (issued 1/8/19)

- ZBA granted 2 Eq. Waivers; Abutter complained
- 1999 CEO had granted BP for 2nd fl add over existing footprint w/in lake setback
- 2008 ZBA granted Var. for 2nd fl add over existing porch
- 2014 survey showed more of adds had been in setback than had been thought
- Abutter wanted all removed; Trial Ct aff'd ZBA
- Supreme Ct aff'd Tr. Ct.
- written findings of each element are not req'd by the statute
- RSA 673:33-a, I(d) is to be interpreted broadly re reliance on misrep of Muni Official
- BOP is on the Applicant to show all elements; but once ZBA grants, the BOP shifts to the Appealing Party to show error of law or unreasonable

35

Equitable Waivers of Dimensional Requirements
Dietz v. Town of Tuftonboro (issued 1/8/19)

- ZBA members can properly use their own knowledge, experience and common sense
- Variance is not a prereq for Eq. Waiver
- Cumulative Impact of Bacon should not be extended to Eq. Waiver

36

RSA 91-A

- Applies to ZBA
 - Avoid Email
 - RSA 91-A:3(II)(I) [as in "L"] allows Non-Public Session to consider legal advice
 - In writing or oral
 - RSA 91-A:2, II-b requires approved mins & notices of mtgs to be posted on website or listed where they may be found

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Questions

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Thank you!

Christopher L. Boldt, Esq.
Donahue, Tucker & Ciandella, PLLC
Meredith, Exeter, Portsmouth & Concord, NH
(603) 279-4158
cboldt@dtclawyers.com

ZBA Decision Making Process

Presented by:

Atty. C. Christine Fillmore

Atty. Matthew Serge

October 5, 2019

NHMA Land Use Law Conference

1

Purpose of the ZBA

Constitutional “safety valve” to prevent indirect taking of private property for public use without just compensation (inverse condemnation). U.S. Constitution, 5th Amendment; N.H. Constitution, Part 1, Arts 2 & 12

Mechanism for relief via administrative appeal, special exception, variance and equitable waiver, RSA 674:33

2

ZBA - Judicial Function

- ZBA is not legislative (does not create or amend land use ordinances or regulations).
- ZBA is not executive (does not enforce its decisions).
- ZBA is quasi-judicial - it *interprets* the ordinance and regulations and applies that interpretation to the application before it.
- Someone's property is at stake, so procedural concerns are elevated.

3

If you remember nothing else...

- Read and follow statutory requirements.
- Read and follow your ordinance and rules.
- Be fair and reasonable.

4

Municipal Authority to Act

- All municipal authority to act comes from the legislature, *Girard v. Allenstown*, 121 N.H. 268 (1981)
- Must find a statute that authorizes the action or necessarily implies it
- May not rely on the absence of a statute that prohibits it
- Municipality/board may not have an ordinance, rule or procedure that isn't authorized or necessarily implied by a statute.

5

Relationship to the Public

- Procedural due process: citizens have right to notice and the opportunity to be heard.
 - *Richmond Co. v. City of Concord*, 149 N.H. 312 (2003)
- Municipalities have a constitutional obligation to provide assistance to all citizens with the **process**.
- It is a “reasonable” obligation, not a duty to educate beyond notices legally required.
 - *Kelsey v. Town of Hanover*, 157 N.H. 632 (2008)

6

ZBA: a Quasi-Judicial Board

- ZBA collects evidence and hears testimony
- From these, it finds facts (may use member knowledge, too, but within limits)
- Decisions based on the facts, applying legal tests to reach a decision
 - Approve, deny, modify, or impose conditions
- Burden of proof is on the applicant
- ZBA develops a record for possible court review

7

Constitutional Procedural Due Process

- To protect against the unfair loss of a property right, state and federal constitutions require at least:
 - *Notice* to affected persons of a proposed action
 - An opportunity to *be heard* at a public hearing
 - Ability to *appear and speak* through counsel
 - Decision by an impartial tribunal
 - Deliberation based upon evidence and facts
 - A written decision with reasons
 - *Appeal* to seek correction of error

8

NH Statutory Due Process

- Notice to affected people, RSA 676:7, I(a)
- Opportunity to be heard at a public hearing, to appear and speak through counsel, RSA 676:7, I and III
- Decision by an impartial tribunal, RSA 673:14
- Deliberation based on evidence and facts, RSA 674:33
- A written decision with reasons, RSA 676:3

9

Working with Other Boards

- When a proposal requires both ZBA and PB approval
 - Which board hears the case first?
 - Whose conditions prevail?
- Joint Meetings, RSA 676:2
 - Any land use boards may hold joint meetings to decide a case involving jurisdiction of both boards
 - Each board must comply with all legal requirements (notice, minutes, votes)
 - Can be very efficient for everyone (time, money and effort for applicant, abutters, boards and public)

10

One Bite at the Apple

- Usually, an applicant may not apply for the same thing over and over.
- 2nd application must be materially different in nature and degree from the 1st.
Fisher v. Dover, 120 N.H. 187 (1980)
 - A change in applicable legal standard
 - Application changed to address reasons first was denied

11

Preparing for Success - Application

- Application can provide a road map for the board
 - What facts do you need to know? Ask for them in the application. If they aren't provided, you know what to ask about.
 - Require a description of the proposal and why it should be granted.
 - Note what they are requesting and the legal standards they must meet to help you make sense of the evidence at the hearing.

12

Timing of the Hearing

- ZBA hearing within 45 days of receipt of application, RSA 676:7, II.
 - Applicant is not entitled to the relief they seek merely because the time requirement isn't met.
- HOWEVER – although state law doesn't require the **decision** within a particular time, federal law may (e.g., telecom facilities).
- Notice of hearing: certified/verified mail to all parties at least 5 days before hearing, newspaper publication at least 5 days before hearing. RSA 676:7.
- You can always provide **more** notice, but not less.

13

Right to a Full Board?

- Not entitled to a hearing and decision by a full board, *Auger v. Strafford*, 156 N.H. 64 (2007)
 - Offer to wait until a full board is available – yes, but apply the policy evenly!
- Can you substitute someone after the process starts?
- Can a member vote if he/she missed one or more sessions of the hearing?
 - On both: If they can catch up by reviewing the record, yes, but it is better to avoid that situation if possible.

14

Participation in the Public Hearing

- Board members may ask questions of parties
- Alternates not sitting for someone else may participate in the hearing process if allowed by ZBA's rules, RSA 673:6, V.
- Disqualified members may participate in the hearing as parties (i.e., abutters) or as members of the public.
- Board must hear all parties, and may hear "such other persons as it deems appropriate," RSA 676:7, I(a).

15

Public Hearing

- Continuing a hearing to another day – no additional notice required if time, date and place of next session are stated before first session ends. RSA 676:7, V
- No contact between parties and board members in the interim days.
- Don't close hearing too soon – has everyone been heard? Has the board asked all of its questions of the parties?

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Obtaining Legal Advice

- Consultation with legal counsel: not a “meeting” under RSA 91-A
 - No posting, no notice, no minutes.
 - Attorney must be actively participating
- Reviewing legal advice without the attorney is *not* “consultation with legal counsel,” so must review either in public session (thus waiving attorney-client privilege) or in nonpublic session – RSA 91-A:3, I(1)

17

Deliberating

- May deliberate immediately, or at the end of the meeting, or on a different day, may continue over more than one session.
- If you need to get legal advice before deciding, you should do that.
- Deliberate only in public, RSA 673:17.
- Deliberation is at a public meeting, not a hearing – so no personal notice to anyone is required (but it is a good idea).

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Deliberating

- Before making a decision, review everything
 - Relief sought
 - Legal standards
 - How the evidence fits with the legal standards
- Deliberation is only among board members – no comments from parties or public
- Board should NOT ask questions of the parties during deliberations.

19

Weighing Expert Evidence

- Board has considerable discretion to choose between competing expert opinions, *Richmond Co. v. Concord*, 149 N.H. 312 (2003)
 - Must have a reason for rejecting expert opinions (what is lacking in qualifications, methodology, data, conclusions?)
 - Minutes and decision should reflect the board's reason for not accepting expert opinion (personal feelings are not enough)
- General studies and articles may not be enough to contradict specific expert opinion.
- Lay opinions and anecdotes don't outweigh uncontroverted expert evidence. *Trustees of Dartmouth College v. Hanover*, No. 2017-0595 (11/6/18); *Condos East Corp. v. Conway*, 132 N.H. 341 (1989)

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Drafting a Motion

- Follow your rules of procedure in making, seconding, discussing, and voting on motions. Robert's Rules are not required.
- Can be a useful way to organize the Board's discussion, especially in more complex cases.
- May a member draft (but NOT circulate) a motion ahead of time?
- A motion can be amended, but keep track!
- Only ONE motion before the board at a time.

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Drafting a Motion

- Begin with what the applicant has asked for, but the board is not required to grant exactly what the applicant seeks; craft the relief you find appropriate.
- Include conditions in the motion (this may be where the motion gets amended over the course of the deliberations).
- Be careful incorporating codes by reference into your decision, because it may incorporate things you don't expect.
 - *Atkinson v. Malborn Realty Trust*, 164 N.H. 62 (2012)

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Drafting a Motion

- Text of the motion (also who made and seconded it) and what happens to it should end up in the minutes.
- Give a written copy to the person taking the minutes.
- If meeting is being audio recorded, be careful to create an adequate record:
 - Read motion out loud, and
 - Require verbal vote from every member

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Drafting a Motion

- The motion, once passed, is the essence of the decision.
- It is difficult for the enforcement authority to enforce conditions that are not clear, and if they aren't aware of them!
- Include conditions in the notice of decision.
- Distribute notice of decision to appropriate officials.
- If there are deadlines or milestones, do the appropriate people know about them?

24

Conditions of Approval

- Conditions “precedent”
 - Must be fulfilled before approval can become final. Consider placing a time limit on satisfying them.
- Conditions “subsequent”
 - Restrict use of the property going forward (ex., hours of operation)
- May not delegate or assign duties to other boards or agencies, only to the applicant.
 - ZBA approval that was subject to off-site improvements to be completed by the State. Held, special exception was unlawful. *Tidd v. Alton*, 148 N.H. 424 (2002)

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Conditions of Approval

- Variances run with the land, not the owner.
 - *Batchelder v. Plymouth ZBA*, 160 N.H. 253 (2010)
 - Exception: variances for the disabled, RSA 674:33, V: ZBA may find that variance shall survive only so long as the particular person has a continuing need to use the premises.
- Special rule for waiver from building and site requirements for agricultural uses under RSA 674:32-c:
 - ZBA shall grant waiver to the extent necessary to reasonably permit the agricultural use.

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Voting on Motions

- Must have at least 3 concurring votes to take any action (regardless of how many members are seated). RSA 674:33, III.
- Failed motion: if you don't get 3 votes in favor of the motion, is that a denial of the appeal or application, or is this a non-decision? Your rules of procedure should answer this question.

27

Voting on Variances

- Applicant must satisfy all of 5 criteria in RSA 674:33 to obtain a variance, and must receive at least 3 votes in favor.
- Board should discuss all 5, but there are varying opinions on whether to vote separately on each one.
- ZBA must use one voting method for all variances until it formally votes to change the method. RSA 674:33, I(c)
 - Change in voting method takes effect in 60 days and doesn't affect pending cases.

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Written Decision with Reasons

- Required by RSA 676:3.
- Purpose: to document the motion that was passed.
- Include the findings of fact that the board made.
- If the appeal/application is denied, written decision must include the reasons, RSA 676:3, I.
- ZBA relief runs with the land, so be precise.

29

Written Decision with Reasons

- Include all conditions, stated clearly so that they are easy to understand.
- Helps make a record for future enforcement actions.
- Complete written decision is also necessary for meaningful court review:
 - Communicate what was granted or why it was denied, clarify how expert opinions were used and relied upon (or rejected).
 - Although a one-line written decision combined with meeting minutes has been found acceptable in the past, NH courts strongly recommend specific findings of fact be stated in written decision to avoid a remand.

30

Written Decision with Reasons

- Written decision and meeting minutes must be on file for public inspection within 5 business days after the vote, RSA 676:3, II and RSA 91-A.
- If they are not, it is not only a violation of the Right to Know Law, it creates a longer period within which someone who appeals the decision to superior court can amend their appeal.
- Does your board mail or e-mail a copy to the applicant? Be consistent.

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Motion for Rehearing

- Motion for rehearing must be filed with ZBA w/in 30 days after order or decision. RSA 677:2
- Who can file? Select board, any party, anyone “directly affected” by the decision or order.
- Even without a motion, ZBA may reconsider its decision within that 30 day period to correct error(s). *74 Cox Street, LLC v. Nashua*, 156 N.H. 228 (2007)
- Motion must state every reason the decision was unlawful or unreasonable. RSA 677:3.

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Motion for Rehearing

- ZBA must grant or deny motion within 30 days, RSA 677:3.
- ZBA holds public **meeting** (not a hearing) to decide. Discussion and vote by board, no input.
- Avoid new findings of fact or new reasoning when denying a motion for rehearing (just say “denied”).
- New evidence submitted with motion for rehearing:
 - If it could have been presented during original hearing, ZBA **may** consider it.

33

Holding a Rehearing

- If motion for rehearing is granted, the case begins again. Schedule hearing, send notices, all parties present all information again and a new decision is made based on this new record.
- Rehearing is not limited to the issues originally identified in the motion for rehearing.

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Appeals to Superior Court

- If motion for rehearing is denied:
 - Any person aggrieved may file a petition for appeal with the superior court within 30 days of the date of the board's vote. RSA 677:4.
 - The governing body may appeal on behalf of the town/city. *Hooksett Conservation Commission v. Hooksett ZBA*, 149 N.H. 63 (2003)
- Compile and preserve "the record" as completely as possible because it is the record the court will review.

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Appeals to Superior Court

- The certified record includes everything the ZBA has on the case.
 - Application, correspondence, documents, photos, all evidence submitted during hearings, minutes, notices, certified mail receipts.....
 - Court will set a date by which the "Certified Record" must be submitted, work with counsel to assemble it.

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Concluding Suggestions

- Encourage all members and staff to learn about laws, ordinances and rules.
- Stay up to date on changes in the law – are your procedures current?
- Stay in touch with enforcement officials and Planning Board – are you helping or hindering one another?
- See how other boards in your municipality and in other municipalities do things.

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Thank you!

C. Christine Fillmore

Matthew R. Serge

Drummond Woodsum

1001 Elm Street, Manchester NH 03101

603-716-2895

cfillmore@dwmlaw.com mserge@dwmlaw.com

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New Hampshire 2018-19 Land Use Law in Review

Statutes and Cases

**New Hampshire Municipal Association and
New Hampshire Office of Strategic Initiatives
*Fall Land Use Law Conference***

Concord, NH
October 5, 2019

Benjamin D. Frost, Esq., AICP
Director, Legal and Public Affairs
New Hampshire Housing
(603) 310-9361
bfrost@nhhfa.org
www.nhhfa.org



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Today's Roadmap

- I. Finding the Law
- II. NH Statutory Changes
- III. NH Supreme Court Decisions
- IV. Federal Issues

1

PART I

Finding the Law

2

Finding the Law

NH Statutes and Bills

- Revised Statutes Annotated (RSA)
 - www.gencourt.state.nh.us/rsa/html/indexes/default.html
- Search for Bills
 - http://www.gencourt.state.nh.us/bill_status/

NH Supreme Court Decisions

- www.courts.state.nh.us/supreme/opinions/index.htm

For Other Jurisdictions

- Cornell Law School
 - <https://www.law.cornell.edu/>
- Google Scholar
 - <https://scholar.google.com/>

Join Plan-link Nation! Confer with over 700 of your best friends

- <https://www.nh.gov/osi/planning/services/mrpa/plan-link.htm>

NH Municipal Association Legislative Bulletins

- www.nhmunicipal.org

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Legislative Tracking

▶ NH General Court
▶ New Query
▶ FAQs

General Court of New Hampshire - Bill Status System

▶ Bill Status
▶ Bill Text

Docket of HB710 Docket Abbreviations

Bill Title: relative to adoption of state building code and fire code amendments.

Official Docket of HB710:

Date	Body	Description
1/18/2019	H	Introduced 01/03/2019 and referred to Executive Departments and Administration HJ 3 P. 27
1/23/2019	H	Public Hearing: 01/29/2019 01:00 pm LOB 306
3/7/2019	H	Subcommittee Work Session: 03/13/2019 09:40 am LOB 306
3/5/2019	H	Executive Session: 03/13/2019 10:30 am LOB 306
3/13/2019	H	Committee Report: Ought to Pass with Amendment #2019-1024h for 03/19/2019 (Vote 19-0; CC) HC 16 P. 9
3/19/2019	H	Amendment #2019-1024h : AA VV 03/19/2019 HJ 10 P. 25
3/19/2019	H	Ought to Pass with Amendment 2019-1024h: MA VV 03/19/2019 HJ 10 P. 25
4/1/2019	S	Introduced 03/28/2019 and Referred to Executive Departments and Administration; SJ 12
4/2/2019	S	Hearing: 04/17/2019, Room 101, LOB, 09:40 am; SC 17
5/2/2019	S	Committee Report: Ought to Pass with Amendment #2019-1776s , 05/15/2019; Vote 5-0; CC; SC 22
5/15/2019	S	Committee Amendment #2019-1776s , AA, VV; 05/15/2019; SJ 16
5/15/2019	S	Ought to Pass with Amendment 2019-1776s, MA, VV; Refer to Finance Rule 4-5; 05/15/2019; SJ 16
5/22/2019	S	Committee Report: Ought to Pass, 05/30/2019; SC 24
5/30/2019	S	Ought to Pass: MA, VV; OT3rd; 05/30/2019; SJ 18
6/13/2019	H	House Concurs with Senate Amendment 1776s (Rep. Goley); MA VV 06/13/2019 HJ 19 P. 4
6/27/2019	S	Enrolled (In recess 06/27/2019); SJ 21
6/27/2019	H	Enrolled 06/27/2019
7/16/2019	H	Signed by Governor Sununu 07/12/2019; Chapter 219; Eff: 08/11/2019

NH House
NH Senate

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Other Sources

- *Land Use, Planning and Zoning*. Peter Loughlin, Esq. New Hampshire Practice Series, vol. 15. LexisNexis. Updated annually
- NHMA's "Town and City," online searchable index and full-text articles
- ***Don't forget to talk with your municipal attorney.*** That's the person who will be defending you in court! ...and who can help keep you out of court in the first place.

"An ounce of prevention..."

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PART II
NH Statutory Changes

6

6

Enacted Legislation

7

7

Lead Paint Poisoning 2018 SB 247 (Ch. 4)

- Reduces the blood lead levels that compel State notice to landlords and enforcement actions
- Establishes a loan loss guarantee for lenders who make loans for lead remediation work
- **Prohibits** the introduction to the market of new residential units in pre-1978 structures as of 7/1/24 without lead safe certification
 - **How will this be done?** What will be the role of local land use boards and building inspectors? Before granting a site plan, subdivision, or building permit, will the board/inspector have to ask the age of the structure? Who else would police such a standard?
 - NHHFA and others are working on a municipal guidebook

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Voting on Variances

- How does your ZBA vote on the 5 variance criteria?
 - Some take a single vote on all 5, others vote on each criterion individually (pros and cons); 3 votes in the affirmative required
 - *Neil Faiman's Plan-link post from 2004, in which he described the voting behavior of ZBA members A, B, C, D, and E:*
 - Imagine a case where A, B, and C vote for "no diminution of property values", and D and E vote against.
 - Then B, C, and D vote for "in the public interest", and A and E vote against.
 - Then C, D, and E vote for "unnecessary hardship", and A and B vote against.
 - By the time you're done, the Board as a whole has found each of the five criteria to be satisfied by a 3-2 vote, yet every member of the Board believes that two of the criteria are NOT satisfied—in a straight vote to approve or disapprove the variance, it would have to be defeated 5-0!

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Voting on Variances 2018 HB 1215 (Ch. 168)

- One vote, or five?
 - Requires every ZBA to use one method consistently until it votes to change how it votes on variances. Changes to voting method used only effective 60 days after the decision to change, and only affect applications filed after the change. Entire statute comprehensively renumbered.
- Recommendation: specify in your rules of procedure which method your board uses

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More ZBA Voting 2018 SB 339 (Ch. 214)

- RSA 674:33, III
 - Current law: 3 votes to reverse administrative action or decide in favor of the applicant
 - New law: requires votes of *any* three ZBA members for any ZBA action (for consistency with HB 1215)
- What's going on here? They're changing the law that's been around since 1925! But how did ***that*** law come to be?

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Standard State Zoning Enabling Act ***A little history for you...***

- The existing statutory language on ZBA voting is not unique to New Hampshire. It's from the Standard State Zoning Enabling Act (SSZEA)(US Department of Commerce, 1926), which I suspect appears in a lot of state zoning enabling acts. The more widely published SSZEA is from 1926, but it was the 1924 draft of the SSZEA that served as the basis for NH's statute, adopted in 1925.
 - "The concurring vote of four members of the board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance."
- This was intended to somewhat limit the power of the ZBA to deviate from the terms of the zoning ordinance (especially with regard to variances).

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Zombie Variances & Special Exceptions **2018 HB 1533 (Ch. 75)**

- Note: in 2013, the Legislature clarified that variances and special exceptions should be good for at least two years – a statewide standard. RSA 674:33, 1-a and IV
- Here: Zoning may be amended to terminate variances and special exceptions that were authorized before 8/19/13, but have not been exercised ("zombies")
- Sequence of actions
 - Zoning amendment approved by local legislative body
 - Notice posted in town hall
 - Authorizations expire 2 years from date of posted notice
- Effective July 24, 2018

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Agritourism 2016 SB 345 (Ch. 267)

- Repeals definition of agritourism and inserts new definition into “marketing or selling” in RSA 21:34-a, II (agriculture definition)
 - Text: (b)(5) The marketing or selling at wholesale or retail, [~~on-site and off-site, where permitted by local regulations,~~] **of any products from the farm, on-site and off-site, where not prohibited by local regulations. Marketing includes agritourism, which means attracting visitors to a farm to attend events and activities that are accessory uses to the primary farm operation, including, but not limited to, eating a meal, making overnight stays, enjoyment of the farm environment, education about farm operations, or active involvement in the activity of the farm.**

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Agritourism (cont'd) 2016 SB 345 (Ch. 267)

- Adds agritourism to RSA 672:1, III-b and III-d
 - *Thou shalt not unreasonably limit...*
- Amends RSA 674:32-b, II
 - Text: Any new establishment, re-establishment after [abandonment], or significant expansion of a farm stand, retail operation, or other use involving on-site transactions with the public, **including agritourism as defined in RSA 21:34-a**, may be made subject to applicable special exception, building permit, or other local land use board approval and may be regulated to prevent traffic and parking from adversely impacting adjacent property, streets and sidewalks, or public safety.
- Adds RSA 674:32-d
 - Agritourism is allowed on any property where agriculture is the primary use, subject to RSA 674:32-b, II

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Agritourism 2018 SB 412 (Ch. 56)

- Prohibits municipalities from adopting law that conflicts with the statutory definition of agritourism
- Property owner may petition Commissioner of Agriculture for a dispositive ruling on whether a proposed activity is agritourism. Appealable to the Supreme Court
- Effective 7/15/18

- Here's some good news: this year, the Legislature didn't do anything regarding agritourism!

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Dredge & Fill Permit Deadlines 2018 HB 1104 (Ch. 279)

- Deadlines all reduced
- Applicant extensions automatic
- DES failure to act within timeframe: applicant written request for decision; DES has 14 days to decide; failure of DES to decide results in permit by default
 - Commissioner may suspend timeline in extraordinary circumstances
 - Doesn't apply to after-the-fact applications
- Conservation Commission investigations of permits by notice allow for additional 40 days for DES decision
- New owner liability reduced from 5 to 2 years
- Effective 1/1/19

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Constitutional Amendments

■ CACR 15 – taxpayer standing

□ Passed by Legislature and Voters

Amend Article 8 by adding: "The public also has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer. However, this right shall not apply when the challenged governmental action is the subject of a judicial or administrative decision from which there is a right of appeal by statute or otherwise by the parties to that proceeding."

■ CACR 16 – individual rights

□ Passed by Legislature and Voters

"[Art.] 2-b. [Right to Privacy.] An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent."

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ZBA Hearings 2019 HB 136 (Ch. 2)

■ Amend RSA 676:7, II to read as follows:

- II. The public hearing shall be held within [~~30~~] **45** days of the receipt of the notice of appeal.
- Effective July 9, 2019

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Planning Board's Procedures on Plats* 2019 HB 245 (Ch. 6)

- In 2016, the Legislature changed the application filing deadline from 15 to 21 days before the meeting at which the board would accept the application
- Some communities want ***less*** time!
- Fast forward to this bill: RSA 676:4, I(b) ...
 - The applicant shall file the application with the board or its agent at least 21 days prior to the meeting at which the application will be accepted, ***provided that the planning board may specify a shorter period of time in its rules of procedure.***
 - Effective July 9, 2019

* **What's a plat?** In the United States, a plat (plan or cadastral map) is a map, drawn to scale, showing the divisions of a piece of land.
– Wikipedia

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Planning Board Membership 2019 HB 370 (Ch. 105)

- Eliminates the board membership distinction between cities and towns and simplifies the rule for cities:
 - RSA 673:7, I. Any 2 appointed or elected members of the planning board ***in a city or town*** may also serve together on any other municipal board or commission, except that no more than one ***appointed or elected*** member of the planning board shall serve on the conservation commission, the local governing body, or a local land use board as defined in RSA 672:7*
 - Effective 8/20/19

* **What's a local land use board?** Planning board, zoning board of adjustment, building code board of appeals, historic district commission, heritage commission, agriculture commission, housing, commission, building inspector.

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Tiny Houses

2019 HB 312 (Ch. 82)

- As introduced, it would have *required* municipalities to allow tiny houses on wheels (THOW)
- As enacted, it creates a study committee to evaluate issues associated with tiny houses on permanent foundations and THOW
- Some issues for the study committee to address
 - Taxation of units – are they real property, or just personal property?
 - Lending standards, foreclosure
 - In NH, manufactured housing is real property (not chattels)
 - Choice of appropriate building code
 - Utility connections (water, sewer, electricity)
- ²² ■ Final report due 11/1/19

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Land Development Commission

2019 SB 43 (Ch. 300)

- Creates a legislative study commission to evaluate
 - current patterns of development, especially residential development and adaptive reuse of existing buildings and identify barriers to increasing the density of land development
 - minimum standards of residential development density, considering public water and sewer infrastructure, and accounting for variability of environmental conditions
 - reinstating the Housing and Conservation Planning Program
 - property tax incentives to promote residential development density, particularly workforce housing
 - preservation of open spaces and maintaining rural character.
 - methods of enforcement of the shared community responsibility of workforce housing
- ²³ ■ Interim report due 11/1/19; final report due 11/1/20

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Private Road Maintenance 2019 SB 39 (Ch. 308)

- 231:81-a Repair of Roads Not Maintained by a Municipality.
 - In the absence of an express agreement or requirement governing maintenance of a private road, where there is a common benefit each owner shall contribute rateably to cost of maintenance and can bring an action to enforce. **“This paragraph shall not apply to any highway defined in RSA 229:5.”**
 - Damages by an owner shall be his/her sole responsibility
- RSA 229:5 is the NH highway classification system
- This has no impact on municipalities, other than to give local officials a law to point to when neighbors are in conflict (i.e., “Go settle it yourselves...”)
- Intended to codify the common law
- Effective 8/2/19

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Wildlife Corridors 2019 SB 200 (Ch. 243)

- Mainly deals with state agency processes, but creates the novel concept of “habitat strongholds”
 - RSA 207:1, XIII-a. Habitat stronghold: A high-quality habitat that supports the ability of wildlife to be more resilient to increasing pressures on species due to climate change and land development.
- Similar to Endangered Species Act’s “critical habitat,” but without the Federal baggage
- Effective 9/10/19

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State Building Code 2019 HB 562 (Ch. 250)

- Updates the State Building Code (RSA 155-A) to the 2015 suite of ICC codes
 - Updates International Building Code, International Existing Building Code, International Plumbing Code, International Mechanical Code, International Energy Conservation Code
 - Adds International Swimming Pool and Spa Code
- State's failure to act on this was having an impact on ISO community ratings (= higher insurance costs)
- Effective 9/15/19

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Local Building Code Appeals 2019 HB 710 (Ch. 219)

- Changes how the State Building Code Review Board (BCRB) adopts new codes
- RSA 674:32. Adds a requirement that the BCRB will hear appeals of local building code board of appeals before such appeals go to superior court
 - In most communities, the ZBA acts as the building code board of appeals
- Effective 8/11/19

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Pending Legislation

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Agriculture Definition 2019 HB 663 – Pending

- Makes clarifying (I hope) amendments to
 - RSA 21:34-a: definition of agriculture
 - RSA 672:1, III(d): no unreasonable local restrictions
 - RSA 674:32-a (presumed permitted): adds “**operations or activities**”
 - RSA 674:32-b (existing uses): unnecessarily adds “site plan review”
 - RSA 674:32-c (compliance with local standards): adds “operations **or activities**”
- Passed both House and Senate; still hasn’t been presented to the Governor for action...

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Prime Wetlands Definition 2019 HB 326 – Pending Veto Override

- RSA 482-A:15, I-a: Prime wetlands must be at least 50 feet wide at their narrowest point.
 - This specifies how that is to be measured (“perpendicular to the wetland’s longitudinal axis”)
 - Allows for expansion of existing prime wetlands to include areas less than 50 feet wide, if the area makes a “significant contribution” (if at least four primary wetland functions can be demonstrated)
- Vetoed by Governor

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Housing Appeals Board 2019 SB 306 – Tabled for Budget

- Creates an alternative to superior court for local decisions on housing and housing development
 - Concurrent, appellate jurisdiction with superior court
 - Response to developers who continue to face costly and time-consuming litigation (both facial and as-applied)
 - Jurisdiction includes mixed-use developments
- Modeled on the Board of Tax and Land Appeals
 - 3-member board appointed by the Supreme Court
 - At least 1 attorney and 1 PE or LLS
 - All 3 must have experience in land use law a/o housing development
 - Non-attorney representation permitted

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Housing Appeals Board 2018 SB 306 – Tabled for Budget

- Board powers
 - Same as superior court – does not have the power to override local zoning
 - Not bound by the rules of evidence – easier for everyone
 - Hear appeals of local decisions; affirm, reverse, modify (not remand)
 - Builder's remedy available
- Appeals can be brought by anyone with standing
 - Non-appellants can intervene
 - Concurrent appeals in Board and court defer to Board
- Enforceable as a court order
- Appeals of Board's decisions to Supreme Court

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Housing Appeals Board 2018 SB 306 – Tabled for Budget

- Timeline
 - Appeals filed within 30 days of local decision
 - Hearing within 90 days of appeal
 - Decision within 60 days of hearing
 - Maximum total to final resolution = 150 days from appeal
- Bottom Line
 - Alternative to time-consuming and expensive trials
 - Latent demand for appeals
 - **No impact on local control**
 - Same standards continue to apply for decisions of local boards; same standards apply to decisions on appeal
- Passed by Senate, then tabled for budget inclusion

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A Few That Didn't Make the Cut

- Retained bills (look for action in January 2020)
 - HB 151 – agriculture definition
 - HB 371 – cats in kennels
 - HB 542 – wetland grant program (House)
 - HB 543 – wetland protection (House)
 - SB 69 – short-term rentals (Senate)
 - SB 152 – third party inspections (Senate)

- Killed bills (can't be reintroduced until 2021)
 - HB 404 – liquefied natural gas storage facility local opt-in
 - HB 454 – Site Evaluation Committee criteria
 - HB 561 – zoning to prohibit “formula businesses”

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PART III NH Supreme Court Decisions

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- All NH Supreme Court opinions are available on its website – go to www.nh.gov, find the Judicial Branch link on the right side, then click on the Supreme Court tab and select “Opinions.”
- You can also get onto the Supreme Court’s email list for notices of decisions.

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Planning Board Approvals

- ***Dartmouth College v. Hanover (2018)***
 - Dartmouth proposes 70K s.f. indoor practice facility (IPF) adjacent to existing facilities in “Institutional” zoning district created by Hanover for the College and other similar entities
 - Location is known as the “sunken garden” and abuts residential zone with single-family homes
 - Ultimate design of IPF fully conforms to “stringent height limitations and setback requirements”
 - Setback of 150 feet for buildings with a maximum average height of 60 feet that abut a residential zone
 - Six months of hearings in 2016

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Planning Board Approvals

- ***Dartmouth College v. Hanover (2018)***
 - Abutters complain of impact on neighborhood:
 - Loss of property value
 - Noise, pollution, impact on town's stormwater system
 - Lack of architectural detail
 - Building will block the winter sunlight from reaching their homes
 - Dartmouth conducts a "shadow study", which the abutters interpreted to show how many hours each house would be impacted
 - Zoning Administrator determines proposal to be fully compliant; staff recommends approval with 21 conditions; Dartmouth agrees to comply with conditions

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Planning Board Approvals

- ***Dartmouth College v. Hanover (2018)***
 - Planning Board denies application 4-1, citing sections of Hanover's site plan regulations
 1. Does not conform to the Hanover Master Plan
 2. Negatively impacts the abutters, neighborhood and others, town services and fiscal health
 3. Does not relate to the harmonious and aesthetically pleasing development of the town and its environs

[Note: these partly echo RSA 674:44, SPR enabling law]
 - Dartmouth appeals, abutters intervene; town sits it out
 - No dispute that the IPF complies with zoning

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Planning Board Approvals

■ *Dartmouth College v. Hanover (2018)*

- Trial court upholds planning board's decision
 - Project's impact on abutting properties – blockage of sunlight
 - [Implied] Facts support a decision on board's personal feelings
- Supreme Court
 - Dartmouth College
 - Vague and ambiguous standards
 - Ad hoc decision-making by board
 - Personal feelings not an appropriate basis for a decision
 - Abutters
 - Standards based on “observable character” of the location (*Deering v. Tibbetts*, 105 N.H. 481 (1964))
 - “Ordinary person” could understand and comply with Hanover's general conditions
 - Record supports trial court's decision

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Planning Board Approvals

■ *Dartmouth College v. Hanover (2018)*

- Supreme Court
 - Trial court unreasonably relied on facts not in the record
 - Abutters' analysis of College's shadow study inconclusive regarding 5 closest residences – but court relied on it anyway
 - Planning board was mixed on the issue of sunlight –
 - 1. Some shading already caused by existing intervening trees; hard to say how much additional blockage would occur
 - 2 & 3. Some mentioning of blockage, but one said regulations weren't sufficiently developed on the point; other vote against denial
 - 4 & 5. Didn't mention any objective criteria; one called IPF “an affront to the neighborhood.”

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Planning Board Approvals

■ ***Dartmouth College v. Hanover (2018)***

- Supreme Court
 - "...the record fails to support either of the trial court's conclusions that the board denied the application out of a concern that the IPF would deprive abutting homes of sunlight, or that there is sufficient support in the record to conclude that the IPF would negatively impact the abutting homes in this manner."
 - Note: while it's clear that the abutters evaluated Dartmouth's shadow study and both the Board and the trial court relied on those conclusions, it's unclear whether the Board itself separately evaluated the study.

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Planning Board Approvals

■ ***Dartmouth College v. Hanover (2018)***

- Supreme Court
 - Planning board engaged in ad hoc decision making that relied on personal feelings
 - "...a planning board's decision 'must be based on more than the mere personal opinions of its members'" and members "may not deny approval on an ad hoc basis because of vague concerns." Citing *Ltd. Editions Properties v. Hebron*, 162 N.H. 488, 497 (2011)

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Planning Board Approvals

■ *Dartmouth College v. Hanover (2018)*

- Supreme Court
 - Board's site plan regulations require the board to assess a variety of "general considerations" including the three relied on by the Board
 - Supreme Court observes that abutters abandoned defense of the Planning Board's conclusion of master plan non-compliance
 - Cites *Rancourt v. Barnstead*, 129 N.H. 45 (1986)(planning board relied on master plan's growth limit recommendations as a basis for denying a subdivision approval)
 - Note: Master plan is a prerequisite for zoning and site plan regulations, but its contents are advisory only

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Planning Board Approvals

■ *Dartmouth College v. Hanover (2018)*

- Supreme Court
 - Other "general considerations"
 - Board reason 2: Negatively impacts the abutters, neighborhood and others, town services and fiscal health
 - Trial court erroneously construed the record to support the Board's conclusion regarding sunlight
 - Note: record appears to be devoid of facts related to services and fiscal health

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Planning Board Approvals

■ *Dartmouth College v. Hanover (2018)*

- Supreme Court
 - Other “general considerations”
 - Board reason 3: Does not relate to the harmonious and aesthetically pleasing development of the town and its environs
 - “Environs” is more than just the abutting properties, but includes the wider zoning districts
 - IPF is a permitted use in the Institutional zone and is consistent with existing adjacent uses – the “observable character” of the area (see *Tibbetts*, supra)
 - Abutters claim that there is no “meaningful or harmonious transition”
 - But that is precisely the purpose served by height limitations and setbacks

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Planning Board Approvals

■ *Dartmouth College v. Hanover (2018)*

- Supreme Court
 - Other abutter arguments
 - Dartmouth failed to address Board’s concerns
 - Record is replete with College’s efforts to accommodate the concerns of the Board and abutters, including additional vegetative screening and a berm
 - Repeatedly revised its plan, and staff concluded that the proposal complied with all requirements (plus 21 conditions)
 - Impact on abutters’ property values
 - Dartmouth presented a study by a licensed appraiser demonstrating no impact; abutters presented anecdotal evidence

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Planning Board Approvals

■ *Dartmouth College v. Hanover (2018)*

- Supreme Court
 - Dartmouth asserts conflict of interest
 - Board Vice Chair's property "closely abuts" the College's athletic complex; she recused herself and actively opposed the IPF proposal
 - Even if this had been a conflict, the College did not raise this concern until it was too late
 - **Practice Point:** Conflicts must be raised at the earliest possible time

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Planning Board Approvals

■ *Dartmouth College v. Hanover (2018)*

- What is this case really about? Heed the warning of the dissenting Chair of the Planning Board – takings!
- The Supreme Court observed that the abutters opposed any development in this location, and the Planning Board supported those views on the record
- The Court: "...a planning board cannot use the site plan review process to require a landowner to dedicate its own property as open space for essentially public use without proper compensation."
- **NH Constitution Part 1, Article 12:** "...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."
- **US Constitution, Amendment V:** "...nor shall private property be taken for public use without just compensation."

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Planning Board Approvals

■ *Dartmouth College v. Hanover (2018)*

- “We do not suggest that site plan review should be reduced to the mechanical process of determining conformity with specific zoning and site plan regulations. In this case, however, the planning board’s reliance solely upon general considerations to override the site plan’s conformity with specific regulations and ordinances, without sufficient evidentiary support for doing so, was unreasonable. Sustaining the board’s decision here would sanction a denial of a property owner’s site plan application simply because board members felt that the owner’s permitted use of its own property was inappropriate. Such a finding would render zoning ‘obsolete, as it would afford no protection to the landowner.’”
- **Result:** case reversed; builder’s remedy awarded – meaning no return trip to town boards for further proceedings.

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Case Take-Aways

- Especially in controversial cases, there should be thorough findings of fact developed to the board’s decision; this makes it clear what served as the basis of the decision
- Abutters interests are important, but they don’t reign supreme – the applicant has rights too, even if it’s a huge “institution”
- Be mindful of your own clear standards; if an applicant is meeting them, reasons for a denial must be supported by compelling evidence and analysis
- Hypothetical musings
 - What result if the Board’s denial were supported by thorough findings?
 - Did the recused Vice Chair unduly influence the other members?

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Planning Board Approvals

■ *Girard v. Town of Plymouth (2019)*

- Multiple parties own 250 acres of undeveloped land; can't resolve how to divide it
- Court orders subdivision application to town, with accompanying sketch
- Formal subdivision application to planning board is consistent with court sketch – includes access to one lot over wetlands
- Planning board receives input of from wetland scientist; proposed access is not “suitable for the construction of a driveway”
- Planning board recommends various changes to minimize wetland impacts; applicants refuse to change the plan
- After 4 hearings and a site walk, planning board denies application based on wetlands impacts
- Trial court affirms; appeal to Supreme Court

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Planning Board Approvals

■ *Girard v. Town of Plymouth (2019)*

- Main Issues:
 - Subdivision regulation is overly broad and does not specifically authorize wetland regulation, resulting in ad hoc decision
 - Municipal regulation of wetlands is preempted by state law
 - Trial court unreasonably relied on wetland scientist's letter
 - Board violated law by discussing application without notice

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Planning Board Approvals

■ *Girard v. Town of Plymouth (2019)*

- **Regulation:** the board “may impose requirements upon the subdivider in order to preserve and protect existing features, trees, scenic points, views, brooks, streams, rock out-croppings, water bodies, stone walls, boundary markers, other natural resources and historic landmarks.”
 - Do you see “wetlands” listed here? No, but the structure (“other natural resources”) creates a grouping “similar in nature” to those listed
 - [Note: e.g., “including, but not limited to...”]
- Court: “We have never held that a planning board cannot act on criteria that do not expressly appear in a regulation when the criteria fall within the plain and ordinary meaning of other terms within the regulation.”

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Planning Board Approvals

■ *Girard v. Town of Plymouth (2019)*

- **Preemption:** express (is easy) or implied (is harder)
 - No express preemption
 - Implied – conflict between state and local regulatory schemes, or local scheme frustrates the purpose of the state regulation
- Wetlands – existence of a comprehensive state regulatory scheme is not alone sufficient to demonstrate preemption
- Here, Court concludes that the local regulation **supports** the purpose of the state regulatory scheme (protection of wetlands!)
- No preemption to be found here

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Planning Board Approvals

■ *Girard v. Town of Plymouth (2019)*

- **Evidence:** trial court relied on wetland scientist's letter, but board didn't clearly rely on it
 - Compare with *Dartmouth College* case: here, the board made findings that could have been supported by the letter; in *Dartmouth College*, there were no findings to be supported
- **Process:** board discussed application at a meeting without the case noticed on the agenda
 - Court: "RSA 676:4, IV provides that judicial review of the planning board's procedures 'shall not be subjected to strict scrutiny for technical compliance.'"
 - Lots of other public process was provided; no decision was made at the unnoticed meeting
 - **Note:** The fact that this board got away with it doesn't mean it's a good idea! If it's not properly noticed, don't talk about it!

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Nonconforming Uses

■ *NH Alpha of SAE Trust v. Hanover (2019)*

- Hanover Zoning history:
 - 1931: Zoning adopted, including "Educational District" allowing dormitories "incidental to and controlled by an educational institution"
 - 1976: Hanover enacts its current zoning ordinance, including "Institution" district
 - Student residences allowed only by special exception
- Summary
 - SAE's national charter revoked; College then revoked official recognition
 - As a result of its loss of connection to the college, SAE became a non-conforming use
 - Zoning enforcement – because SAE no longer operated "in conjunction with an institutional use"

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Nonconforming Uses

- ***NH Alpha of SAE Trust v. Hanover (cont'd)***
 - Administrative appeal to ZBA
 - SAE argues that it never operated “in conjunction” with the College and therefore is a legal non-conforming use
 - ZBA agrees!
 - Dartmouth requests rehearing, produces voluminous evidence of connection between SAE and the College (fire safety, business manager, etc.)
 - ZBA reverses, denies SAE’s appeal; denies SAE’s request for rehearing
 - Trial court: sufficient evidence to support ZBA’s ultimate decision that SAE operated in conjunction with Dartmouth prior to 1976
 - Takings claim rejected, as there are other Fraternity-related uses of the property – enforcement and ZBA decision only concerned the use as a residence

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Nonconforming Uses

- ***NH Alpha of SAE Trust v. Hanover (cont'd)***
 - Supreme Court
 - No longer “in conjunction”? Derecognition by College is merely one factor; helps to avoid argument that zoning decisions have been unlawfully delegated to the College
 - SAE argues that it itself is an “institution” within the meaning of the zoning ordinance
 - ZBA construed the district to be limited to “major” institutions – this was error
 - This issue vacated and remanded
 - Note: Couldn’t serving as a place of residence for Dartmouth students mean that it was operating “in conjunction” with the College?

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Equitable Waivers

■ *Dietz v. Tufonboro (2019)*

- Sawyer Point Realty owns a house on Lake Winnepesaukee
 - Located within town's 50-foot setback from the lake
- 1999 second floor addition without expanding footprint – building permit application shows non-conformity; granted
- 2008 additions – second floor over existing porch and new addition off the side of the house; variance granted for the side addition that increased the footprint
- 2014 survey reveals that the structure and its additions were more non-conforming than previously thought
- Equitable waivers sought for 1999 and 2008 additions
 - Both granted by ZBA

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Equitable Waivers

■ *Dietz v. Tufonboro (cont'd)*

- Abutters rehearing request is denied; they appeal, requesting demolition of 1999 and 2008 additions; trial court upholds ZBA's decision
- Abutters claim that the equitable waiver statute requires the ZBA to make findings on all points in RSA 674:33-a, I

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Equitable Waivers

■ *Dietz v. Tuftonboro* (cont'd)

- ZBA must grant waiver if and only if it makes these findings:
 - a) Violation wasn't noticed until after substantial completion
 - b) Violation wasn't an outcome of ignorance of the law, but was a good faith error of measurement by the owner or a misinterpretation of law by a municipal official
 - c) Violation doesn't constitute a nuisance or diminish property values
 - d) "That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected."

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Equitable Waivers

■ *Dietz v. Tuftonboro* (cont'd)

- Supreme Court
 - A case of first impression – Supreme Court's first interpretation of this statute since its adoption in 1996
 - Assume the fact-finder makes all necessary factual findings
 - Variances don't require a specific finding – see, e.g., *Kalil v. Dummer*, 155 N.H. 307 (2007)
 - Variance statute is similar in construction to this one
 - To grant a variance, the ZBA must satisfy five elements
 - To grant an equitable waiver, the ZBA must make findings on four elements
 - Statute doesn't say the findings must be *in writing*

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Equitable Waivers

■ *Dietz v. Tufonboro* (cont'd)

- Supreme Court
 - Compare planning board waivers – basis must be recorded in the board's minutes (RSA 674:44, III(e) (site plans) and RSA 674:36, II(n) (subdivisions))
 - Here, record reflects that the ZBA discussed all four requirements – implicit finding that all had been met
 - Abutters then argue that Sawyer Point was not ignorant of the facts constituting the violation, having admitted the non-conformity in 1999
 - Court: this would make a nullity out of the alternative reason of a municipal official error, because the owner would always have to be ignorant of the facts of the error

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Equitable Waivers

■ *Dietz v. Tufonboro* (cont'd)

- Supreme Court
 - Abutters also argue that the balancing test in (d) was not properly made by the ZBA, because no cost estimates were presented by Sawyer Point
 - Court: “members of the ZBA were entitled to use their own knowledge to conclude that the cost of correcting the zoning violations would, in this case, be substantial.”
 - So you can rely on personal knowledge! Sometimes...
 - Court: members can also rely on “common sense”
 - Abutters: cost of correction is only the cost of applying for a variance
 - Court: variance doesn't correct the violation, it only allows it to continue
 - Affirmed

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Variances

■ *Rochester City Council v. Rochester ZBA (2018)*

- 2014 – City Council updated zoning and eliminated manufactured housing parks as a permitted use
- 2015 – owners of an existing park purchase abutting land
- 2016 – owners apply for variance to expand existing park with 14 new units
- ZBA grants variance; makes brief findings on four variance criteria, but no findings on hardship; City Council motion for rehearing denied
- Trial court affirmed, finding there was sufficient evidence on the record to support a finding of hardship – the ZBA could reasonably have concluded that unique conditions of the property “requires the type of development” that was proposed

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Variances

■ *Rochester City Council v. Rochester ZBA (2018)*

- Supreme Court
 - Grant of variance “carries with it an implicit finding of hardship”
 - Variance application addressed hardship, and hardship was discussed by the ZBA
 - Failure to make explicit findings on hardship was not error
 - Was there sufficient evidence to support the ZBA’s finding of hardship? Yes – special conditions of the property (configuration, wetlands, limited access, proximity to existing manufactured housing parks)
 - Affirmed
- **Practice Point:** written findings really would help judicial review!

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Variances

■ *Perreault v. New Hampton (2018)*

- 0.3-acre lot on Lake Waukegan; owner sought to replace plastic movable sheds with a single 10x16 shed to be located one foot from the property line (and one foot from the neighbor's shed), within the 20-foot side yard setback
- Owner seeks a variance; abutter supports with a letter, fire chief is OK with it
- ZBA conducts four public hearings and makes two site visits; owner says there's another location that meets zoning, but is less preferable
- ZBA denies variance, finding that "allowing many sheds to be built on a small lot within those setbacks creates overcrowding and is contrary to the spirit of the ordinance."

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Variances

■ *Perreault v. New Hampton (2018)*

- Rehearing granted; owner presents evidence of many other sheds similarly situated and ZBA variances granted for other lakeside lots; shed would not alter the essential character of the neighborhood or threaten public health, safety, or welfare.
- ZBA – other properties distinguishable; specter of cumulative impact of granting this and other similar variances "jeopardizes the goals of the setback requirements"; denied
- Superior court affirms on public interest, spirit and intent of the ordinance, and substantial justice; hardship not addressed (what about property values?)

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Variances

■ *Perreault v. New Hampton (2018)*

- Supreme Court
 - Public interest and spirit of the ordinance criteria are related; need to examine the ordinance
 - Zoning ordinance is a statement of public interest, so any variance is in some measure contrary to it
 - To be contrary to the public interest and to violate the spirit and intent of the ordinance, a variance “must unduly and in a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives.” Quoting *Harborside Associates v. Parade Residence Hotel*, 162 N.H. 508, 512 (2011)
- Would the variance alter the essential character of the locality or threaten public health, safety, or welfare?

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Variances

■ *Perreault v. New Hampton (2018)*

- Supreme Court
 - Owner argues there are other similarly situated sheds and properties, as well as variances previously granted
 - ZBA counters that some of those sheds were grandfathered, others weren’t in any setback, and some of the variances were granted when variance criteria were different (see *Boccia v. Portsmouth*, 151 N.H. 85 (2004) and subsequent legislation to reverse it); still other sheds were now being investigated for violations
 - Cumulative impact? First time considered since *Bacon v. Enfield*, 150 N.H. 468 (2004) – and that was a plurality decision; here, Court assumes without deciding that it’s OK to apply cumulative impact in a variance decision
 - Record supports ZBA’s conclusion that overcrowding would be a problem, and that granting the variance would “jeopardize” the purpose of the setbacks

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Variances

■ Case Take-Aways

- Court continues to merge 2 criteria:
 1. The variance will not be contrary to the public interest; and
 2. The spirit of the ordinance is observed
 - The Court can't actually merge them, as they're statutory
- Can a ZBA cite the potential prospective cumulative impact of variances as a reason to deny the one before it?
 - The Court effectively invited litigants to brief the point; that will require a ZBA to take a risk
- When evaluating the “essential character” of an area to address the two criteria above, a ZBA can discount those uses of property that predated the adoption of zoning – they don't reflect the expression of “public interest” or “spirit of the ordinance”

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PART IV Federal Issues

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Telecommunications 5G and Small Cell Deployment

- Activity at the FCC
 - March 2018 – environmental and historic preservation review no longer necessary; state and local review still required [appealed]
 - August 2018 – ban on moratoria [appealed]
 - September 2018 – small cell order
 - Significantly alters the process and timelines for local boards and officials
 - Recent webinar on current legal developments
 - <https://www.youtube.com/watch?v=cpdG-qyJho> (PowerPoint: http://ohioplanning.org/aws/APAOH/asset_manager/get_file/322380?ver=212)

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Signs after *Reed v. Gilbert* (2015)

- ***Willson v. Bel-Nor* (MO), (8th Cir., 5/20/19)**
 - Willson had three stake-mounted, freestanding signs (2 political candidates, one political/philosophical statement)
 - Bel-Nor ordinance addresses size, placement, etc.
 - Only one political advertising sign (to be removed within 15 days after election) and
 - One flag per parcel,; flags limited to those “used as a symbol of a government or institution
 - Enforcement action undertaken
 - Willson seeks injunctive relief, citing 1st Amendment Free Speech Clause, claiming that restrictions were content-based; District Court denies injunction

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Signs after *Reed v. Gilbert* (2015)

■ *Willson v. Bel-Nor* (cont'd)

- On appeal, 8th Circuit reverses and remands
 - *Reed*: “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”
 - 8th Circuit: hard to imagine how these are not content based
 - Strict scrutiny: government action must further a compelling governmental interest and is narrowly tailored to that end

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Signs after *Reed v. Gilbert* (2015)

■ *Willson v. Bel-Nor* (cont'd)

- Bel-Nor: traffic safety and aesthetics
 - Not *compelling*; ordinance is not *narrowly drawn*
- Ordinance also deemed to be overbroad (are a substantial number of the law’s applications unconstitutional, despite legitimate objectives?)
 - Homeowners prevented from endorsing more than two candidates
 - Alternative channels of communication not open
 - The right to speak *from one’s own home* is specially significant
- Injunction granted because Willson is likely to succeed on the merits

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Takings (5A: “...nor shall private property be taken for public use, without just compensation.”)

■ ***Knick v. Township of Scott, PA***

- Local law required public access to all cemeteries
- Knick’s property contained a family plot, and relatives of those buried there sought access; municipality required Knick’s private property to be partly open to the public during daylight
- Knick sued in federal court, alleging an unconstitutional taking
- Trial court dismissed; appellate court affirmed dismissal – not “ripe” because no state court had denied compensation
- Rule of *Williamson County* (1985):
 1. A final decision resulting in a taking must have occurred; but
 2. Federal takings claim is not ripe until state process has been exercised for determination of just compensation
- Prong #2 explicitly overruled by Knick
- **Impact to you?** This only affects appellate process (but could result in more claims)

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Land Use Board Boot Camp

Shawn Tanguay, Esq.
Drummond Woodsum

Tim Corwin, Esq., AICP
City of Lebanon, NH



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What we will cover:

- Goals of the Land Use Board Review Process
- Pre-Meeting Administration
- The Meeting
- Hearing Procedures
- Deliberation
- Making a Decision
- Q & A (30 mins)



2

Goals of the Land Use Board Review Process

- To have a legally defensible final decision by the Board
 - Land use board decisions can be appealed to court (RSA 677:4 & 15)
 - Review must comply with statutory procedural requirements (RSA 676:4 & 676:7)
 - Decision must be based on testimony given and evidence submitted in light of the applicable regulations



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Goals of the Land Use Board Review Process

- To ensure **fundamental fairness**
 - Board must provide procedural due process to all parties
 - Procedural due process means providing:
 - Notice of the hearing (RSA 676:4, I & 676:7)
 - An opportunity to be heard by an impartial board at a public meeting (RSA 676:7, 673:14, 674:33, and 91-A)
 - A decision in writing explaining the basis of the decision (RSA 676:3)



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Goals of the Land Use Board Review Process

- To ensure **effectiveness and efficiency** by:
 - Avoiding procedural mistakes & creating appealable issues
 - Helping to create a complete and understandable record in case of an appeal
 - Instilling public confidence



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Pre-Meeting Administration

- Regulations should identify what information, plans, etc., needs to be included with an application
- Application forms, instructions and checklists should be used to ensure applicant provides what is needed



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Pre-Meeting Administration

- A checklist should be prepared for each application type, e.g.:
 - site plan review checklist
 - subdivision checklist,
 - variance checklist,
 - etc.
- Planning Board checklists should identify both *submission* requirements and *design requirements (if feasible)*



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Pre-Meeting Administration

- The Hearing Notice
 - Minimum requirements set forth in RSA 676:4, I and 676:7
 - WHO: applicant, property owner, easement holders, professional representatives, and abutters
 - WHEN:
 - Zoning Board – 5 days (RSA 676:7)
 - Planning Board – 10 days (676:4, I)
 - HOW: Statute requires notice sent by “verified mail”



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Pre-Meeting Administration

- Preparing and posting the agenda
- Preparing and providing agenda materials for the Board members
- Preparing the meeting room



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The Meeting

- “Right-to-Know” or “Open Meetings” law
–91-A:2, II: “all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public [...] no vote while in open session may be taken by secret ballot.”



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The Meeting

- The Board's Rules of Procedure
 - Boards must adopt Rules of Procedure (RSA 676:1)
 - Help fill in the gaps between the minimum statutory requirements
 - Rules must be followed
 - Board members must be familiar with them
 - Will help ensure proceedings are conducted fairly



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The Meeting

- To open the meeting, the Chair should:
 - Introduce the members
 - Appoint alternates
 - Educate the audience:
 - Explain the purpose of a public hearing
 - Explain Board's role and principles involved in evaluating applications
 - Outline how each hearing will proceed
 - If less than a full member board is present, offer applicants the option of postponing the hearing.



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Hearing Procedures

- Role of Chair
- Role of Staff
- Opening the Hearing
 - Read hearing notice
 - Appoint alternates (if not already appointed)
 - Discuss possible recusal, if needed (RSA 673:14)
 - It is the member's decision, unless prejudgment/bias or direct abutter



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Hearing Procedures

- Applicant's presentation
- Questioning the applicant
 - Board members may (and should) ask questions
 - Try to wait until conclusion of applicant's presentation
 - Questions should have legal bearing
 - Should be posited as impartially as possible
 - All questions for the applicant must be asked and answered *before* the hearing is closed
 - Don't wait until deliberation



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Hearing Procedures

- Abutter/other interested party testimony
 - Cross examination of applicant should not be permitted
 - Questions should be directed to the Chair and answered during rebuttal
 - Entering exhibits is OK but allow applicant an opportunity to review
 - Chair should never allow personal attacks
- Standing (“persons aggrieved”) (RSA 677:4 & 15)
 - Abutters have automatic standing
 - Err on allowing testimony when standing is suspect
 - but due weight should be given to its relevance



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Hearing Procedures

- Rebuttal
 - Applicant
 - Abutters (optional)
- Final questions from Board to Applicant
 - Avoid negotiations; but can explore conditions of approval
- Prior to closing the hearing:
 - Confirm all Board’s questions have been answered
 - Confirm Board has sufficient information to make a decision



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Deliberation

- RSA 91-A:2-a, I:
 - “public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III”
- Evaluating and weighing evidence and testimony
- Expert testimony
- Personal knowledge



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Deliberation

- Evaluating the applicable regulations/criteria
 - Variances: consider voting on each criteria separately
- Reopening the hearing
 - This should be a last resort
 - All parties will need to be given an opportunity to speak
 - May need to continue the hearing and renotice if anyone has left
- Draft motions
 - Can be prepared in advance or assigned to a member or staff



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Making a Decision

- The Board must issue a written decision that clearly explains the basis for the decision (RSA 676:3)
 - Should include findings of fact and conclusions of law



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Making a Decision

- Zoning Board:
 - approval requires majority vote of the 5-member Board (RSA 674:33)
 - even if less than a quorum is present
 - (i.e. 3 votes needed even if only 3 members present)
 - If less than a full board is present, deliberation may need to be continued until a full board is present
- Planning Board:
 - a simple majority of members present is needed to pass a motion



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Land Use Board Meeting Mechanics

From start to finish, a land use board's review of an application should be legal, fair, and effective.

I. Introduction

A. Planning Boards and Zoning Boards act as *quasi-judicial* bodies when reviewing land use and land development applications.

➤ Remember: Any quasi-judicial decision of a land use board can be appealed to court. (RSA 677:4 & 15)

B. Review procedures are established by statute (RSA 676:4 & 676:7) and by the board's rules (RSA 676:1).

The statutory and locally enacted rules of procedures must be followed in order effectuate the overall goal of the land use board review process, i.e.:

1. Ensure **legality** of the proceedings and of the outcome.

2. Ensure **fundamental fairness**.

a. In reviewing an application, the Board must provide *procedural due process* to all parties to protect the applicant and other interested parties against unfair loss of a property right.

b. Procedural due process means providing:

i. Notice of the hearing. (RSA 676:4, I & 676:7)

ii. An opportunity to be heard by an impartial board at a public meeting. (RSA 676:7, 673:14, 674:33, and 91-A).

iii. A decision in writing explaining the basis of the board's decision. (RSA 676:3)

3. Ensure **effectiveness** and efficiency by:

a. Avoiding procedural mistakes resulting in appealable issues.

b. Helping to create a complete and understandable record of the proceedings in case of an appeal.

c. Instilling public confidence in the overall process and the decision itself.

II. Pre-Meeting Administration

A. Application submission requirements should be clear and accessible. Boards should provide application forms, instructions, and submission checklists.

- d. Explain role of alternates.
 - e. If less than a full member board is present, offer applicants the option of postponing the hearing.
-
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IV. Hearing Procedures

A. General notes:

- 1. Role of Chair.
 - a. Directs and manages the proceedings, in accordance with the statute and the Board's rules.
 - b. Maintains order, control, and decorum of the meeting at all times.
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- 2. Testimony will often stray from legal relevance. The Chair should provide leeway and show patience, but should use good judgment in redirecting testimony as needed.
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- 3. Role of Staff.

- a. Serves as impartial resource to provide helpful information and analysis.
 - b. Advocacy only appropriate in the context of an administrative appeal.
 - c. Prepares staff memo for the Board which should be delivered to the Board (with a cc to the applicant), together with the application materials, well in advance of the meeting.
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B. The Chair should:

- 1. Read aloud the hearing notice and state for the record how notice was provided.
 - 2. If needed, appoint alternates (if appointing alternates on a per-hearing basis).
-
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- 3. Ask the members if there are any recusals. (RSA 673:14)
 - a. Applicants have a right to be heard by an impartial tribunal.
 - b. It is the member's decision whether or not to recuse themselves (although prejudgment/bias and direct abutter status are automatic disqualifiers).
 - c. Member can request a non-binding advisory vote from the Board.
 - d. If a member recuses themselves, they should step down from the table and sit in the audience.
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- 4. Clarify who the voting members are, if necessary.
 - 5. Open the hearing and ask the applicant to come forward.
-
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C. Applicant's presentation.

V. Deliberation

A. Must be conducted in public pursuant to NH RSA 91-A (“right to know” law).

B. In making a decision, Board members should:

1. Evaluate all testimony/evidence presented, as well as all materials included in the application.
 2. Give due weight to relevant testimony given by: abutters, other interested parties, & competing expert testimony.
 3. Weigh hearsay evidence by considering the source and credibility of the testimony.
 4. Base a decision on relevant testimony only, no matter how passionately irrelevant testimony is made.
 5. Make a determination on the criteria only.
 6. Note: Personal knowledge may be used, but not normally to counterbalance relevant expert testimony.
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C. All criteria for granting an approval should be discussed as thoroughly as possible.

- *Practice point:* For variance applications or other requests for relief where there a number of conditions to be met, Board should vote on each individual criteria.
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D. Reopening the hearing (only if absolutely necessary).

1. Will have to provide all parties an opportunity to speak.
 2. May need to re-notice if anyone in the audience has already left.
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E. Draft motions:

1. Chair may direct a Board member and/or staff to prepare a draft motion; deliberation would then be continued to the following meeting.
 2. Draft motions may also be prepared prior to the hearing by staff, a Board member or legal counsel.
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VI. Decision

A. The Board must issue a written decision that clearly explains the basis for the decision. (RSA 676:3)

- *Practice point:* The decision should include findings of fact and conclusions of law.
-
-

B. Zoning Board: to pass, a motion requires approval by a majority vote of the 5-member Board, even if less than a quorum is present (i.e. 3 votes needed even if only 3 members present). (RSA 674:33, III)

- *Practice point:* If less than a full board is present, and no motion has been approved with at least 3 votes, deliberation may need to be continued until a full board is present.
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C. Planning Board: a simple majority of members present is needed to pass a motion.



NHMA'S MISSION

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