


Update on The State of New Hampshire Housing Appeals Board

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2022 NHMA/CDD MUNICIPAL LAND USE LAW VIRTUAL CONFERENCE 1

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Today's Agenda

- Statutory Overview
- Practical Overview
- Case Studies
- Mike's Missives
- Q&A

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RSA 679 OVERVIEW

- RSA 679:1 – Establishes HAB with three members, learned and experienced in questions of land use law or housing development or both.
 - At least one attorney
 - At least one professional engineer or land surveyor
- RSA 679:2 – Members are appointed by the supreme court and commissioned by the Governor

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RSA 679 OVERVIEW (con't)

- RSA 679:5 – Authority; Duties
 - Jurisdiction over appeals of final decisions of municipal boards, committees, and commissions
 - Regarding *questions of housing and housing development*.
 - Including, but not limited to: PB decisions; ZBA decisions; ILUC use (RSA 674:21); growth management control; historic, heritage, and conservation commissions; mixed use development; workforce housing
- RSA 679:7 – Jurisdiction; Court Appeals
 - HAB has concurrent, appellate jurisdiction with the superior court

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RSA 679 OVERVIEW (con't)

- RSA 679:6 – Timing of Appeals
 - Appeals shall be filed with the board within 30 days of the final decision
 - Municipality has 30 days to file a certified record
 - Board hearing on the merits within 90 days of receipt of appeal
 - Board decision within 60 days after hearing on the merits

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RSA 679 OVERVIEW (con't)

- RSA 679:8, III-VI – Temporary Members
 - If a member is disqualified, a temporary member is approved by the supreme court and appointed through disposal of the matter
 - Temporary member must have the same qualification as the member they are replacing

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RSA 679 OVERVIEW (con't)

- RSA 679:9 – Hearing Procedure; Standard of Review.
 - Appeals are consistent with appeals to superior court pursuant to RSA 677:4 to 677:16 (regarding appeals of decisions by ZBAs, local legislative bodies, and PB)
 - Appeals are on the certified record except as justice may warrant
 - Board shall not reverse or modify a local decision unless it is unlawful or unreasonable

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RSA 679 OVERVIEW (con't)

- RSA 679:10 – Representation by Nonattorneys.
 - Nonattorneys may represent any party before the board.
 - The board may deny representation it deems improper or inadequate

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RSA 679 OVERVIEW (con't)

- RSA 679:12 – Rules and Regulations.
 - Board may (and did) adopt rules under RSA 541-A
 - Rules promulgated and available here:
https://www.gencourt.state.nh.us/rules/state_agencies/hab.html

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HAB: Practical Overview

- Case Filed (\$250.00 filing fee)
- Applicant provides notice of appeal to municipality (RSA 679:6, I)
- Board issues a Notice to Municipality
 - Includes deadlines for Answer and Certified Record (30 days from notice)
 - Notes that future correspondence from Board is via e-mail
- Common Initial Motions:
 - Motion to Intervene
 - Motion to Dismiss

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HAB: Practical Overview (con't)

- Following Submission of CR:
 - Possible Motion to Expand or Supplement the Record
 - Prehearing Conference held to address procedural matters
- Hearing held within 90 days from filing of appeal
- Decision due 60 days after hearing

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HAB: Practical Overview (con't)

- Outcomes can vary
- RSA 541 requires a motion for reconsideration as a prerequisite to appeal to the supreme court
- User-friendly Board hearings

- TAKE AWAY → Efficient and Inexpensive Appeal before panel with subject matter expertise

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Case Summary:
Michaud v. Auburn (ZBA 2021-24)

- Request to restore involuntarily merged lots (see RSA 674:39-aa)
- Appeal from a ZBA decision denying an administrative appeal of a Selectboard decision (denial)

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Case Summary:
Michaud v. Auburn (con't)

- Basic Facts
 - Applicant held title to land shown on a 1961 subdivision plan as 2 separate lots (.52 acre and .73 acre, respectively)
 - Deed metes and bounds described the perimeter of the lots
 - Lots were historically assessed together by Town

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Case Summary:
Michaud v. Auburn (con't)

- More Facts
 - 1976 Variance – owner applied for and received lot area variance (min. lot size of 2 ac.)
 - o Application proposed to build one house on the site to sell the land
 - o Application referred to lot size as 1.25 acres in size with sketch of perimeter of lots (no internal lines)
 - 1976 Septic Approval: approved two-bedroom house on lots 55 and 56
 - 1976 Building Permit: two-bedroom home approved
 - House ultimately constructed on only one lot

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Case Summary:
Michaud v. Auburn (con't)

- Issue: whether lots were “voluntarily merged” by predecessor in title *i.e.*, whether record showed overt action or conduct that indicates an owner regarded lots are merged. See RSA 674:39-aa, I(c).
- Here → No physical improvements or access across lot lines
→ No recorded plans abandoning internal lot line
- But, Board found totality of evidence demonstrated overt action indicating prior owner regarded the lots as merged
- ZBA Decision affirmed

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Case Summary:
D&C Clearwater, LLC v. Laconia (ZBA 2021-25)

- Appeal of a ZBA decision denying a special exception to allow property to be used for short-term lodging
- ZBA denied the request based on
 - (1) increased demand on municipal services, and
 - (2) proposed use being a hazard in the neighborhood

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Case Summary:
D&C Clearwater, LLC v. Laconia (con't)

- Noteworthy: City enacted a STR ordinance in 2019
 - Two Tiers of Municipal Review:
 1. Special exception by ZBA
 2. Planning Department administrative review (inspection to determine occupancy and parking)
 - Per ordinance, owner must ensure trash removal, occupancy limits, on-site parking, noise ordinance compliance
 - Two-year permit; revocation possible

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Case Summary:

D&C Clearwater, LLC v. Laconia (con't)

Initial Recusal Issue

- Applicant alleged a tainted process because of alleged statements made by ZBA chair prior to a public meeting
- While Applicant raised the issue before the ZBA, it did so without identifying any specifics
- Specific allegations were not articulated until HAB appeal was well underway
- Board denied request to expand CR with such allegations
- Un-supplemented record did not support recusal

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Case Summary:

D&C Clearwater, LLC v. Laconia (con't)

Re: Demand on Municipal Services

- Record contained evidence of a single call to police, which was not logged
- No noise complaints on file
- Applicant arranged for mid-week trash pick-up

Board concluded that the record did not support a finding that the STR would increase demand on municipal services

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Case Summary:

D&C Clearwater, LLC v. Laconia (con't)

Re: Hazard to Neighborhood

- ZBA decision and public testimony seemed to focus on past use as a short-term rental: noise, trespass, tie-dye party in lake; parking obstruction; occupancy concerns; uncollected trash
- Applicant's request included conditions to address neighborhood complaints → supplementing trash pickup; installing fence

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Case Summary:

D&C Clearwater, LLC v. Laconia (con't)

Re: Hazard to Neighborhood

- HAB interpreted the ordinance as focusing on future use, as contemplated in the ZO
- HAB found the record lacked evidence that future use would result in a neighborhood hazard
- HAB found that ZO did not call for speculation about possible illegal future use

ZBA Decision vacated and remanded to address conditions of approval

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Case Summary:

Appeal of Chichester Commons, LLC *HAB 2021-0476 (September 2, 2022)*

First NH Supreme Court decision on a HAB appeal

Posture:

- Town PB denied waiver request of the density requirements in ZO
- HAB affirmed local decision

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Case Summary:

Appeal of Chichester Commons (con't)

Basic Facts:

- 2015 (initial design):
 - Proposed elderly housing facility (up to 41 units) with retail on adjacent lot
 - Applicant requested and obtained waiver from local density requirement (elderly housing on 2.4 acres where 22 were required)
 - Project stalled due to financing issues. No site plan submitted for review.

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Case Summary: *Appeal of Chichester Commons (con't)*

Basic Facts:

- 2018 (first altered design)
 - In lieu of elderly housing, Applicant proposed 14-unit affordable housing complex on 2.4 acres
 - Another density waiver was granted and site plan approved
 - 2018 design was not constructed

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Case Summary: *Appeal of Chichester Commons (con't)*

Basic Facts:

- 2020 (second altered design, similar to 2015 proposal)
 - 24-unit elderly housing facility on 5.5 acres
 - Differences from 2015: relocated structure on the lot; fewer square feet; no retail component; lower overall density
 - Applicant sought to amend the 2018 site plan approval → denied without prejudice by the PB because PB viewed application as a new plan

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Case Summary: *Appeal of Chichester Commons (con't)*

Basic Facts:

- 2020
 - Applicant formally filed for the 24-unit elderly housing facility, including density waiver
 - Applicant argued that the 2015 waiver compelled the PB to grant another waiver because the project was less dense
 - Applicant also argued that the 2015 waiver did not expire
 - PB denied waiver request

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Case Summary: *Appeal of Chichester Commons (con't)*

Appeal to HAB:

- HAB affirmed PB decision:
 - Found that the PB was not bound by 2015 waiver because three projects were different
 - Found that Applicant failed to appeal the PB decision that the 2020 proposal was a new application (vs. an amendment of the 2018 approval)

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Case Summary: *Appeal of Chichester Commons (con't)*

Appellate Analysis:

- Familiar standard of review: whether record supported HAB decision
- Issue 1: Whether 2015 waiver still applies?
 - No → ZO language links a waiver to "a development"
 - 2015 waiver applies to the 2015 proposed project
 - 2020 project is not the 2015 project (reduced units, decreased s.f., expanded lot area, relocated structure on the land, no retail component)
 - Current conditions are relevant (PB is not tasked with comparing two projects over time)

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Case Summary: *Appeal of Chichester Commons (con't)*

Appellate Analysis:

- Issue 2: Whether approval of the 2015 density waiver compels the PB to grant the 2020 request?
 - No → 2020 project is a different project
 - 2020 project must be considered on its own merits

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Case Summary: *Appeal of Chichester Commons (con't)*

Appellate Analysis:

- Issue 3: Whether *Fisher* Doctrine Applies?
 - No → Fisher does not require successive waivers
 - Never found Fisher to apply to prior grants of permits (only applies to prior denials)
 - Declined to expand Fisher to this case

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Case Summary: *Appeal of Town of Windham* HAB 2021-0473 (October 4, 2022)

Second NH Supreme Court decision on a HAB appeal

Posture:

- PB denied applicant's request for waiver of workforce housing (ZO requires at least 50% of units must qualify as workforce)
- HAB vacated PB decision and remanded matter back to the PB

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Case Summary: *Appeal of Town of Windham (con't)*

Basic Facts:

- Applicant proposed 17 total units (mix of market-rate and workforce units) on 6 acres in Town's rural zone
- Applicant sought waiver seeking 4 workforce units (23.5%) alongside feasibility analysis
- PB denied waiver

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Case Summary: *Appeal of Town of Windham (con't)*

Appeal to HAB

- HAB vacated PB decision
- HAB remanded the matter to the PB, with instructions to "reconsider an appropriate workforce housing percentage"

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Case Summary: *Appeal of Town of Windham (con't)*

Appellate Analysis:

- Whether HAB erred in vacating and remanding the PB decision
 - Viability → HAB was not unjust or unreasonable in finding that at least 50% would not be econ. viable
 - Burden → HAB properly determined that PB erred in completely denying the request
 - Remand with instructions → Issue not preserved for appeal

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Mike's Misc. Missives

- Not all lots are the same
- The record is key and minutes matter
- Transcripts can tell another story
- Rules apply to everyone
- Start with your best foot forward

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Thank you for your time.

Michael Klass, Housing Appeals Board

