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
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Today's Roadmap

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

PART I
Finding the Law

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/

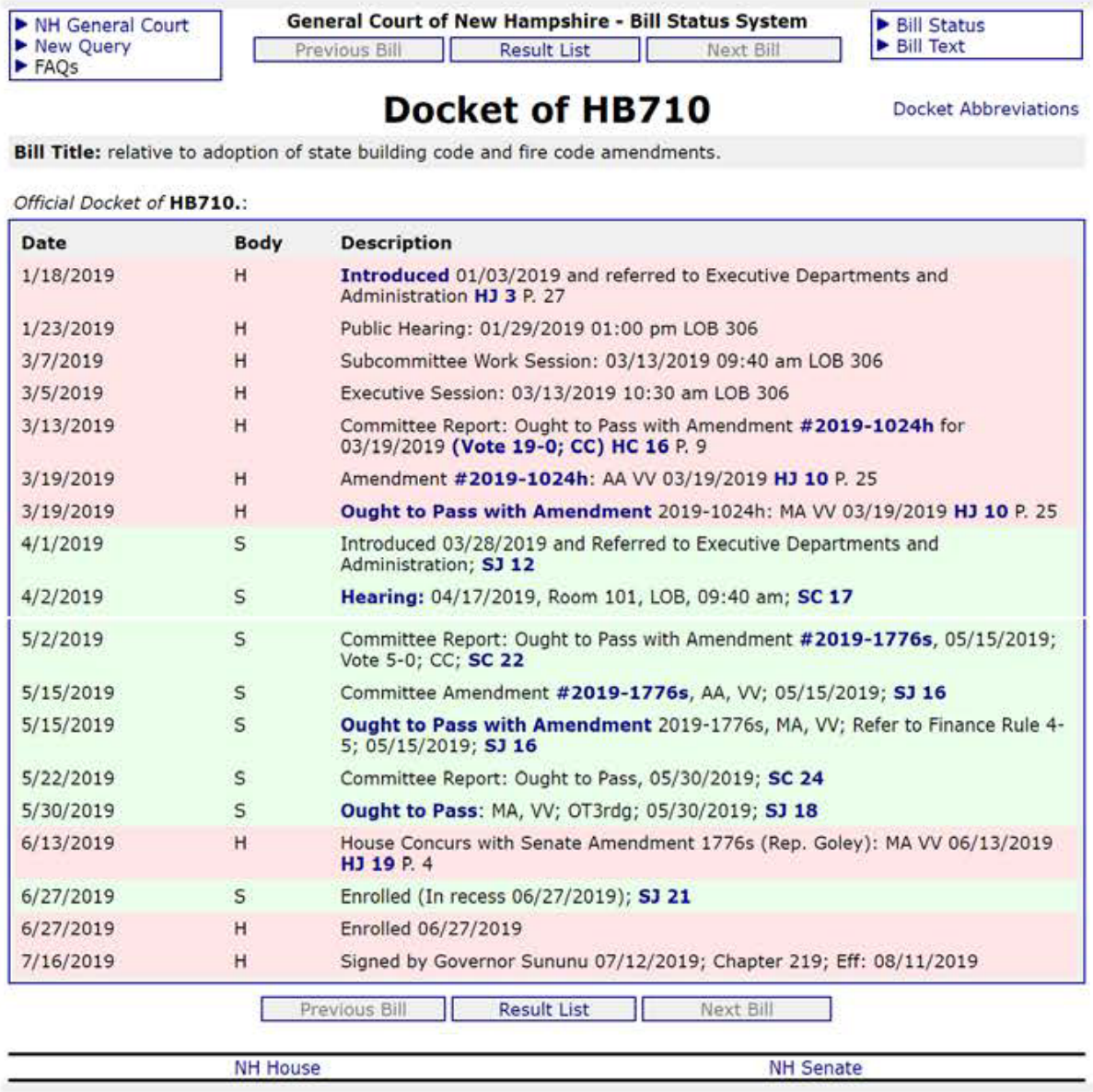
Join Plan-link Nation! Confer with over 700 of your best friends

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

NH Municipal Association Legislative Bulletins

- www.nhmunicipal.org

Legislative Tracking



▶ NH General Court
▶ New Query
▶ FAQs

General Court of New Hampshire - Bill Status System

Previous Bill | Result List | Next Bill

▶ 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; OT3rdg; 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

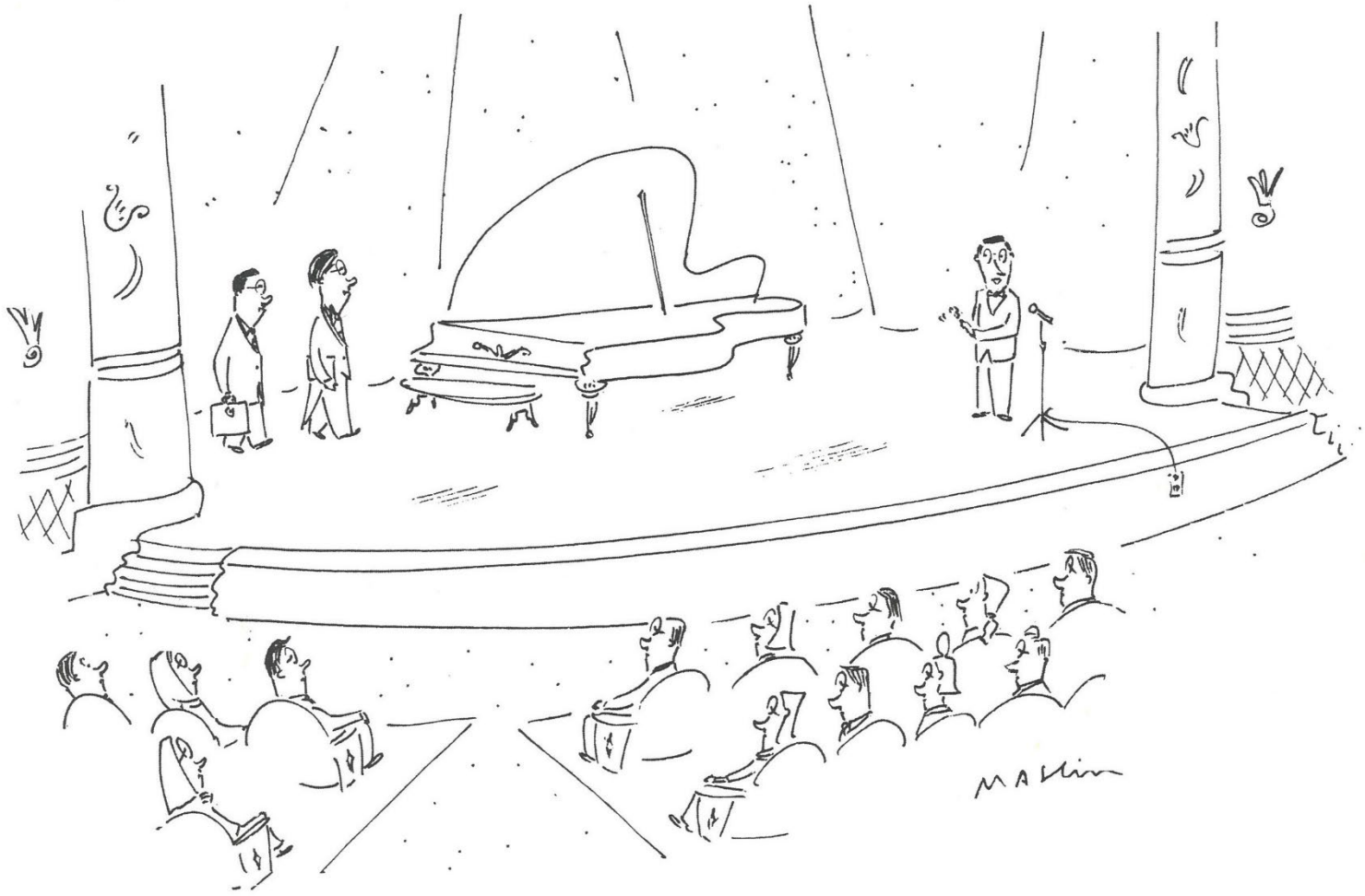
Previous Bill | Result List | Next Bill

NH House | NH Senate

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…"



"Won't you please welcome Edwin Nells – accompanied, as always, by his attorney."

PART II
NH Statutory Changes

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

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!

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

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?

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).


Best of the Zombies!
Variances and Special Exceptions

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

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.***

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

Gould Hill Farm, Hopkinton

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!

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

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.”

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

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

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.

Woman's tiny house hits roadblock in Hampton Falls

By Max Sullivan
Seacoast Online, May 2, 2019

HAMPTON FALLS -- Brianna O'Brien wanted to stay in the Seacoast where she grew up, and a tiny house on wheels, parked in her parents' back yard, seemed the most practical option.

While the 128-square-foot house is affordable and mobile, O'Brien got a notice from the town in March saying her new tiny house did not meet zoning requirements. Her new home was technically a trailer, she learned from the building inspector, not permitted for occupancy. ….

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)
- Final report due 11/1/19

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
- Interim report due 11/1/19; final report due 11/1/20

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

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

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

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

Agriculture Definition
2019 HB 663 (Ch. 338)

- 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***"
- Effective 9/5/19

Housing Appeals Board (cont'd)
2019 SB 306 (Enacted in HB 4, Ch. 346)

- 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

Housing Appeals Board (cont'd)
2019 SB 306 (Enacted in HB 4, Ch. 346)

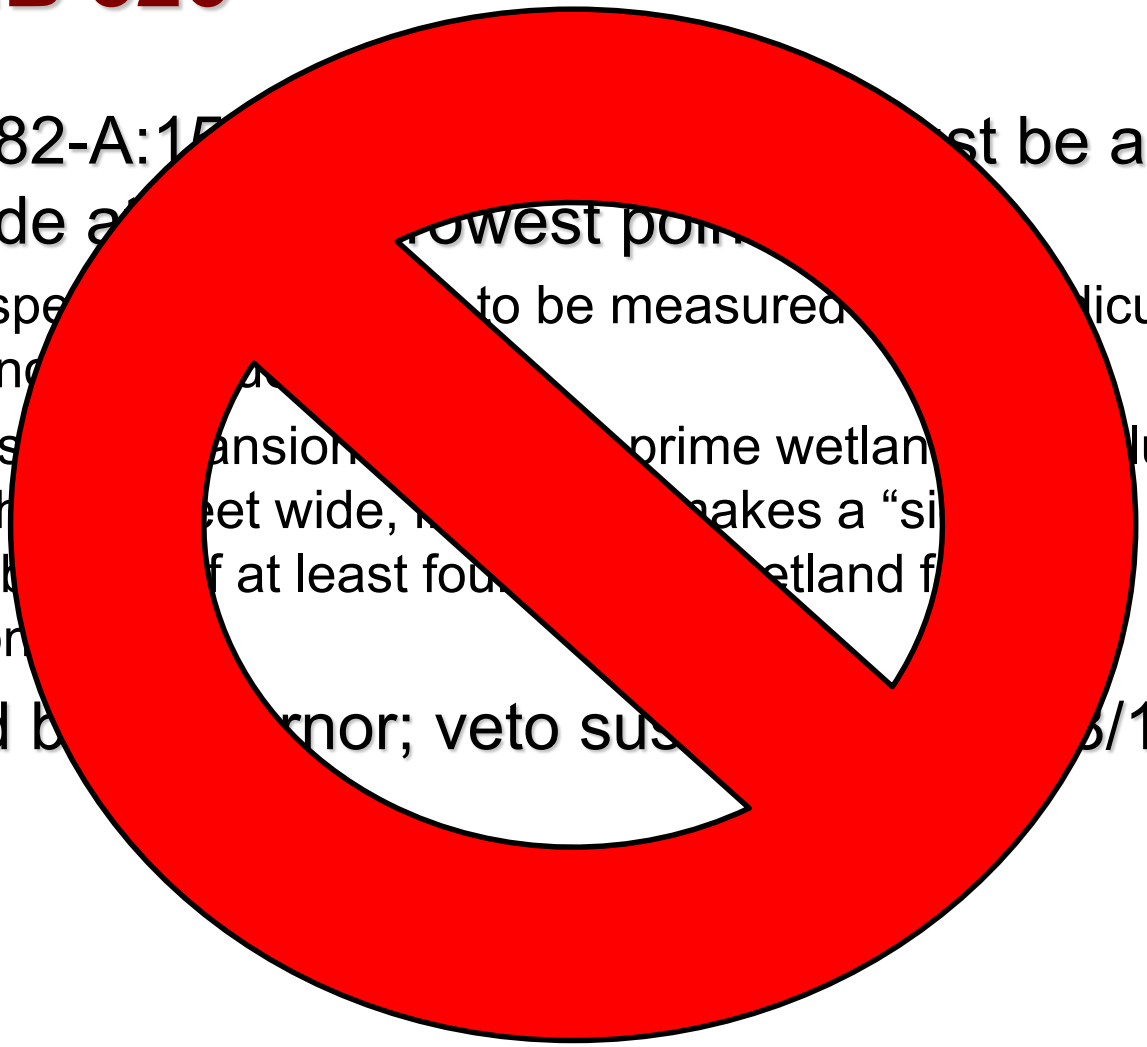
- Board powers
  - Same as superior court – does not have the power to override local zoning
  - Not bound by the rules of evidence – easier for everyone
  - Hear appeals of local decisions; affirm, reverse, modify (not remand)
  - Builder's remedy available
- Appeals can be brought by anyone with standing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

Housing Appeals Board (cont'd)
2019 SB 306 (Enacted in HB 4, Ch. 346)

- 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
- Effective 7/1/2019

Prime Wetlands Definition
2019 HB 326

- RSA 482-A:1[illegible]st be at least 50 feet wide a[illegible]owest poi[illegible]
  - This spe[illegible] to be measured [illegible]licular to the wetlan[illegible]
  - Allows [illegible]ansion [illegible]prime wetlan[illegible]lude areas less th[illegible]eet wide, [illegible]akes a "si[illegible] contrib[illegible]f at least fou[illegible]etland f[illegible] can be demon[illegible]
- Vetoed b[illegible]rnor; veto sus[illegible]3/19



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"

PART III
NH Supreme Court Decisions

- 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.

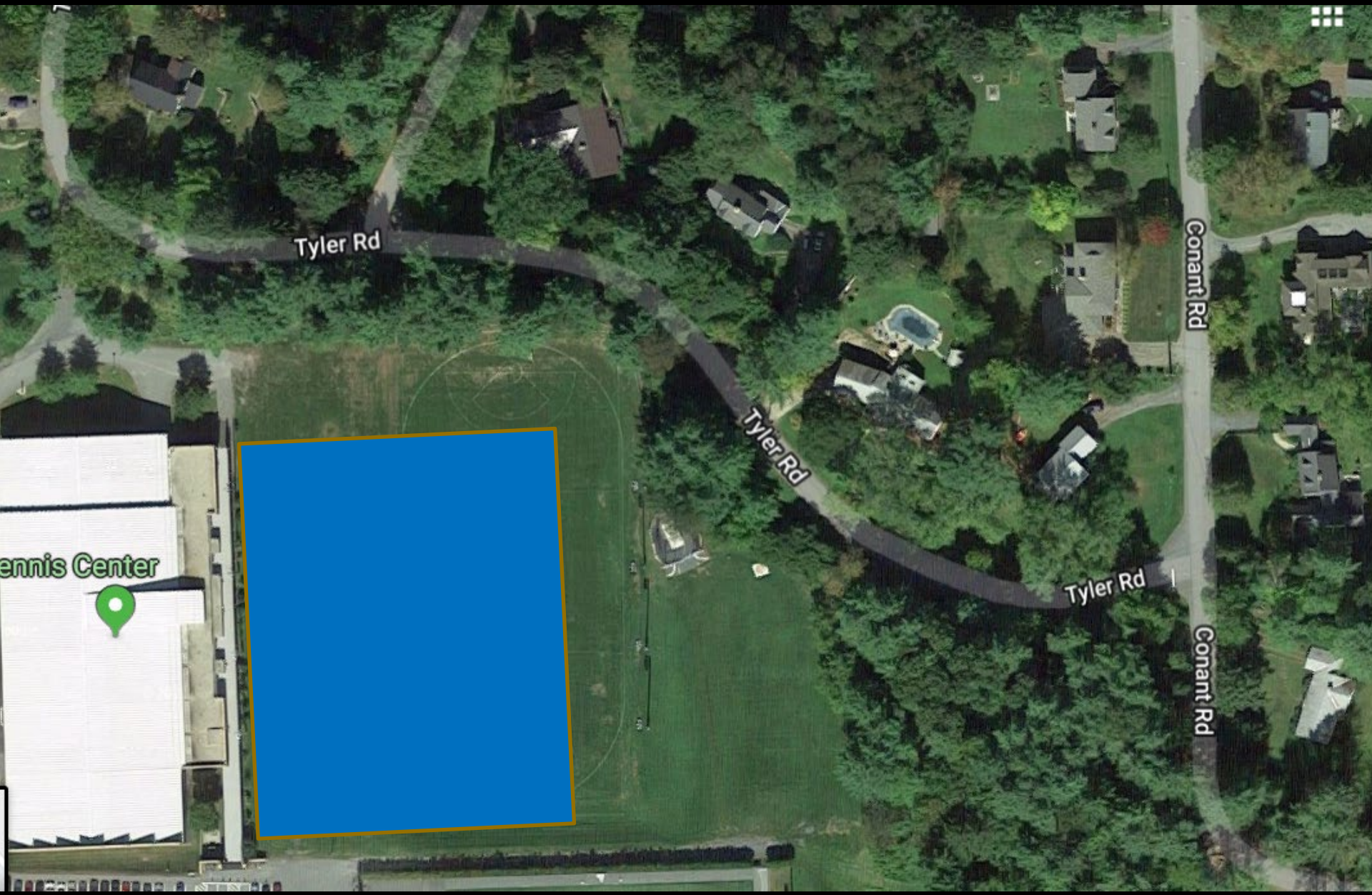
Planning Board Approvals

- ***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

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


DARTMOUTH
DARTMOUTH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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

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

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."

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.

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)

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

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

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

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

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

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."

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.

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?

What do you think?

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

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

Planning Board Approvals

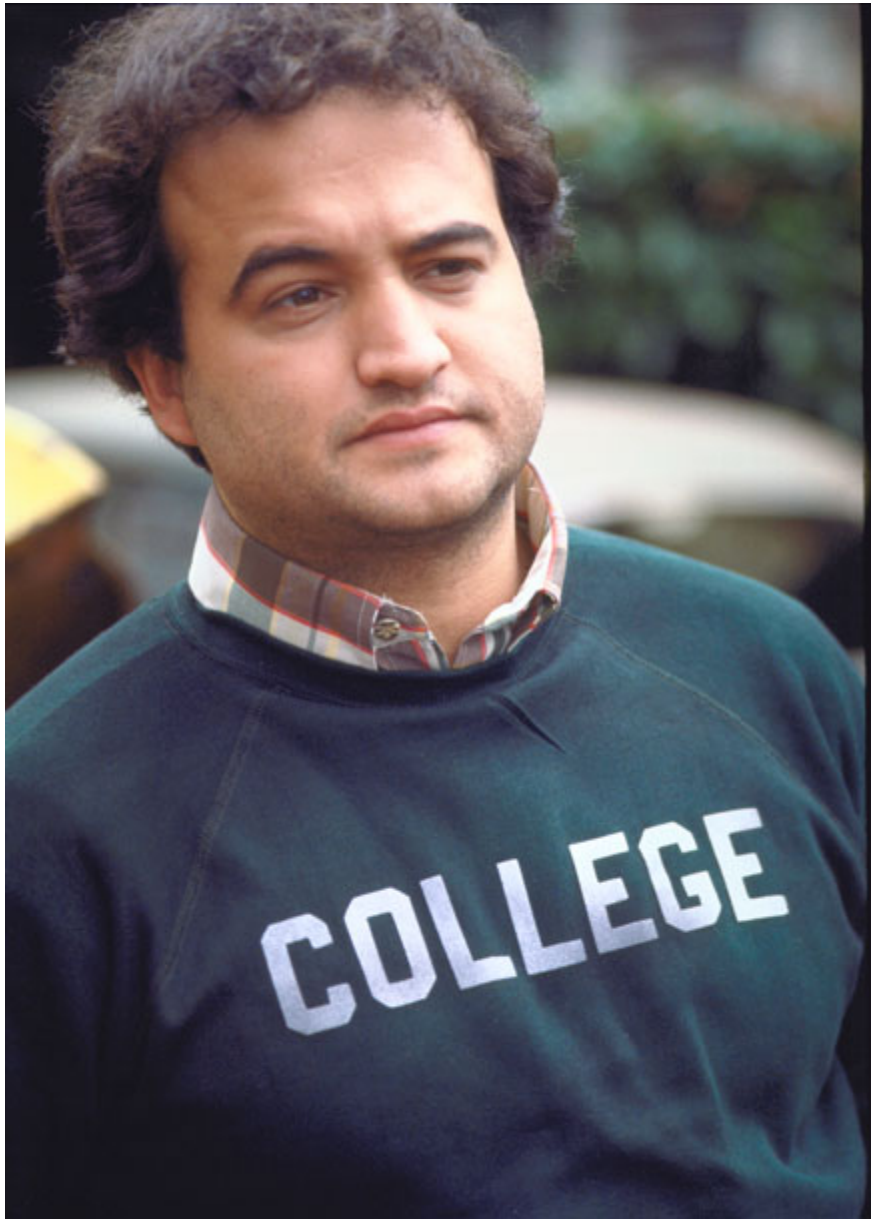
- ***Girard v. Town of Plymouth (2019)***
  - **Regulation**: the board "may impose requirements upon the subdivider in order to preserve and protect existing features, trees, scenic points, views, brooks, streams, rock out-croppings, water bodies, stone walls, boundary markers, other natural resources 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."

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

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!



Animal House, Revisited

See *Dartmouth Corp. of Alpha Delta v. Hanover,* 169 N.H. 743 (2017)

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"

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

Appeal to the Supreme Court

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?

Banned fraternity case back to Hanover ZBA

By Damien Fisher
Union Leader Correspondent

HANOVER — After more than three years since it was first banned by Dartmouth College, and after a year since it lost its national charter, the Sigma Alpha Epsilon fraternity is due back before the Hanover Zoning Board of Adjustment over whether it can still use its frat house.

Hanover said the fraternity was in violation of town zoning by housing students in the fraternity house on College Road. Sigma Alpha Epsilon took the town to court. The case ended with a New Hampshire Supreme Court ruling in March that sent the case back to the town.

Hanover moved against the fraternity, citing the town ordinance against housing students in the building, which falls in the town's "institution" district. Residential housing is only allowed in the institution district with special permission, which the fraternity did not have.

The fraternity had been allowed to house students in the building as long as the fraternity was recognized by the college, according to the court filing. When that recognition was taken away in 2016, the town threatened to impose daily fines as long as students continued to live on the premises.

The court found that the town was correct on nearly every point in dealing with Sigma Alpha Epsilon, except in deciding whether it counts as its own institution.

Hanover's ZBA is now scheduled to meet next week for a rehearing on whether the fraternity counts as an institution separate from the college. If it does, Sigma Alpha Epsilon could be allowed to house students in the building.

Equitable Waivers

- ***Dietz v. Tuftonboro* (2019)**
  - Sawyer Point Realty owns a house on Lake Winnipesaukee
    - 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 that previously thought
  - Equitable waivers sought for 1999 and 2008 additions
    - Both granted by ZBA

Equitable Waivers

- ***Dietz v. Tuftonboro* (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

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."

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*

Equitable Waivers

- ***Dietz v. Tuftonboro* (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

Equitable Waivers

- ***Dietz v. Tuftonboro* (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

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

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!

Variances

- ***Perreault v. New Hampton (2018)***
  - 0.3-acre lot on Lake Waukewan; 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."

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?)

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?

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

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"

Zoning and Short-Term Rentals

“Lilac House,” Portsmouth

Administrative Appeals

- ***Working Stiff Partners, LLC v. Portsmouth (2019)***
  - Single-family dwelling used for short-term rentals (e.g., AirBnB)
    - Up to 9 guests, daily pay schedule, “suitable for family parties, wedding parties, and corporate stays”
    - Owners reside in house on adjacent property
    - No one uses the premises as a primary residence
  - Complaints registered with City – not about noise or nuisance, just that the use wasn’t permitted
  - City issues Cease & Desist; appealed to ZBA
  - ZBA – ultimately upholds staff interpretation that short-term rentals are not a permitted use in the zone
  - Trial court affirms ZBA

Administrative Appeals

- ***Working Stiff Partners (cont'd)***
  - Plaintiff argues that use of the property for short-term rentals fits within the City's definition of dwelling unit
  - Supreme Court reviews the structure of the ordinance
    - "Permissive zoning" – allowed uses must be "expressly permitted, or incidental to uses so permitted."
    - District: General Residence A
      - Permitted: "single-family, two-family, and multi-family dwellings, with appropriate accessory uses"; density up to 12 units/acre; B&B up to 5 guests by special exception

Administrative Appeals

- ***Working Stiff Partners (cont'd)***
  - Supreme Court reviews the structure of the ordinance
    - Zoning ordinance definitions
      - Dwelling unit: independent living facility – living, sleeping, eating, cooking, sanitation; shall not be deemed to include such transient occupancies as hotels, motels, rooming or boarding houses."
        - "Transient" and "transient occupancy" not defined
          - Dictionaries: "transient" means "brief stay"
      - "Hotel" and "motel" – daily rates; "boarding house" – room rental, no separate kitchen or bathroom
    - Principle of "ejusdem generis" – *of the same kind;* a general class accompanied by an illustrative list; the class is limited to things that are similar to those included in the list

Administrative Appeals

- ***Working Stiff Partners (cont'd)***
  - Supreme Court reviews the structure of the ordinance
    - Plaintiff argues that a dwelling unit becomes a "transient occupancy" only when the internal layout is such that access to independent living facilities is limited
    - Court: consider the definition as a whole – hotel, motel, rooming and boarding houses: "…the unifying feature that these 'occupancies' share is the provision of short-term lodging accommodations to paying guest for as little as one day."
    - Court: zoning district purpose is for dwelling units; plaintiff's use is not for that purpose

Administrative Appeals

- ***Working Stiff Partners (cont'd)***
  - Plaintiff also argues that the ordinance is unconstitutionally vague
    - Tests:
      1. Does it fail to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits? or
      2. Does it authorize or encourage arbitrary and discriminatory enforcement?
    - Court: perfect clarity and precise guidelines are not required
      - Here: sufficiently clear to provide the plaintiff with a reasonable opportunity to understand that its use was not permitted
  - Result: ZBA's (and trial court's) decision affirmed on all counts

Administrative Appeals

- ***Working Stiff Partners – Case Take-Aways***
  - Does this mean that municipalities can regulate short-term rentals?
    - Yes, sort of: this is a case about interpretation of the words in an ordinance, not about the question of regulating short-term rentals
    - So if your zoning language is identical to Portsmouth's…
  - **Court's Footnote:** "We note, as did the trial court, that this case does not present us with the occasion to address whether short-term rentals are allowed under the ordinance as an accessory use to a permitted principal use. … Nor does this case involve an application for a variance."

PART IV
Federal Issues

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)

Examples of Small Cell Installations







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

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

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)


Questions?