THE STATE OF NEW HAMPSHIRE

CARROLL, SS. **SUPERIOR COURT**

Christopher Andrews and Kelly Andrews

v.

Kearsarge Lighting Precinct

Docket No.: 212-2018-CV-00049

ORDER

On April 16, 2018, the plaintiffs, Christopher Andrews and Kelly Andrews, appealed a decision of the Kearsarge Lighting Precinct Zoning Board of Adjustment (the "ZBA") pursuant to RSA 677:4. (Court index ##1, 7, Ex. A (requesting an award of attorney's fees).) On June 5, 2018, the court granted a motion to consolidate the plaintiffs' appeal with a similar appeal in docket number 212-2018-CV-00033 (the "Gleason Appeal"). (Gleason court index #10.)[1] On January 4, 2020, the court dismissed the Gleason Appeal as moot after the plaintiff in that case sold the property at issue. (Gleason court index #60.) The court must now decide the merits of the plaintiffs' appeal.[2] The court held a hearing on the appeal on April 27, 2021. Both the plaintiffs and the Kearsarge Lighting Precinct (the "KLP") filed hearing memoranda in support of their positions. (Court index ##12–15.) For the following reasons, the court AFFIRMS the ZBA and DENIES the plaintiffs' request for attorney's fees.

[1] To avoid confusion between the dockets, the court will cite to documents in docket number 212-2018-CV-00033 as "Gleason court index #[x]."

[2] In addition to their statutory appeal pursuant to RSA 677:4, the plaintiffs brought a number of other claims in their amended complaint. (See court index #7, Ex. A.) The court dismissed those other claims on November 27, 2019. (Court index #32; see also Footnote 6, infra.)

Background[3]

The KLP is a village precinct within the towns of Conway and Bartlett that the New Hampshire General Court established in 1957. (See Certified Record ("CR") 77–84.) The plaintiffs' primary residence is in Melrose, Massachusetts. (Id. at 1.) The plaintiffs own two properties in the KLP, which they purchased in 2011 and 2013 respectively. (Id. at 67.) The plaintiffs use their properties for short-term vacation rentals. (Id.) The plaintiffs placed a dumpster on each of the properties before June 2015. (Id.)

On September 19, 2017, the KLP Board of Commissioners (the "BOC") held a public hearing on "vacation property rentals" and dumpster violations. (Id. at 87–88.) From the minutes, it appears that the meeting was particularly focused on four properties in the KLP, including the plaintiffs' two properties, the property of Stephen Gleason, the plaintiff in the Gleason Appeal, and another property owner. (Id.) All of these individuals used their properties for short-term vacation rentals. (Id.) It is uncontested that these individuals were not full-time residents of either the KLP or New Hampshire. In addition, the parties do not contest that, prior to the meeting, members of the public, including the son of ZBA Member Ted Wroblewski, had complained about these properties due to the behavior of their guests. At the BOC's meeting, at least one member of the public commented that local property owners in the KLP did not benefit from vacation rentals. (Id. at 87.) Several members of the public also noted the properties at

[3] The court draws the following facts from the certified record and documents attached to the plaintiffs' motion to expand the record. (See Pls.' Mot. Expand Record.) The court cites to the documents the plaintiffs produced through discovery in this action as "KLP [page number]." These documents are attached to the plaintiffs' motion to expand the record. (See Pls.' Mot. Expand Record.) The record includes copies of transcripts from the ZBA hearings related to both the plaintiffs' appeal and the Gleason Appeal. The plaintiffs also filed the transcripts for four public hearings before the ZBA, including: (1) the transcript for the ZBA's first hearing on Gleason's administrative appeal on December 20, 2017 ("ZBA's Hr'g Tr. 1"); (2) the transcript for the ZBA's second hearing on Gleason's administrative appeal on January 3, 2018 ("ZBA Hr'g Tr. 2"); the ZBA's first hearing on the plaintiffs' administrative appeal on February 8, 2018 ("ZBA Hr'g Tr. 3"); and the ZBA's second hearing on the plaintiffs' administrative appeal on February 14, 2018 ("ZBA Hr'g Tr. 4").

issue violated the KLP Zoning Ordinance ("ZO")'s provisions related to guests (the "Guest Provision"). (Id. at 87–88; see also CR 81 ("All residential properties that offer sleeping accommodations to transient or permanent guests shall be owner occupied and operated.").) ZBA Member Karnopp participated in this meeting as a member of the public, and asked: "Since these rentals have not been enforced in the past does it make it not enforceable?" (Id. at 88). The KLP's counsel, Attorney Malia, responded by saying that the BOC could enforce the Guest Provision. (Id.)

With respect to the plaintiffs' dumpsters, one member of the public noted that the dumpsters were "offensive" and violated a ZO provision related to dumpsters that the KLP enacted in 2017 (the "Dumpster Provision"). (Id. at 87; see also id. at 81 ("Dumpsters must meet setback requirements and be enclosed on all sides by a privacy or stockade fence that equals or exceeds the height of the dumpster."); id. at 152–54 (minutes form March 23, 2017 BOC meeting during which the BOC enacted the Dumpster Provision).) At the close of the public meeting, the BOC unanimously voted to have Attorney Malia draft notices of violations for the four properties to "address the short-term rental violation, as well as the dumpster violation . . . ." (Id. at 88.)

The BOC addressed these issues again at a public meeting on October 17, 2017. (Id. at 90–94.) At the outset of the meeting, Commissioner Lyman noted that the BOC was only considering four properties, including the plaintiffs' properties. (Id. at 90.) After this clarification, members of the public noted that vacation rentals were an issue nationwide because they increased rents for local residents, reduced housing supplies, and decreased the values of other residential properties. (Id. at 90.) The BOC then presented the draft letters Attorney Malia had prepared regarding vacation rentals and dumpsters at the four properties. (Id.) After the

BOC distributed the drafts, Meredith Wroblewski, who was the clerk of the BOC, and a member of the public discussed how the BOC should respond if the individual owners questioned "why others did not receive letters." (Id. at 91.) The meeting participants also discussed possible methods of restricting short-term rentals, and Commissioners Lyman and DiFiore stated that short-term residential rentals were "hurting all the inns." (Id. at 92.)

In addition, Commissioner DiFiore and ZBA Member Lee, who was participating as a member of the public, discussed the potential involvement of the ZBA if the property owners appealed the BOC citations against them. (Id. at 93.) ZBA Member Lee noted that the ZBA should "be well prepared and informed about the issues" and stated that "public comments [would be] taken before [the ZBA] vote[d]." (Id.) Commissioner Lyman recommended that the ZBA have its lawyer present during any appeal of the citations once issued. (Id.) After these discussions, the BOC unanimously voted to send the notices of violation to the plaintiffs and other property owners. (Id. at 94.)

On October 27, 2017, the BOC sent four notices of violations to the plaintiffs, two for each of the properties. (Id. at 1–4.) Two of the notices stated the plaintiffs violated the Guest Provision at each property because: "House is being offered for sleeping accommodation to transient guests without being owner occupied and operated." (Id. at 1, 3.) The next two letters addressed the dumpsters at each of the properties, stating: "Dumpsters must meet setback requirements and be enclosed on all sides by a privacy or stockade fence that equals or exceeds the height of the dumpster." (CR 2, 4.) The BOC also sent citations to the owners of the two other properties at issue—including Stephen Gleason. (See, e.g., Pl.'s Hr'g Tr. 1.)

At some point prior to November 22, 2017, Stephen Gleason filed an administrative appeal of the BOC's decision to the ZBA. (See KLP 2.)[4] On November 22, 2017, ZBA Member Karnopp emailed the other ZBA members about Gleason's administrative appeal. (Id.) In that email, he noted that: "we are being asked to overturn the commissioner[s'] decision . . . . It has nothing to do with whether we like, or dislike, the commissioners[']decision, but rather was their decision appropriate for the KLP." (Id.) He further noted that, "[f]rom what [he saw, the ZBA] should secure a lawyer to help [it] understand the legal rights the KLP ha[d] for what it is enforcing out of [the ZO], and a property owner['s] rights." (Id.) Member Karnopp observed that Attorney Cronin—who served as Gleason's counsel, and continues to serve as the plaintiffs' counsel in this case—"ha[d raised] quite a few points [and] it would be wise for [the ZBA members] to get an understanding on what [they] w[ould] be up against." (Id.)

After receiving this email, Member Wroblewsi emailed Member Karnopp that "[o]ver the holiday weekend, we had some lively conversations about the current challenges facing the KL[P,]" and that his "son in law . . . [was] a lawyer in Brooklyn and participated [and] offer[ed] his perspective." (KLP 3.) He further noted that his son Colin, one of the original complainants against the four properties, "was involved in these discussions." (Id.) Member Wroblewski relayed that he asked his son if he would consider being Member Wroblewski's alternate for the hearing, and recommended that Member Karnopp reach out to Colin to further discuss that proposal. (Id.)[5]

[4] The plaintiffs maintain that the court must consider the record in the Gleason Appeal, which included substantially similar factual and legal issues, in order to fairly adjudicate the plaintiffs' appeal in this case. (See Pls.' Hr'g Mem. 4–5.) The KLP objects to this request, arguing that it would be improper for the court to consider the record in the Gleason Appeal because the court dismissed that appeal and the plaintiffs cannot raise arguments on Gleason's behalf. (See KLP's Reply Mem. 4.) After reviewing the parties' arguments and the records in the consolidated dockets, the court will not independently review the certified record in the Gleason Appeal. However, the court will consider facts from the other appeal in this section to the extent the plaintiffs cite to these facts in their memoranda and they are supported by the expanded record in this case.

[5] Colin Wroblewski did not participate as an alternate member.

The ZBA heard the Gleason's administrative appeal on December 20, 2017. (See ZBA Hr'g Tr. 1.) The ZBA retained outside counsel—Attorney Waugh—to attend the hearing and assist them with some of the legal issues Gleason had raised. (See KLP 10.) At the hearing, Attorney Cronin represented Gleason and made several arguments in favor of overturning the BOC's decision, including that the BOC was precluded from enforcing the Guest Provision against Gleason under the doctrines of administrative gloss and selective enforcement. (See generally ZBA Hr'g Tr. 1.) In their pleadings in the instant appeal, the plaintiffs highlight two issues that the participants discussed at this hearing. The first was whether the Guest Provision was ambiguous. Attorney Cronin argued that the Guest Provision was ambiguous because it could be interpreted in different ways, particularly as the ZO did not define the terms "owner occupied" and "guest." (Id. at 8:6–14.) With respect to this argument, ZBA Member Karnopp stated that he believed the Guest Provision precluded all rentals of residential properties, both short- and long-term, unless the property was owner occupied. (Id. at 57:10–58:13.)

The second issue related to whether the BOC had historically enforced the Guest Provision. Attorney Cronin testified that other property owners in the KLP told him that, prior to purchasing their properties, realtors informed them that the properties were capable of generating rental income. (Id. at 15:19–22.) Attorney Cronin further testified that Dan Jones, a local realtor, informed him that many properties in the KLP would lose value if owners were precluded from using them for vacation rentals. (Id. at 16:14–17.) Finally, Dan Jones himself testified that, in his forty-three years of experience as a realtor, he had never heard that owners could not rent out their properties in the KLP. (See id. at 29:21–30–12.)

After listening to Attorney Cronin's presentation and public comments, the ZBA voted to continue the hearing to a later date to hold deliberations and vote on the appeal. (Id. at 68:15–

72:15) In between the two hearings, Attorney Waugh wrote a draft notice of decision denying Gleason's appeal, with the assistance of ZBA Member Lee. (See ZBA Hr'g Tr. 2 at 4:1–16.) The ZBA held the continued public hearing on Gleason's administrative appeal on January 3, 2018. (See ZBA Hr'g Tr. 2.) At the continued public hearing, ZBA Member Lee distributed the draft decision, and Attorney Waugh advised the ZBA members to review the draft decision, determine if they agreed with its findings, ask questions or request changes, and, if in agreement, express their support for the findings on the record. (Id. at 4:1–5:1.) ZBA Member Lee then discussed the findings and conclusions within the draft decision. (See id. at 7:23–16:10.) After this discussion, Member Lee moved to deny Gleason's appeal for the reasons contained in the draft decision. (Id. at 28:5–28:10.) In considering the motion, the ZBA members each expressed that they agreed with the findings and conclusions within the draft decision. (See id. at 28:2–29:29.) They then voted to deny Gleason's administrative appeal. (Id. at 29:16–23.)

On December 13, 2017, while Gleason's administrative appeal was pending before the ZBA, the plaintiffs filed an administrative appeal of the BOC's citations related to the Guest Provision and the Dumpster Provision to the ZBA. (CR 5–27.) On February 8, 2018, the ZBA held a public hearing on the plaintiffs' administrative appeal. (Id. at 63–66; see also ZBA Hr'g Tr. 3.) Attorney Cronin represented the plaintiffs at the hearing. (CR 63–66.) He first addressed the Guest Provision. (Id.) At the outset, he submitted a statement of facts, (CR 67–68), and "referenced his previous arguments from the Gleason hearing" about the doctrines of administrative gloss and selective enforcement. (CR 64.) In support of both arguments, Attorney Cronin presented evidence that many property owners in the KLP used their properties for short-term vacation rentals. (See CR 98 (a printout showing properties in the KLP listed on a short-term vacation rental service); CR 100–109 (a list of all property owners in the KLP that

paid New Hampshire rooms and meals taxes); ZBA Hr'g Tr. 3 at 11:12–14 (Attorney Cronin testifying that several properties in the KLP have rental offices).)

Attorney Cronin also presented evidence that the BOC knew about these violations, but had not enforced the Guest Provision against the other owners. (See ZBA Hr'g Tr. 3 at 25:17–20 (Attorney Cronin arguing that everybody in the KLP had a general understanding that people throughout the community were using their properties for rentals); id. at 25:11–16 (Attorney Cronin stating that Commissioner Lyman must have known about the other violations because she operated an oil business that delivered to short-term rental properties).) In order to further support this point, Attorney Cronin noted that, after the ZBA rejected Gleason's administrative appeal, the plaintiffs had filed complaints to the BOC against other individuals who were using their properties in violation of the Guest Provision. (Id. at 9:18–10:1.) Attorney Cronin represented that the BOC had not, at the time of the February 8, 2018 hearing, enforced the Guest Provision against the other individuals. (Id. at 10:1–5.)

In addition to his arguments about the lack of enforcement, Attorney Cronin maintained that the BOC could not apply the Guest Provision to the plaintiffs' properties under the doctrines of prior nonconforming uses, waiver, and estoppel. (CR 64.) With respect to the dumpsters, Attorney Cronin noted that the Dumpster Provision did not exist prior to 2017. (Id.) For this reason, he maintained it was inappropriate under the doctrine of prior nonconforming uses for the BOC to apply the Dumpster Provision to the plaintiffs' properties because their dumpsters had existed on the properties since at least 2015. (Id.)

After Attorney Cronin finished his presentation, ZBA Member Karnopp noted that "the ZBA opinion w[ould] likely be similar to the Gleason appeal." (CR 64; see also id. at 66 (Attorney Cronin appearing to agree with this assertion by noting that the issues in the plaintiffs'

administrative appeal "[were] relatively the same issues compared to the Gleason case except for the dumpsters").) With respect to the plaintiffs' dumpsters, ZBA Member Karnopp stated he did not think it was appropriate to exempt them from the Dumpster Provision because: (1) the dumpsters were moveable; and (2) the plaintiffs did not own the dumpsters. (Id. at 65.) For his part, ZBA Member Lee disputed Attorney Cronin's characterizations regarding the administrative enforcement of the Guest Provision. (Id.) In particular, he stated it was inappropriate to assume the BOC knew there were other violations of the Guest Provision and chose not to enforce the provision. (Id.) After this discussion, the ZBA closed the meeting to public comments, and voted to delay deliberations and a final vote until a further meeting. (Id. at 66.)

At a meeting on February 14, 2018, ZBA Member Lee presented a draft decision denying the plaintiffs' appeal. (CR 157.) Member Lee prepared the draft using Attorney Waugh's draft decision in Gleason's administrative appeal as a template. (Id. (Member Lee stating that he did not request that Attorney Waugh review the draft due the "similarity to the draft for the Gleason Appeal").) The minutes and hearing transcripts reflect that ZBA Member Lee read the draft aloud at the public hearing and that the ZBA members discussed the issues within the draft. (Id. at 157–58; ZBA Hr'g Tr. 4 at 7:2–18:22.) With respect to the dumpsters, ZBA Member Karnopp stated that he believed the BOC had not erred in issuing citations for them. (Id. at 157.) While ZBA Member Karnopp noted that the dumpsters were "being used as . . . accessor[ies] to . . . non-permitted use[s]," he also noted that the BOC was not forcing the plaintiffs to remove the dumpsters but only requiring them to comply with the Dumpster Provision. (Id. at 157.) Towards the end of the deliberative session, ZBA Member Libby "stated she [was] concerned that notices were sent to only four properties." (Id. at 158.) ZBA Members Lee and Wroblewski

"responded that this [was] not applicable to the current deliberation and it would need to be brought up with the [BOC]." (Id.) After finishing their deliberations, the ZBA unanimously voted to uphold the BOC's citations against the plaintiffs. (Id.; see also Hr'g Tr. 4 at 20:10–21:4.)

The ZBA subsequently sent a letter explaining the rationale for its decision to the plaintiffs. (Id. at 160–63.) It is uncontested that this letter was the draft decision ZBA Member Lee prepared. With respect to the short-term rental issue, the ZBA noted that the doctrine of non-conforming uses did not shield the properties from the Guest Provision. (Id. at 161.) The ZBA reached this conclusion, in part, on the grounds that, under existing case law, the applicant had the burden of establishing that owners of the property had used it in a manner contrary to the regulation prior to the enactment of the regulation. (Id.) The ZBA found that there was conflicting evidence about how previous owners had used the properties prior to the date the Guest Provision came into effect, and that the plaintiffs had therefore failed to meet their burden on this issue. (Id.)[6]

The ZBA further concluded that the doctrine of administrative gloss was inapplicable to the plaintiffs' appeal because: (1) that doctrine only applied where ordinances were ambiguous; and (2) the Guest Provision was not ambiguous. (Id.) The ZBA stated that the ordinary meaning of the Guest Provision's terms was clear, and required that "a property rented to transient guests [was] to be occupied and operated by the owner." (Id.) According to the ZBA, the purpose of the Guest Provision was to "maintain a quiet peaceful neighborhood made up of residents, not transients[,]" and that it achieved this goal, in part, by requiring "owner[s to remain at the] residence on the property in order to serve as a check on guest behavior which might otherwise

[6] The KLP represented at the April 2021 hearing that the KLP adopted the current Guest Provision in 1986.

be incompatible with the neighborhood." (Id.) Noting that the plaintiffs did not purport to reside at the properties, the ZBA concluded that the BOC correctly applied the Guest Provision to the plaintiffs. (Id.)

In addition, the ZBA concluded that, even if the Guest Provision were ambiguous, the plaintiffs had failed to present any previous instance in which the BOC had interpreted the Guest Provision as inapplicable to short-term vacation rentals. (Id. at 161–62). The ZBA stated that there was no history of enforcement because the BOC had never considered the issue in the past, and further noted that, prior to the instant case, residents had never complained about noncompliance with the Guest Provision. (Id. at 162.) In light of these conclusions, the ZBA found that the plaintiffs had not shown "a policy of nonenforcement" based on a particular interpretation of the Guest Provision. (Id.) As existing case law on the doctrine required individuals to establish such a policy, the ZBA concluded that, even if the Guest Provision was ambiguous, the doctrine of administrative gloss was inapplicable to the plaintiffs' appeal. (Id.)

After addressing these two points regarding enforcement of the Guest Provision, the ZBA stated the plaintiffs "also raise[d] various claims that the restriction [was] beyond the statutory and/or constitutional authority of the" KLP. (Id.) It concluded, however, that the plaintiffs did "not develop [those arguments] at the public hearing, [and failed to cite] any specific legal citations given for such assertions." (Id.) The ZBA appears to have addressed those arguments by noting that "it [was] fairly common for zoning ordinances to distinguish between residential uses on the one hand, and motels, and rooming houses on the other" and that "the Legislature itself [enacted an owner occupancy requirement option in RSA 674:72, VI,] which "suggest[ed] that such requirements can serve valid public purposes." (Id.)

With respect to the Dumpster Provision, the ZBA concluded that: "Dumpster is allowed but needs to meet setback requirements and have privacy fence." (Id.) Further, the ZBA noted that the "[d]umpster would most likely not be required if not in violation of [the Guest Provision]." (Id.)

After receiving the letter, the plaintiffs moved for a rehearing of the ZBA's decision, raising many of the same issues they present in their appeal before this court. (Id. at 175–83.) During a public hearing on March 26, 2017, the ZBA members reviewed the plaintiffs' motion for rehearing. (Id. at 195–200.) The ZBA members concluded that the plaintiffs had failed to raise any new or additional information in their motion and thus voted to deny it. (Id. at 200.) As noted in the introduction, both the plaintiffs and Gleason appealed the ZBA's decisions on their respective administrative appeals to this court.

Analysis

Currently before the court are: (1) the plaintiffs' appeal of the ZBA's decision to uphold the BOC's Guest Provision citation; (2) the plaintiffs' appeal of the ZBA's decision to uphold the BOC's Dumpster Provision citation, and (3) the plaintiffs' request for reasonable attorney's fees. (See generally Am. Compl.; Pls.' Hr'g Mem.; Pls.' Reply Mem.) The court will consider each issue in turn.

I. Guest Provision appeal

The court will first consider the plaintiffs' appeal of the ZBA decision upholding the citations for violating the Guest Provision. The superior court's "review of zoning board decisions is limited." Harborside Assocs., L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 512 (2011). The superior court "must treat all factual findings of the ZBA as prima facie lawful and reasonable, and may not set them aside, absent errors of law, unless it is persuaded by a

balance of the probabilities on the evidence before it that the ZBA decision is unreasonable." Id. "The trial court's review is not to determine whether it agrees with the ZBA's findings, but rather, to determine whether there is evidence in the record upon which they could have been reasonably based." Working Stiffs Partners, LLC v. City of Portsmouth, 172 N.H. 611, 615 (2019). However, the trial court reviews issues of law de novo." Id. "The party seeking to set aside the ZBA's decision bears the burden of proof on appeal to the trial court." Dietz v. Town of Tuftonboro, 171 N.H. 614, 618 (2019). The plaintiffs in this case argue the ZBA made a number of legal and factual errors that require this court to reverse or remand the ZBA's decision. (See generally Am. Compl.; Pls.' Hr'g Mem.; Pls.' Reply Mem.) The court will consider each issue in turn.[7]

a. Procedural due process

The plaintiffs first argue that the ZBA erred because it violated their procedural due process rights. (Am. Compl. ¶¶ 112–14.) The plaintiffs raise their arguments under both the New Hampshire and United States Constitutions. (Id.) The court will first consider their arguments under the New Hampshire Constitution. "Part I, Article 15 of the State Constitution

[7] In addition to their statutory appeal of the ZBA's decision, the plaintiffs initially brought state and federal constitutional claims against the KLP based on the actions of the BOC and the ZBA. (See generally Am. Compl.) The court dismissed those constitutional claims. (See Gleason court index #32.) Within their statutory appeal, however, the plaintiffs argued that the ZBA erred, in part, because its decision violated the plaintiffs' constitutional rights, raising many of the same constitutional issues as in the counts the court dismissed. (See Am. Compl. ¶¶ 110–122.) The court has not previously addressed how it would consider these arguments, and the parties fully briefed them in their hearing memoranda. (See generally Pls' Hr'g Mem.; KLP' Reply Mem.) For these reasons, the court will consider the plaintiffs' constitutional arguments as part of their statutory appeal. In doing so, the court notes that, despite raising them in separate counts, the plaintiffs did not argue the ZBA erred because its decision conflicted with the federal Commerce and Privileges and Immunities Clauses. Therefore, the court will not consider arguments regarding the federal Commerce and Privileges and Immunities Clauses as part of the statutory appeal. Significantly, the court did not dismiss Count IV of the plaintiffs' complaint, which related to waiver and estoppel, and Count VIII, which the court understands to be a challenge to the KLP's statutory authority to enact the Guest Provision. (See Gleason court index #32; Am. Compl.) Nevertheless, the court will address arguments regarding waiver and estoppel and the authority to enact the Guest Provision within the plaintiffs' statutory appeal of the ZBA's decision, rather than as separate counts, because: (1) the only relief the plaintiffs seek in their amended complaint (aside from attorney's fees) is reversal of the ZBA's decision; and (2) both counts relate to whether the ZBA could have lawfully upheld the BOC's decision to issue the Guest Provision citations.

provides, in relevant part: 'No subject shall be deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land[.]" State v. Veale, 158 N.H. 632, 636 (2009) (quoting N.H. Const. pt. 1, art. 15) (ellipses omitted). "Law of the land in this article means due process of law." Veale, 158 N.H. at 636 (quotations omitted). "The ultimate standard for judging a due process claim is the notion of fundamental fairness." Id. at 637 (quotations omitted). "Fundamental fairness requires that government conduct conform to the community's sense of justice, decency, and fair play." Id. (quotations omitted).

The "threshold determination in a procedural due process claim is whether the challenged procedures concern a legally protected interest." Id. (quotations omitted). If the challenged procedures affect a legally protected interest, courts must next consider what process is required to protect that interest. See id. at 639. In doing so, courts balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. (quotations omitted); see also id. ("The requirements of due process are flexible and call for such procedural protections as the particular situations demands." (brackets omitted)). As an initial matter, the court concludes that the plaintiffs have raised a legally protected interest: the right to use their properties. Town of Chesterfield v. Brooks, 126 N.H. 64, 68 (1985). Therefore, the court will consider whether, in restricting that right, the ZBA provided the

plaintiffs sufficient process. The plaintiffs argue that the ZBA failed to do so for several reasons. (See generally Pls.' Hr'g Mem.) The court will consider each in turn.[8]

i. Impartiality of the ZBA members

The plaintiffs first argue that the ZBA failed to provide them with a fair hearing because the ZBA members were not impartial to the plaintiffs' appeal. (Pls.' Hr'g Mem. 13–15.) Pursuant to statute:

> No member of a zoning board of adjustment . . . shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.

RSA 673:14. The prejudgment of the facts of an appeal "constitutes a cause for disqualification from a quasi-judicial function of a board." Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 266 (1984) (quotations and brackets omitted). Moreover, a disqualified members' participation in the deliberative hearing is sufficient to invalidate the body's decision, even if that member was not the deciding vote on the decision. Id. at 268. That said, participants in zoning board meetings must raise potential issues of bias among members "at the earliest possible time" or else they waive their right to raise the issue. Rochester City Council v. Rochester Zoning Bd. Of Adjustment & a., 171 N.H. 271, 280 (2018).

In support of their argument that the ZBA members were biased, the plaintiffs point to several facts that they contend are indicative of prejudice, whether considered separately or together. The plaintiffs first note that, at the BOC's October 2017 hearing, Commissioners and

[8] The plaintiffs argue, in part, that the ZBA failed to provide them with sufficient process because its actions violated several statutes applicable to zoning boards. (See Pls.' Hr'g Mem.) In reviewing these arguments, the court will consider whether the challenged actions either violated the relevant statute or otherwise deprived the plaintiffs of a fair hearing.

ZBA members had discussed the potential involvement of the ZBA and how the ZBA should prepare for a possible appeal of the BOC's decision. (See Pls.' Hr'g Mem. 13–14.) In particular, the plaintiffs note that, during that hearing: (1) Commissioner DiFiore commented that, if the plaintiffs appealed, the ZBA should consult with the KLP's counsel: (2) ZBA Member Lee commented that the ZBA should "be well prepared and informed about the issue;" and (3) Commissioner Lyman commented that the ZBA should have a lawyer present at hearing on the appeal. (Pls.' Hr'g Mem. 14 (citing CR 93).) In addition, the plaintiffs note that the ZBA members appear to have followed through on this advice because the ZBA retained Attorney Waugh to attend the ZBA hearings on both Gleason's and the plaintiffs' administrative appeals. (Pls.' Hr'g Mem. 14.)

Whatever the merits of the plaintiffs' argument, they have failed to preserve the issue for review in this court. Significantly, the plaintiffs did not raise this potential bias with the ZBA at the time of the February 8, 2018 public hearing on their administrative appeal, nor did they do so in their motion for rehearing. Notably, the BOC hearing was in October 2017. The plaintiffs thus either knew, or could have reasonably known, about the comments at issue prior to the ZBA's February 2018 hearing. The plaintiffs have offered no explanation as to why they could not have raised this argument at the February 2018 hearing. Therefore, the plaintiffs have waived this argument. See Bayson Props,, Inc. v. City of Lebanon, 150 N.H. 167, 172 (2003) ("Waiting until after eleven hours of hearings held over three months to raise a concern about alleged bias of board members does not fulfill the plaintiffs' obligation to raise the issue at the earliest possible time . . . . In governmental proceedings, interested parties are entitled to object to any error they perceive but they are not entitled to take later advantage of error they could

have discovered or chose to ignore at the very moment when it could have been corrected." (quotations omitted)).

The plaintiffs next contend that ZBA Member Karnopp demonstrated bias against Gleason, and by extension the plaintiffs, when he emailed the ZBA in November 2017, prior to the public hearings on either administrative appeal, and stated that "it would be wise for us all to get an understanding on what we will be up against." (Pls.' Hr'g Mem. 14 (quoting KLP 2).) The court disagrees. Member Karnopp does not appear to be expressing a biased opinion or prejudgment of Gleason's or the plaintiffs' administrative appeals. (See KLP 2; see also supra at 4 (describing contents of Member Karnopp's email).) Notably, Member Karnopp does not express any opinion as to what he believes would be the correct outcome in either administrative appeal. In fact, he states that the ZBA members were required to consider the appeals on their merits. (See KLP 2). Moreover, the court reads the phrase "what we will be up against" as referring to the legal arguments about the KLP's and property owners' respective legal rights under the ZO, which Karnopp discussed in the immediately preceding sentence, rather than an expression of antagonism towards the property owners. (See id.) Based on the record, the court cannot find that ZBA Member Karnopp's email demonstrates he was biased against Gleason or the plaintiffs, or that he should have recused himself on that basis.

Next, the plaintiffs argue that ZBA Member Wroblewski was biased for two reasons. (Pls.' Hr'g Mem. 14.) First, the plaintiffs represent that Wroblewski's son filed the complaint that initiated the BOC's enforcement of the Guest Provision against the plaintiffs. (Id.) In the court's view, the fact that a zoning board member's relative filed a complaint against a party appearing before the zoning board is not by itself sufficient to disqualify that member. Notably, Member Wroblewski does not appear to have filed a complaint against the plaintiffs or have

otherwise expressed any opinion as to the propriety of his son's decision to do so. For these reasons, the court concludes the plaintiffs have failed to show Member Wroblewski was biased against the plaintiffs because his son filed a complaint against them.

Second, the plaintiffs note that, in response to ZBA Karnopp's email to the ZBA, Member Wroblewski responded by saying: "Over the holiday weekend we had some lively conversations about the current challenges facing the KL[P]." (Id. (quoting KLP 4).) After reviewing the entire email, (see supra at 4), the court does not find it demonstrates Member Wroblewski prejudged or was otherwise biased against the plaintiffs' appeal. In the email, he merely notes that he discussed the "challenges" facing the KLP with his son and son-in-law. (KLP 4.) While it is true that his son appears to have complained about the plaintiffs' appeal, Member Wroblewski did not himself express any opinion about the plaintiffs' appeal or the propriety of his son's complaint in the email, (see id.), and there is no evidence that he did so at any other time. Accordingly, in light of the evidence in the record, the court concludes the plaintiffs have failed to show that Member Wroblewski prejudged or was otherwise prejudiced against their appeal and should have recused himself on that basis.

Third, the plaintiffs argue that ZBA Member Lee should have recused himself because the plaintiffs filed a complaint against him on the grounds he was operating a yoga studio from his residence in violation of the ZO. (Id. at 14–15.) The court makes no conclusions as to whether ZBA Member Lee should have recused himself on this basis. Regardless of whether he should have done so, the plaintiffs were obviously aware that they filed a complaint against him and they thus could have raised this issue before the ZBA at either the February 8 or February 14, 2018 public hearings. The plaintiffs did not do so, and they thus cannot now seek to void the ZBA's decision on this basis. See Brayson Properties, 150 N.H. at 172, supra.

Finally, the plaintiffs contend that the manner in which the ZBA conducted the hearings on both their administrative appeal and Gleason's appeal suggests the ZBA members had an agenda and failed to consider the plaintiffs' appeal on the merits. (Pls.' Hr'g Mem. 15.) The plaintiffs cite to several aspects of both administrative appeals to support this argument. The plaintiffs first contend that ZBA Member Karnopp expressed bias about the plaintiffs' appeal at the initial February 8, 2018 hearing because, prior to the ZBA making any findings on the record, he stated: "[T]he ZBA opinion will probably be similar to the Gleason appeal . . . ." (Pls.' Hr'g Mem. 15, 18; see also CR 64.) The plaintiffs next note that ZBA Member Lee used Attorney Waugh's draft decision in Gleason's administrative appeal as a template for his draft decision in the plaintiffs' appeal and that the decisions were very similar. (Pls.' Hr'g Mem. 15, 17–18.) Finally, the plaintiffs contend that, during the ZBA's deliberative sessions in both administrative appeals, the ZBA members failed to substantively discuss the issues and essentially adopted the findings within Attorney Waugh's decision without actually making factual findings on their own. (Id. at 15–17 (citing ZBA Hr'g Trans. 2 at 28:14–29:14, supra; ZBA Hr'g Tr. 4 at 10:12–20:16, supra); see also Pls.' Hr'g Mem. 15 ("It is unclear from both the record and actual hearing transcript what the ZBA members' independent reasons were when they voted to uphold the Notice of Violation.").)

In the court's view, the plaintiffs have failed to show that the ZBA members prejudged their appeal on these grounds. As an initial matter, the court disagrees that ZBA Member Karnopp's statement about the likely similar outcomes in the plaintiffs' and Gleason's administrative appeals was an improper predetermination of the plaintiffs' appeal. Rather, the court reads the statement as a reasonable acknowledgment that, given the similar factual and legal issues in each case, the outcomes would "likely" be similar. (See CR 64.) Notably, this

statement was largely consistent with the plaintiffs' understanding of the two appeals, as demonstrated by the fact that Attorney Cronin incorporated his arguments from Gleason's administrative appeal into the record during the plaintiffs' appeal, (id. at 64), and directly stated that the appeals concerned essentially the same issues, (id. at 66.)

For similar reasons, the court does not find it indicative of bias that ZBA Member Lee used the decision letter in Gleason's administrative appeal as a template for the decision in the plaintiffs' appeal. As an initial matter, it is not improper for local governmental bodies to use templates from previous appeals in drafting decisions, particularly where, as here, the factual and legal issues in the appeals are similar. Moreover, ZBA Member Lee drafted the letter in the plaintiffs' appeal after the ZBA closed the public comments portion of the hearing. Accordingly, when he drafted the letter, he had already heard all facts within the record. There is no indication that Member Lee relied on facts outside of the plaintiffs' appeal record in preparing his draft. For these reasons, the court cannot it find indicative of bias that Member Lee applied the legal reasoning from the decision in Gleason's administrative appeal to the facts of the plaintiffs' appeal.

Lastly, the court does not agree that the record reflects that the ZBA members inadequately considered either the plaintiffs' or Gleason's administrative appeals. The court reviewed the hearing transcripts. During both hearings, ZBA Member Lee read the respective draft decision aloud and the ZBA members discussed particular issues within that draft. The ZBA members then voted to deny the appeal at issue based on the reasons in the draft decision. Based on the record, it appears the ZBA members knew the facts of each appeal and voted in a manner consistent with their respective views on the issues. For these reasons, the court

concludes the plaintiffs have failed to show the ZBA members were biased or failed to consider the appeals on their merits on these grounds.

In light of the foregoing, the court concludes that the plaintiffs have not demonstrated that, on the record in this case, the ZBA failed to provide them a fair hearing because the ZBA members prejudged their appeal or were otherwise biased against the plaintiffs.

ii. The ZBA's role as factfinder

The plaintiffs next argue that the ZBA violated their procedural due process rights because its members failed to make factual findings in this case and instead merely "rubber stamped" Attorney Waugh's conclusions in the draft he prepared during Gleason's administrative appeal, which ZBA Member Lee used as a template in the plaintiffs' appeal. (Am. Compl. ¶ 114; Pls.' Hr'g Mem. 15–18.) The court disagrees. It is undisputed that Attorney Waugh drafted the decision in Gleason's administrative appeal, and that ZBA Member Lee used that decision as the template for his draft decision in the plaintiffs' appeal. Regardless of who prepared the draft, however, the ZBA reviewed the factual and legal conclusions in the draft at a public hearing on the plaintiffs' appeal after listening to all of the evidence in the case. The ZBA members then voted to adopt the findings in the draft. In other words, the ZBA listened to all the facts and issues in the case and acted as the final decision maker. The court fails to see how, under these circumstances, the ZBA did not make factual findings on the appeals. Accordingly, the court cannot conclude that the ZBA deprived the plaintiffs due process on the grounds its members reviewed a draft decision Attorney Waugh prepared and adopted the findings and conclusions therein.

iii. ZBA members' actions outside of the public hearings

The plaintiffs next argue that the ZBA erred because ZBA members "act[ed] outside of the forum of a public hearing to decide the result of the [plaintiffs' a]ppeal before the public deliberations." (Am. Compl. ¶ 126.) Specifically, the plaintiffs argue that it was inappropriate for ZBA Member Lee to prepare a draft decision on the plaintiffs' administrative appeal, and then present the prepared draft to the ZBA. In supporting this argument, the plaintiffs maintain that ZBA Member Lee's actions violated RSA 91-A, New Hampshire's Right-to-Know Law, because he prepared a draft decision outside of the public hearing. (Pls.' Reply Mem. 4–6.)

In the court's view, the plaintiffs have not shown that the ZBA violated their procedural due process rights on this basis. As an initial matter, the court does not find that ZBA Member Lee's actions conflicted with the Right-to-Know Law. Under RSA 91-A:2-a, public bodies, such as zoning boards, are required to hold public meetings when they discuss or decide issues in their jurisdiction. "Communications outside a meeting . . . shall not be used to circumvent the spirit and purpose of" the Right-to-Know Law. RSA 91-A:2-a, II; see also RSA 91-A:1 ("The purpose of this chapter is to ensure both the greatest possible access to the actions and records of all public bodies, and their accountability to the people."). Here, the plaintiffs do not argue that ZBA Member Lee communicated with any member of the ZBA outside of a public hearing to discuss the plaintiffs' appeal, and the record does not support such a finding. Therefore, the court cannot find that communications took place between ZBA members outside of a public hearing, and ZBA Member Lee thus did not violate RSA 91-A:2-a on this basis. In addition, the plaintiffs have not proffered any reasons as to why ZBA Member Lee's actions otherwise deprived them of a fair hearing. Accordingly, the court concludes the plaintiffs have failed to

show that the ZBA violated their due process rights because Member Lee prepared a draft decision outside of the public hearings.

iv. The ZBA's deliberations on the plaintiffs' motion for rehearing

The plaintiffs' final procedural due process argument is that the ZBA failed to provide them a fair hearing on their motion for rehearing because the ZBA members voted to deny the motion "without any actual deliberation." (Am. Compl. ¶¶ 112, 121, 124–26.) The court disagrees that the ZBA erred on this basis. The ZBA considered the plaintiffs' motion for rehearing at a public hearing on March 26, 2018. (C.R. 200.) At that hearing, the ZBA members noted that they had reviewed the plaintiffs' motion and they did not find that the plaintiffs presented any new or additional information that merited rehearing. (Id.) The ZBA members then voted to deny the motion. (Id.) In other words, the plaintiffs were able to present their arguments for rehearing and the ZBA considered them. The court finds this process was sufficient to ensure the ZBA members fairly considered the plaintiffs' motion, and thus concludes that the plaintiffs failed to show the ZBA deprived the plaintiffs of a fair hearing on these grounds.

In sum, the court concludes that the plaintiffs have failed to show that the ZBA deprived them of a fair hearing in violation of their procedural due process rights under the New Hampshire Constitution.[9] In addition, the United States Constitution is no more protective of the plaintiffs' procedural due process rights than the New Hampshire Constitution. Compare Veale,

[9] The plaintiffs also argue that the ZBA erred by "fail[ing] to provide the [plaintiffs] with a five person voting board in violation of their due process rights to a fair hearing . . . ." (Am. Compl. ¶ 124.) The plaintiffs do not elaborate on this allegation in their amended complaint or in their hearing memoranda, and it is not exactly clear what hearing the plaintiff's claim concerns. According to the KLP, the plaintiffs' arguments about a five-member board are related to Gleason's administrative appeal, as there were less than five ZBA members at one of the hearings in that appeal. (See KLP's Hr'g Mem 4–5.) The plaintiffs do not refute this contention. Accordingly, the court concludes that the plaintiffs are not challenging the ZBA's decision on their administrative appeal on this basis, and the court will not thus consider it in the instant order.

158 N.H. at 636, supra with Mathews v. Eldridge, 424 U.S. 319, 332–34 (1976). For this reason, the court reaches the same conclusion under the federal standard.

b. Substantive due process

The plaintiffs next argue that the Guest Provision violates their substantive due process rights under the New Hampshire and United States Constitutions because it "interfered with the [plaintiffs'] property rights and . . . is not rationally related to any governmental objective . . . ." (Am. Compl. ¶ 127; see also Am. Compl. ¶ 121.) The court will first address the argument under the New Hampshire Constitution. "A substantive due process challenge to an ordinance questions the fundamental fairness of the ordinance." McKenzie v. Town of Eaton Zoning Bd. of Adjustment, 154 N.H. 773, 778 (2007). "In determining whether an ordinance is a reasonable exercise of the municipality's police powers and, therefore, can withstand a substantive due process challenge, [trial courts must] appl[y] the rational basis test." Id. (quotations omitted). Under that standard:

> [The] legislation [need] only [be] rationally related to a legitimate governmental interest . . . [T]he rational basis test under the State Constitution contains no inquiry into whether legislation unduly restricts individual rights, and . . . a least-restrictive-means analysis is not part of th[e] test.

Id. (quotations omitted). The plaintiffs in this case are bringing an as-applied challenge under the due process clause, (Pls.' Hr'g Mem. 18), and thus must show that the Guest Provision is unconstitutional "in relation[] [to] . . . particular property under particular conditions existing at the time of the litigation." McKenzie, 154 N.H. at 778 (quotations omitted).

Here, the plaintiffs argue that the Guest Provision is unconstitutional because it "forbids rentals of any kind," and municipalities cannot "zone out a use in the entire municipality." (Pls.' Hr'g Mem. 18.) In other words, the plaintiffs argue that the Guest Provision is not rationally related to a legitimate government purpose because they contend it bans all rentals in the KLP,

including longer-term residential tenancies. Notably, however, the plaintiffs have only represented that they intend to use their properties for short-term vacation rentals, and the KLP has only sought to enforce the Guest Provision against them on that basis. Therefore, in order to succeed on their as-applied challenge, the plaintiffs must show that the KLP has no rational basis for restricting short-term vacation rentals, not rentals generally. See McKenzie, 154 N.H. at 778, supra.

The plaintiffs have not done so. In its decision on the plaintiffs' appeal, the ZBA stated that the purpose of the Guest Provision was to "maintain a quiet peaceful neighborhood made up of residents, not transients." (CR 161; see also KLP's Hr'g Mem. 23–24 (arguing that one of the purposes of the Guest Provision is to preserve the residential character of the KLP's neighborhoods).) It further noted that the provision's "evident purpose [was] to have the owner in residence on property in order to serve as a check on guest behavior which might otherwise be incompatible with the neighborhood." (CR 161.) The court concludes that maintaining the residential character of a community is a legitimate governmental interest. See Roman Cath. Diocese of Rockville Ctr., N.Y. v. Inc. Vill. of Old Westbury, 128 F. Supp. 3d 566, 584 (E.D.N.Y. 2015) (ruling that local governments have legitimate interest in maintaining their communities' residential characters). The court further concludes that, as applied to short-term rentals, the Guest Provision is rationally related to that interest because it requires owners of short-term rental properties to reside at the property and monitor and resolve problems their guests may cause. See Cmty. Res. For Justice, Inc. v. City of Manchester, 154 N.H. 748, 757 (2007) (holding that, when analyzing a municipality's proffered basis for an ordinance, courts do not independently evaluate the factual assumptions underlying the ordinance, but "inquire only as to whether the [municipality] could reasonably conceive to be true the facts upon which it is

based" (quotations omitted)). Accordingly, the court concludes that the Guest Provision, as applied to the plaintiffs' use of their properties, satisfies the rational basis test.

The plaintiffs make three arguments against this conclusion, all of which the court finds unavailing. First, the plaintiffs maintain that the ZBA did not make sufficient factual findings to support the conclusion that the Guest Provision was rationally related to a legitimate government interest. (Pls.' Reply Mem. 9–10.) In essence, the plaintiffs maintain that the record does not indicate the ZBA made any findings about the purpose of the Guest Provision because: (1) the ZO does not directly state what the Guest Provision's purpose is; and (2) the ZBA did not make any findings of fact relevant to the Guest Provision's purpose. (Id. at 10.) The plaintiffs further contend that the ZBA's conclusion that the purpose of the Guest Provision was to maintain peaceful, residential neighborhoods, was in error because it was not supported by the record. (Id. at 9–10.) The court disagrees. As the plaintiffs acknowledge, the ZBA concluded that the purpose of the Guest Provision was to preserve the residential character of the KLP's neighborhoods, a determination with which the KLP agrees. (KLP's Hr'g Mem. 23–24.) Notably, a municipality's proffered interests under the rational basis test "need not be [its] actual interests in adopting the ordinance nor need they be based upon facts." Cmty. Res, 154 N.H. at 757. For this reason, the ZBA did not err by failing to make factual findings to support its conclusion as to the Guest Provision's purpose.

Second, the plaintiffs note that the ZO permits apartment houses operated by businesses. (Pls.' Hr'g Mem. 19.) The plaintiffs argue that is inconsistent for the ZO to separately permit apartment houses operated by businesses, which obviously cannot occupy a residence, while forbidding owners of residential properties from renting out their properties unless they are owner-occupied. (Id.) The plaintiffs maintain that due "to this inconsistency, there is no

legitimate goal [to] be achieved by prohibiting all residential properties from being rented when the [ZO] clearly permits rentals" and that the BOC therefore arbitrarily applied the Guest Provision to the plaintiffs while abstaining from applying it to other rental uses—such as apartment houses. (Id.) The court disagrees. Given the proffered purpose of the Guest Provision, the KLP could rationally choose to regulate apartment houses for longer-term tenants differently from short-term rentals of residential properties. Therefore, the fact that the ZO expressly allows business-owned apartment houses does not obviate the KLP's rational basis for the Guest Provision.

Third, the plaintiffs cite Community Resources for the proposition that municipalities cannot entirely zone out a use within their jurisdictions, (Pls.' Hr'g Mem. 18), and thus presumably maintain that the KLP cannot entirely preclude short-term vacation rentals through the Guest Provision. Contrary to the plaintiffs' contention, however, Community Resources does not stand for the proposition that municipalities cannot zone out an entire use within a municipality. Rather, with respect to this issue, the case stands for the proposition that the zoning statute prohibits municipalities from enacting zoning ordinances that conflict with the general welfare of the surrounding community. Cmty. Res., 154 N.H. at 754–56. In other words, it is not a matter of protecting individuals' substantive due process rights, but of ensuring that New Hampshire municipalities satisfy their obligations to zone in the public interest pursuant to their statutory authority. Therefore, the holding in Community Resources does not compel a different conclusion on this issue. In light of its rejection of the plaintiffs' arguments, the court concludes the plaintiffs have failed to show that the Guest Provision, as applied to their properties, violates their right to substantive due process under the New Hampshire Constitution.

The court will next consider the plaintiffs' claim under the United States Constitution. The Due Process Clause of the United States Constitution protects more than fair process, and "the liberty it protects includes more than the absence of physical restraint." Washington v. Glucksberg, 521 U.S. 701, 719 (1997) (quotations omitted). "In zoning dispute cases, the principle of substantive due process assures property owners of the right to be free from arbitrary or irrational zoning actions." Brady v. Town of Colchester, 863 F.2d 205, 215 (2d Cir. 1988) (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977)). "In order to prevail on [a] substantive due process claim, [plaintiffs] must establish that the [zoning provision] bears no rational relationship to any legitimate governmental purpose." Ecogen, LLC v. Town of Italy, 438 F. Supp. 2d 149, 156 (W.D.N.Y. 2006). In as-applied challenges, "[s]tatutes . . . and their constitutionality [are] evaluated . . . in the particular context in which [the plaintiff] acted, or in which he proposes to act . . . ." Ada v. Guam Soc. of Obstetricians and Gynecologists, 506 U.S. 1011, 1011 (1992). As with the plaintiffs' substantive due process challenge under the New Hampshire Constitution, the court concludes the plaintiffs have failed to show the Guest Provision is arbitrary or irrational as applied to their properties. Therefore, the plaintiffs cannot show that the ZBA erred by failing to find the Guest Provision violated their substantive due process rights.

In sum, the court concludes the plaintiffs have not shown that the BOC's application of the Guest Properties violated their rights to substantive due process under either the New Hampshire or United States Constitutions. Accordingly, the court cannot reverse the ZBA's decision on this basis.

c. Statutory authority

The plaintiffs next argue that the KLP lacked the authority to enact and enforce the Guest Provision under the zoning statute. (Am. Compl. ¶¶ 160–165.) In essence, the plaintiffs argue that the BOC and ZBA, in applying the Guest Provision in the instant case, adopted an interpretation that would not allow any rentals in the KLP unless they were owner occupied. (Pls.' Reply Mem. 14–15.) The plaintiffs note that this interpretation would essentially eliminate long-term rentals in the KLP, and thus restrict the availability of affordable housing. (Id.) The plaintiffs maintain that the Guest Provision thus conflicts with the holding in Britton v. Chester, 134 N.H. 434 (1991), in which the New Hampshire Supreme Court determined that municipal zoning regulations that severely restrict affordable housing conflict with the zoning statute's public welfare requirements and are thus ultra vires. Id. at 441. Accordingly, the plaintiffs argue that the Guest Provision is void and that the KLP cannot enforce it against them. (Pls.' Reply Mem. 15.)

In the court's view, the plaintiffs lack standing to challenge the Guest Provision on this basis.

> Standing under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress. In evaluating whether a party has standing to sue, we focus on whether the party suffered a legal injury against which the law was designed to protect. Neither an abstract interest in ensuring that the State Constitution is observed nor an injury indistinguishable from a generalized wrong allegedly suffered by the public at large is sufficient to constitute a personal, concrete interest. Rather, the party must show that its own rights have been or will be directly affected.

Teeboom v. City of Nashua, 172 N.H. 301, 306 (2019) (brackets, citations, and quotations omitted). In this case, the plaintiffs use their properties for short-term vacation rentals, and the BOC filed a citation against them based on that activity. Notably, the plaintiffs do not argue that

the holding in Britton prevents municipalities from prohibiting short-term rentals. Rather, they argue that Britton prohibits municipalities from prohibiting long-term residential apartments, and that the Guest Provision conflicts with this holding because it purportedly prevents long-term rentals in the KLP. In other words, the plaintiffs are trying to invalidate a statute on the grounds it unlawfully interferes with a use they do not, and do not intend to, engage in. For this reason, the plaintiffs lack standing to challenge the Guest Provision on this basis. See Town of Oxford v. N.H. Air Res. Com'm, 128 N.H. 539, 542 (1986) (holding that owners of dumps that cause air pollution did not have standing to challenge regulation on grounds that it could improperly regulate dumps that do not cause air pollution). Accordingly, the court will not consider whether the Guest Provision violates Britton in the plaintiffs' appeal.

d. Administrative gloss

The plaintiffs next argue that the "ZBA illegally and unreasonably failed to properly apply the doctrine of administrative gloss after the [ZBA's chairperson] admitted there were various definitions and interpretations for [the Guest Provision]." (Am. Compl. ¶ 118.) "The doctrine of administrative gloss is a rule of statutory construction." In re Kalar, 162 N.H. 314, 321 (2011). "Administrative gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference." Id. (quotations omitted). "If an administrative gloss is found to have been placed upon a clause, the agency may not change its de facto policy, in the absence of legislative action, because to do so would, presumably, violate legislative intent." Id. (quotations omitted). "Lack of ambiguity in a statute or ordinance, however, precludes application of the administrative gloss doctrine." Id. The "failure to show a de facto policy of non-enforcement regarding similarly situated applicants

precludes application of the administrative gloss doctrine." Anderson v. Motorsports Holdings, LLC, 155 N.H. 491, 502 (2007).

The plaintiffs argue that the administrative gloss doctrine applies in this case because the Guest Provision is ambiguous and the BOC has a de facto policy of non-enforcement. (Pls.' Hr'g Mem. 5–8.) With respect to ambiguity, the plaintiffs maintain the ZO lacks definitions for important terms and is thus vague and subject to numerous possible interpretations. (Id. at 5–7). For example, the plaintiffs maintain that the Guest Provision, in addition to being interpreted as applicable to short-term vacation rentals, could plausibly be interpreted to apply to long-term residential rentals or even to apply to personal, non-paying guests. (Id. at 7.)

With respect to a policy of non-enforcement, the plaintiffs argue that Commissioners knew for decades that the owners of other properties rented them out but took no action to enforce the Guest Provision against them. (Id. at 8.) The plaintiffs cite several forms of evidence in support of their argument. (Id.) First, they assert Commissioner Lyman knew about rentals because she owned an oil delivery business that served rental homes. (Id. at 8; see also id. at 9 (citing ZBA Hr'g Tr. 3 at 25:12–16).) Second, they maintain "an ex-Commissioner rented his property in violation of the [ZO.]" (Pls.' Hr'g Mem. 8.) Third, they note that at the BOC's October 2017 meeting, ZBA Member Karnopp asked: "since these rentals have not been enforced in the past does it not make it not enforceable?" (Pls.' Hr'g Mem. 8 (citing CR 88).) Fourth, they contend that Member Karnopp, a realtor, had previously listed properties in the KLP and described their rental incomes on the listings. (Pls.' Hr'g Mem 8.) Finally, they note that a realtor who testified at the first hearing on Gleason's appeal indicated that he had listed rental properties in the KLP for decades without facing repercussions. (Id. (citing ZBA Hr'g Tr. 1 at 16:14–17).) The plaintiffs maintain that this evidence establishes that the Commissioners knew

about violations, chose not to act upon them, and thus "created a de facto policy of looking the other way and not enforcing the [Guest] Provision until recently." (Id.)

For the purposes of this order, the court will assume without deciding that the Guest Provision is ambiguous. That said, the court concludes the plaintiffs have failed to establish that administrative gloss doctrine precludes enforcement of the Guest Provision in this case because they have not shown that the BOC established a de facto policy of non-enforcement. As an initial matter, the court notes that, contrary to the plaintiffs' intimations, the administrative gloss doctrine requires more than a municipality's knowing failure to enforce a provision. Otherwise the doctrine would be indistinguishable from the doctrine of waiver. See § I(e), infra. To establish the applicability of the administrative gloss doctrine, individuals must show that the municipality failed to enforce a provision against certain uses because it interpreted the provision as inapplicable to those uses. See Kalar, 162 N.H. at 321 (holding that the administrative gloss doctrine applies when an administrative body has "interpret[ed] the clause in a consistent manner . . . ." (emphasis added)).

In this case, the plaintiffs have not pointed to any prior instance in which the BOC, the ZBA, or any other entity of the KLP ever enforced or considered enforcing the Guest Provision against similarly situated individuals—i.e. individuals using their properties for short-term rentals—and decided against doing so because it interpreted the Guest Provision as inapplicable to that use. In fact, the record does not indicate that the BOC ever enforced or considered the applicability of the Guest Provision prior to 2017. (See CR 165–66.) At most, the plaintiffs have shown that individual Commissioners, and other residents of the KLP, knew of violations and chose not to enforce the provision in the past. Even assuming the plaintiffs have shown that the BOC overlooked previous transgressions, there is no evidence as to why the BOC previously

refrained from enforcing the Guest Provision. For these reasons, the plaintiffs have not shown that the BOC has placed an "administrative gloss" on the Guest Provision as inapplicable to short-term vacation rentals. Accordingly, the court cannot conclude that the ZBA acted unreasonably by failing to apply the administrative gloss doctrine in the plaintiffs' appeal.

e. Waiver

The plaintiffs next argue the "ZBA illegally and unreasonably failed to properly apply the doctrine of waiver . . . despite [the BOC's] lack of enforcement of the [Guest Provision] for nearly sixty years." (Am. Compl. ¶ 119.) The waiver of a legal right is a question of fact. See Town of Atkinson v. Malborn Realty Tr., 164 N.H. 62, 66 (2012). "A finding of waiver must be based upon an intention expressed in explicit language to forego a right, or upon conduct under the circumstances justifying an inference of a relinquishment of it." Id. (quotation omitted). In general, outside of specific, limited circumstances, municipalities do not waive their rights to enforce ordinances because they failed to enforce those ordinances in the past. Tompkins, 124 N.H. at 470.

Here, the plaintiffs argue that the BOC waived its right to enforce the Guest Provision because it has long failed to enforce that provision. (Pls.' First Mem. 13.) The plaintiffs point to no other evidence that the BOC expressed, either explicitly or through its actions, an intention to forever forego enforcing the Guest Provision. As the mere lack of enforcement of a provision is insufficient to establish waiver, the plaintiffs have not established that the BOC has waived its right to enforce the Guest Provision. Accordingly, the court concludes the plaintiffs have failed to show that the ZBA erred in upholding the BOC's decision on this basis.

f. Estoppel

The plaintiffs next argue the "ZBA illegally and unreasonably failed to properly apply the doctrine of . . . estoppel despite [the BOC's] lack of enforcement of the [Guest Provision] for nearly sixty years." (Am. Compl. ¶ 119.) "The doctrine of municipal estoppel has been applied to municipalities to prevent unjust enrichment and to accord fairness to those who bargain with the agents of municipalities for the promises of the municipalities." Malborn, 164 N.H. at 67.[10]

> The elements of estoppel are: First, a false representation or concealment of material facts must have been made with knowledge of those facts; second, the party to whom the representation was made must have been ignorant of the truth of the matter; third, the representation must have been made with the intention of inducing the other party to rely upon it; and fourth, the other party must have been induced to rely upon the representation to his or her injury.

Id. "Each element of estoppel requires a factual determination." Id. (quotation omitted).

Here, the plaintiffs argue that KLP is estopped from enforcing the Guest Provision on the sole grounds that KLP has failed to enforce the provision in the past. (Pls.' Hr'g Mem. 13.) The plaintiffs have not argued, and the record does not otherwise indicate, that any official within the KLP made any representations to the plaintiffs regarding the enforcement of the Guest Provision. The plaintiffs have thus failed to show that the doctrine of municipal estoppel applies in this case, and the court therefore cannot conclude that the ZBA erred in the upholding the BOC's decision on these grounds.

g. Equal protection/selective enforcement

The plaintiffs next argue that the ZBA should have reversed the BOC because the BOC selectively enforced the Guest Provision against the plaintiffs and thereby violated their rights to equal protection under both the New Hampshire and United States Constitutions. (Am. Compl.

[10] Although the plaintiffs do not specifically refer to "municipal estoppel," the law they cite in support of their estoppel claim relates to the law of municipal estoppel. (Pls.' Hr'g Mem. 13.) For this reason, the court assumes the plaintiffs' claim is based on the doctrine of municipal estoppel.

¶¶ 115, 121, 145–51.) The court will first consider the plaintiffs' claim under the New Hampshire Constitution. In order to set forth an equal protection claim based on selective enforcement of a municipal ordinance, "[plaintiffs] must . . . demonstrate that the town impermissibly established classifications and . . . treated similarly situated individuals in a different manner" based on those classifications. Bacon v. Town of Enfield, 150 N.H. 468, 474 (2004) (quotations omitted). "For [plaintiffs] to show that the town's enforcement was discriminatory, [they] must show more than that it was merely historically lax." Alexander v. Town of Hampstead, 129 N.H. 278, 283 (1987). "[A] municipality's failure to enforce an ordinance does not constitute ratification of a policy of nonenforcement and, consequently, will not estop a municipality's subsequent enforcement of the ordinance." Id. (quotations omitted). "Instead, [plaintiffs] must show that the selective enforcement of the ordinance against [them constituted] conscious intentional discrimination." Id. (quotations omitted). Although lack of enforcement generally does not support a selective enforcement action, "it is conceivable that a pattern of nonenforcement [c]ould be so systematic as to constitute ratification of a policy of nonenforcement." Id. Finally, plaintiffs "ha[ve] the burden to prove that the [enforcement against them was] arbitrary or without some reasonable justification and . . . to negative every conceivable basis which might support the [enforcement], whether or not the basis has a foundation in the record." N. New England Tel. Operations, LLC v. City of Concord, 166 N.H. 653, 657 (2014).

In this case, the plaintiffs argue that the BOC consciously chose to enforce the Guest Provision against the plaintiffs and other property owners because they were not from New Hampshire, while not enforcing the Guest Provision against KLP residents who rented their homes on similar short-term bases. (Pls.' Hr'g Mem. 8–12; Pls.' Reply Mem. 6–7.) The

plaintiffs cite several forms of evidence to support their argument, and the court will consider each in turn. First, the plaintiffs point to the BOC's public meetings in September and October of 2017 where members of the public noted that KLP residents do not benefit from vacation rentals. (Pls.' Hr'g Mem. 9–10 (noting that there was a strong "us versus them" mentality at the public meetings); Pls.' Reply Mem. 6–7; see also CR 87 (minutes from the BOC's September 2017 meeting at which a member of the public commented that vacation rentals do not benefit KLP residents and serve as investment opportunities for non-residents).) Even assuming that these comments displayed prejudice against non-residents, they were made by members of the public. By contrast, none of the Commissioners mentioned an individual's state of residence as a basis for enforcing the Guest Provision during either of the BOC's meetings on the issue. For this reason, the court concludes the plaintiffs have failed to show these comments demonstrated discriminatory intent on the part of the BOC.

Second, the plaintiffs cite Commissioner Lyman's statement at the BOC's October 2017 meeting that short-term rentals were harming local inns, which the plaintiffs maintain is relevant because the inns were owned by locals. (Pls.' Hr'g Mem 9.) However, while the plaintiffs impute prejudice into Commissioner Lyman's comment about short-term rentals' effects on local inns, the court does not read such prejudice in the record. Even assuming that the plaintiffs had shown that all local inns in the KLP had local ownership, which they did not, Commissioner Lyman's comments were not necessarily directed at short-term rentals with out-of-state ownership, but all short-term rentals. Thus, the court concludes the plaintiffs have failed to show this comment demonstrated discriminatory intent against non-New Hampshire residents.

Third, the plaintiffs contend the BOC was long aware of other violations of the Guest Provision, but chose only to enforce the Guest Provision against four properties owned by non-

New Hampshire residents, which the plaintiffs maintain is evidence of the BOC's discriminatory intent. (Id. at 9–10.) As proof that short-term rentals were ubiquitous in the KLP and the Commissioners must have therefore known about them, the plaintiffs point to the evidence Attorney Cronin provided the ZBA: (1) a map of properties in the KLP listed on a short-term rental platform, which indicated that many owners used their properties for this purpose; and (2) a list of all properties in the KLP that paid New Hampshire rooms and meals taxes. (Id. at 10–11 (citing CR 98–109).) In addition, the plaintiffs note that Attorney Cronin informed the ZBA that he observed rental offices throughout the KLP. (Pls.' Hr'g Mem. at 10 (citing ZBA Hr'g Tr. 3 at 11:10–17).) Finally, the plaintiffs also note that they informed the ZBA that they had filed several complaints against other properties violating the Guest Provision to the BOC, and that the BOC had failed to enforce the Guest Provision against those properties. (Pls.' Reply Mem. 6–7 (citing ZBA Hr'g Tr. 3 at 9:18–23).) In light of this evidence, the plaintiffs maintain that the ZBA erred by failing to conclude that the BOC selectively enforced the Guest Provision against them because they were non-New Hampshire residents. (Pls.' Hr'g Mem. 11.)

In the court's view, the plaintiffs have failed to show that this evidence demonstrates the BOC intentionally discriminated against non-New Hampshire residents in its application of the Guest Provision. As a preliminary matter, the evidence in the record supports a finding that the BOC never enforced the Guest Provision against anyone in the past. Thus, there is no historical record of discriminatory enforcement against non-New Hampshire residents. Moreover, while the plaintiffs have cited evidence related to the BOC's purported failure to enforce the Guest Provision against other owners who used their properties for short-term rentals, they have not shown that these other owners are all New Hampshire residents. For this reason, the court cannot draw an inference that the BOC has chosen not to enforce the Guest Provision on the

basis of residency. In other words, the evidence the plaintiffs presented to the ZBA appears to show a widespread failure to enforce the Guest Provision, not widespread discrimination against a particular class of property owners. The court acknowledges that the only time the BOC opted to enforce the Guest Provision was against four properties owned by non-New Hampshire residents. However, the court cannot conclude that, under the facts of this case, this single instance gives rise to an inference of intentional discrimination based on residency. Accordingly, in light of the record, the court concludes the plaintiffs have failed to show that the BOC selectively enforced the Guest Provision against them.

As an alternative argument, the plaintiffs maintain that the ZBA did not address their selective enforcement argument in its notice of decision. (Pls.' Hr'g Mem. 11–12.) For this reason, the plaintiffs ask that if the court disagrees that the record compels a finding of selective enforcement, that the court remand the appeal to the ZBA to make a finding on this issue. (Id.) The court does not find it necessary to remand this case to the ZBA to make additional factual findings. In the court's view, the record does not support that the ZBA failed to make findings on this issue. The plaintiffs appealed the BOC's decision to the ZBA and argued that the ZBA should reverse the BOC on the grounds it selectively enforced the Guest Provision. In its written decision, the ZBA noted that the plaintiffs had made a number of constitutional arguments without fully developing them, and then denied the appeal on the grounds that the plaintiffs had not shown that the BOC erred in issuing citations. (CR 166.) In other words, the ZBA concluded that the constitutional arguments, such as the selective enforcement argument, did not merit reversal of the BOC. When reviewing a zoning board's decision, the superior court "generally assume[s] that [the] fact-finder ma[de] all of the necessary factual findings to support its conclusion." Dietz, 171 N.H. at 619. Therefore, as the ZBA concluded that the plaintiffs'

constitutional arguments did not merit reversal of the BOC's citations, the court assumes the ZBA made the factual findings necessary to support that conclusion. Id. Accordingly, the court will not remand this issue to the ZBA to make additional findings.

In sum, the court concludes that the plaintiffs have failed to show that the BOC intentionally discriminated against them in its enforcement of the Guest Provision because they were not residents of New Hampshire. Accordingly, the court cannot conclude that the BOC's actions violated the New Hampshire Constitution's equal protection provisions on this basis.

With respect to the plaintiffs' argument under the United States Constitution, federal courts also recognize selection enforcement actions as a means to enforce individuals' equal protection rights under the Fourteenth Amendment. Brown v. City of Syracuse, 673 F.3d 141, 151 (2d Cir. 2012); U.S. Const. amend. XIV, § 1 ("[No state shall] deny to any person within its jurisdiction the equal protection of the laws."). As with the standard under the New Hampshire Constitution, individuals must show that a government actor intentionally treated them differently than similarly situated individuals in the enforcement of a statute or ordinance in order to succeed on this claim. Brown, 673 F.3d at 151–52. Given the court's conclusion that the plaintiffs have failed to show that the BOC treated them differently because they were non-New Hampshire residents, the plaintiffs cannot succeed on their selective enforcement action under the United States Constitution.

In light of the foregoing, the court concludes the plaintiffs have failed to show that the ZBA erred by failing to reverse the BOC's decision on the grounds it violated the plaintiffs' equal protection rights under the New Hampshire and United States Constitutions.

h. Prior non-conforming use doctrine

The plaintiffs next argue that the ZBA erred by failing to apply the doctrine of prior non-conforming uses to their properties. (Am. Compl. ¶ 116.) RSA 674:19 states that "zoning ordinance[s] . . . shall not apply to existing structures or to the existing use of any building." "Under RSA 674:19, a zoning ordinance shall not apply to a pre-existing use unless that use is altered for a purpose or in a manner which is substantially different from the use to which it was put before alteration." Ray's Stateline Mkt., Inc. v. Town of Pelham, 140 N.H. 139, 143 (1995) (quotations omitted). The plaintiffs do not explain in their memoranda why the doctrine of prior nonconforming uses precludes application of the Guest Provision to their properties. For its part, the ZBA found that the plaintiffs had failed to show that previous owners of the properties had used them for short-term rentals prior to the enactment of the Guest Provision in 1986. (CR 165.) As the plaintiffs have offered no argument as to why this finding was unreasonable, the court cannot conclude that the ZBA erred in making this finding. Accordingly, the court will not reverse the ZBA's decision on this basis.

i. Unconstitutional takings

Finally, the plaintiffs argue that the ZBA erred because it "illegally and unreasonably upheld [the BOC's decision] that r[ose] to the level of a governmental taking." (Am. Compl. ¶¶ 120, 122.) Specifically, the plaintiffs maintain that by enforcing the Guest Provision against them, the KLP "took away the rights of homeowners to rent their properties in [the KLP]." (Id. ¶ 131.) In the court's view, the plaintiffs cannot demonstrate that the ZBA committed reversible error on these grounds as a matter of law. The takings clauses of the New Hampshire and United States Constitutions do not prevent public entities from taking private property for public purposes. Rather, they provide a cause of action to individuals to recover damages for the loss of their property when governments do so. See Sundell v. Town of New London, 119 N.H. 839,

845 (1979); First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal., 482 U.S. 304, 315 (1987). Therefore, even if the plaintiffs could show that the BOC effected a taking of their property by enforcing the Guest Provision against them, this court could not reverse the ZBA's decision on these grounds.

In light of all the plaintiffs' arguments related to the Guest Provision, the court concludes the plaintiffs have failed to demonstrate that the ZBA's decision to uphold the BOC's application of the Guest Provision to their properties was unreasonable or unlawful. The court is sympathetic to the plaintiffs' sense they have been singled out, amidst others within the KLP who may be similarly renting their properties on a short-term basis. To prevail on the particular constitutional and statutory claims they raise, however, the plaintiffs must present evidence on specific elements, which they failed to do. Therefore, the court AFFIRMS the ZBA's decision as to the Guest Provision.[11]

II. Dumpster Provision appeal

The plaintiffs next argue that the ZBA erred because it failed to properly apply the doctrine of prior nonconforming uses to the plaintiffs' dumpsters. (Am. Compl. ¶ 116; Pls.' Hr'g Mem. 19–20); see also RSA 674:19, supra; (CR 166 (ZBA's decision upholding BOC's citation against the plaintiffs for failing to comply with setback and fencing requirements in the Dumpster Provision).) The plaintiffs maintain that they placed their dumpsters on their properties prior to 2017, which is the year the KLP enacted the Dumpster Provision. (Pls.' Hr'g Mem. 19.) The plaintiffs represent, and the KLP does not dispute, that prior to that year, the

[11] To the extent the plaintiffs raise a void for vagueness argument in their memoranda, (Pls.' Reply Mem. 11–12), the court notes that plaintiffs did not raise this argument before the ZBA, in their motion for rehearing, or in their amended complaint in this court. Therefore, the court will not consider this argument as a basis for the plaintiffs' appeal. See RSA 677:3 (preventing appellants from raising any issue in a superior court appeal that they did not raise before the zoning board on a motion for rehearing).

KLP did not have regulations on dumpsters. (Id.) The plaintiffs therefore argue that the dumpsters are a prior nonconforming use of the properties, and that the KLP cannot apply the Dumpster Provision's setback and fencing requirements to them. (Id.) In response, the KLP argues that even if the dumpsters are nonconforming uses, the ZBA may still lawfully impose reasonable conditions on the continued use of the dumpsters. (KLP's Reply Mem. 10–11.) Alternatively, the KLP argues that the plaintiffs failed to show that their use of the dumpsters is a valid nonconforming use because they did not present evidence about the historical use and locations of the dumpsters. (Id. at 11.)

For the purposes of this order, the court assumes without deciding that the plaintiffs' use of their dumpsters could be a protected prior nonconforming use under RSA 674:19. Prior nonconforming uses, however, are not forever exempt from zoning ordinances. Hurley v. Town of Hollis, 143 N.H. 567, 571 (1999). Under New Hampshire law, new ordinance provisions apply to "any alteration of a building for use for a purpose or in a manner that is substantially different from the use to which it was it before the alteration." Id.; see also id. (noting that the policy of zoning law is ultimately to limit enlargement and extension of nonconforming uses and bring them to conformity as soon as possible). "Whether a proposed use would be a substantial change in the nature or purpose of the pre-existing nonconforming use turns on the facts and circumstances of the particular case." (Id. (brackets omitted).

> In conducting this inquiry, [courts] consider: (1) the extent the use in question reflects the nature and purpose of the prevailing nonconforming use; (2) whether the use at issue is merely a different manner of utilizing the same use or constitutes a use different in character, nature, and kind; and (3) whether the use will have a substantially different effect on the neighborhood.

Id. at 571–72; see also id. ("[N]onconforming uses cannot be substantially enlarged or expanded, but may only be altered where the expansion is a natural activity, closely related to the

manner in which a piece of property is used at the time of the enactment of the ordinance creating the nonconforming use." (quotations omitted)). "Further, any expansion of a nonconforming use must be evaluated in the context of the zone in which it is located." Id. at 572 (brackets and quotations omitted).

In this case, in order to establish that the doctrine of prior nonconforming uses exempts their dumpsters from the Dumpster Provision, the plaintiffs would have to show that they have used their dumpsters in substantially the same manner since the provision came into effect. Significantly, the record does not contain any evidence as to the plaintiffs' historical use of their dumpsters. Therefore, the plaintiffs have not shown that their use of the dumpsters has not substantially changed since 2017. Accordingly, the court cannot conclude that the ZBA acted unreasonably in failing to find the doctrine of prior nonconforming uses applied to the plaintiffs' dumpsters in this case. Therefore, the court AFFIRMS the ZBA's decision on the Dumpster Provision.[12]

III. Attorney's fees

Finally, the plaintiffs request an award of attorney's fees on two grounds. (Am. Compl. ¶¶ 166–176.) First, the plaintiffs request an award fees on the grounds that the KLP acted in bad faith throughout this process because the individual boards arbitrarily enforced the Guest Provision against them and failed to provide them with fair hearings in violation of their constitutional rights. (Id. ¶ 167 (citing Harkeem v. Adams, 117 N.H. 687, 690–91 (1977).) After reviewing the record and the plaintiffs' arguments, the court concludes the plaintiffs have

[12] The plaintiffs also argue in the alternative that, to the extent the KLP maintains that the dumpsters were not protected under RSA 674:19 because they were not structures, the KLP must necessarily concede that it lacks the statutory authority to regulate the dumpsters. (See Pls.' Hr'g Mem. 20–21.) Notably, the KLP does not argue that the dumpsters were not "structures" within the meaning of the statute, nor does the court's ruling rest on such a conclusion. As the plaintiffs expressly framed this contention as an alternative argument should the court conclude that the dumpsters were not uses or structures, (see Pls.' Hr'g Mem. 21 ("If the dumpster is neither a use nor a structure . . . ."), the court will not consider this argument given that the court has not made the predicate conclusion.

failed to show the KLP, or its local boards, acted in bad faith during the plaintiffs' administrative appeal to the ZBA or their appeal in this court. Therefore, the court concludes the plaintiffs are not entitled to attorney's fees based on the KLP's purported bad faith in this action. Second, the plaintiffs request an award of attorney's fees on the grounds that they brought their action to secure the constitutional property rights of landowners in the KLP, and thus deserve an award of attorney's fees for benefitting the public. (Am. Compl. ¶ 168 (citing Mooney v. Laconia, 133 N.H. 30, 36 (1999).) As the plaintiffs have not prevailed on any of their constitutional claims against the KLP, the court cannot conclude they merit attorney's fees on this basis. In sum, the plaintiffs have failed to show they merit an award of attorney's fees in this case, and the court therefore DENIES their request.

Conclusion

For the foregoing reasons, the court: (1) AFFIRMS the ZBA; and (2) DENIES the plaintiffs' request for attorney's fees.

SO ORDERED.

Date: September 14, 2021

Amy L. Ignatius
Presiding Justice