
New Hampshire 2020 Land Use Law in Review

Part 1: Statutory Changes

**New Hampshire Municipal Association
NH Office of Strategic Initiatives
2020 Land Use Law Conference
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Today's Roadmap

- Intro: Finding the Law
- Part 1: Statutory Changes
Federal Issues
- Part 2: NH Supreme Court Decisions
Federal Cases



Introduction: Finding the Law

Finding the Law

NH Statutes and Bills

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

NH Supreme Court Decisions

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

For Other Jurisdictions

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

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

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

NH Municipal Association Legislative Bulletins

- www.nhmunicipal.org

Legislative Tracking

- ▶ NH General Court
- ▶ New Query
- ▶ FAQs

General Court of New Hampshire - Bill Status System

Previous Bill

Result List

Next Bill

- ▶ Bill Status
- ▶ Bill Text
- SOS Archives!
- ▶ Senate History

Docket of HB130

Docket Abbreviations

Bill Title: relative to property tax relief for totally and permanently disabled veterans.

Official Docket of **HB130**:

Date	Body	Description
12/26/2018	H	Introduced 01/02/2019 and referred to Municipal and County Government HJ 2 P. 38
1/23/2019	H	Public Hearing: 01/29/2019 11:00 am LOB 301
2/6/2019	H	Executive Session: 02/12/2019 10:45 am LOB 301
2/15/2019	H	Committee Report: Ought to Pass with Amendment #2019-0378h for 02/27/2019 (Vote 19-0; CC) HC 13 P. 12
2/27/2019	H	Amendment #2019-0378h : AA VV 02/27/2019 HJ 6 P. 19
2/27/2019	H	Ought to Pass with Amendment 2019-0378h: MA VV 02/27/2019 HJ 6 P. 19
3/18/2019	S	Introduced 03/14/2019 and Referred to Election Law and Municipal Affairs; SJ 9
3/20/2019	S	Hearing: 03/27/2019, Room 102, LOB, 10:00 am; SC 15
4/24/2019	S	Committee Report: Rereferred to Committee, 05/02/2019; SC 20
5/2/2019	S	Rereferred to Committee, MA, VV; 05/02/2019; SJ 15
12/6/2019	S	Committee Report: Ought to Pass, 01/08/2020; Vote 5-0; CC; SC 47
1/8/2020	S	Ought to Pass: MA, VV; OT3rdg; 01/08/2020; SJ 1
1/16/2020	S	Enrolled (In recess 01/08/2020); SJ 2
1/21/2020	H	Enrolled 01/09/2020 HJ 2 P. 58
2/11/2020	H	Signed by Governor Sununu 02/06/2020; Chapter 1; Eff: 04/01/2020

Other Sources

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

"An ounce of prevention..."



PART I

NH Statutory Changes



Enacted Legislation

Zoning Amendment Hearing Notice

2020 HB 1129 (Ch. 8)

- RSA 675:7
 - Allows publication on municipal website instead of in newspaper (plus 2 other physical places)
 - Home page posting for requisite legal period – 10 days prior, “until the conclusion of the hearing”
 - When does a hearing conclude? Many hearings are continued to a certain date, time, and place – but not often those for zoning amendments

Zoning Amendment Hearing Notice 2020 HB 1129 (Ch. 8)(cont'd)

- RSA 675:7
 - Does this apply to notices for other hearings?
 - Limited references to RSA 675:7 – mostly pertain to zoning and regulation adoption
 - Distinguish posting of *meeting notice* in RSA 91-A:2, II – post in 2 places, one of which may be website
 - ZBA appeal hearings: RSA 676:7; continuation with no additional notice (but see RSA 674:41, II (and RSA 674:15))
 - PB application hearings 676:4; continuation with no additional notice
 - Check your board's rules of procedures – do they allow web publication of hearing notices?
 - **Practice Pointer:** be careful of the specific requirements that pertain to particular types of hearings
 - Effective 9/8/2020

Recovery Housing Study Committee

2020 HB 1245 (Ch. 37)

- Omnibus bill creates committee to study
 - ...state and municipal authority governing recovery housing to ensure the safety and wellbeing of individuals and families residing in recovery housing and to promote positive integration of recovery housing within surrounding neighborhoods. The committee shall also study incentives for recovery operators to adhere to nationally recognized quality standards.
- Report due 11/1/2020 – watch for future legislation.
- Legislation also directs DHHS to establish recovery housing standards for voluntary certification

Lead Paint Poisoning

2018 SB 247 (Ch. 4)

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

Voting on Variances

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

Voting on Variances

2018 HB 1215 (Ch. 168)

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

More ZBA Voting

2018 SB 339 (Ch. 214)

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

Standard State Zoning Enabling Act

A little history for you...

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

Zombie Variances & Special Exceptions

2018 HB 1533 (Ch. 75)

- Note: in 2013, the Legislature clarified that variances and special exceptions should be good for at least two years – a statewide standard. RSA 674:33, 1-a and IV
- Here: Zoning may be amended to terminate variances and special exceptions that were authorized before 8/19/13, but have not been exercised (“zombies”)
- Sequence of actions
 - Zoning amendment approved by local legislative body
 - Notice posted in town hall
 - Authorizations expire 2 years from date of posted notice
- Effective 7/24/2018

Agritourism

2016 SB 345 (Ch. 267)

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

Agritourism (cont'd)

2016 SB 345 (Ch. 267)

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

Agritourism

2018 SB 412 (Ch. 56)

- Prohibits municipalities from adopting law that conflicts with the statutory definition of agritourism
- Property owner may petition Commissioner of Agriculture for a dispositive ruling on whether a proposed activity is agritourism. Appealable to the Supreme Court
- Effective 7/15/18
- Here's some good news: the Legislature hasn't recently done anything regarding agritourism!

Agriculture Definition

2019 HB 663 (Ch. 338)

- Makes clarifying (I hope) amendments to
 - RSA 21:34-a: definition of agriculture
 - RSA 672:1, III(d): no unreasonable local restrictions
 - RSA 674:32-a (presumed permitted): adds “**operations or** activities”
 - RSA 674:32-b (existing uses): unnecessarily adds “site plan review”
 - RSA 674:32-c (compliance with local standards): adds “operations **or activities**”
- Effective 9/5/19

ZBA Hearings

2019 HB 136 (Ch. 2)

- Amend RSA 676:7, II to read as follows:
 - II. The public hearing shall be held within [~~30~~] **45** days of the receipt of the notice of appeal.
 - Effective July 9, 2019
 - Note: there is still no timeline for the ZBA to make a decision

Planning Board's Procedures on Plats*

2019 HB 245 (Ch. 6)

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

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

Planning Board Membership

2019 HB 370 (Ch. 105)

- Eliminates the board membership distinction between cities and towns and simplifies the rule for cities:
 - RSA 673:7, I. Any 2 appointed or elected members of the planning board ***in a city or town*** may also serve together on any other municipal board or commission, except that no more than one ***appointed or elected*** member of the planning board shall serve on the conservation commission, the local governing body, or a local land use board as defined in RSA 672:7*
 - Effective 8/20/19
- * **What's a local land use board?** Planning board, zoning board of adjustment, building code board of appeals, historic district commission, heritage commission, agriculture commission, housing, commission, building inspector (list does not include conservation commissions!)

Land Development Commission

2019 SB 43 (Ch. 300)

- Legislative study commission to evaluate
 - current patterns of development, especially residential development and adaptive reuse of existing buildings and identify barriers to increasing the density of land development
 - minimum standards of residential development density, considering public water and sewer infrastructure, and accounting for variability of environmental conditions
 - reinstating the Housing and Conservation Planning Program
 - property tax incentives to promote residential development density, particularly workforce housing
 - preservation of open spaces and maintaining rural character.
 - methods of enforcement of the shared community responsibility of workforce housing
- Final report due 11/1/2020

State Building Code

2019 HB 562 (Ch. 250)

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

Local Building Code Appeals

2019 HB 710 (Ch. 219)

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

Housing Appeals Board

2019 SB 306 (Enacted in HB 4, Ch. 346)

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

Housing Appeals Board (cont'd)

2019 SB 306 (Enacted in HB 4, Ch. 346)

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

Housing Appeals Board (cont'd)

2019 SB 306 (Enacted in HB 4, Ch. 346)

- Timeline
 - Appeals filed within 30 days of local decision
 - Hearing within 90 days of appeal
 - Decision within 60 days of hearing
 - Maximum total to final resolution = 150 days from appeal
- Bottom Line
 - Alternative to time-consuming and expensive trials
 - Latent demand for appeals
 - **No impact on local control**
 - Same standards continue to apply for decisions of local boards; same standards apply to decisions on appeal
- Effective 7/1/2020

2021 Legislative Preview

(Based on bills that stalled in 2020)

Tiny Houses

2020 SB 482

- Would have *required* municipalities to allow tiny houses, including on wheels (THOW), and it would have required municipalities to allow THOW in parks of at least 4 units
- Some issues that need to be addressed
 - Taxation of units – are they real property, or just personal property?
 - Lending standards, foreclosure
 - Note: In NH, manufactured housing is real property (not chattels); tiny houses are not the same
 - Choice of appropriate building code (3rd party certification?)
 - Utility connections (water, sewer, electricity)

Short-Term Rentals

2020 SB 458

- Would have prevented municipalities from prohibiting STRs, but would have allowed a local registration requirement
- Would have instituted limited life safety measures for STRs
- Would have allowed revocation of registration after 3 disorderly complaints
- Would have established a “disorderly houses” statute

Local Land Use Board Processes

2020 HB 1629

- Would have required (among other things):
 - OSI to develop augmented online training for planning board and ZBA members;
 - Transparent publication of all local land use fees;
 - Issuance of written findings of fact in cases of application denial;
 - Density bonuses for elderly housing apply to workforce housing
 - ZBA to act on an appeal within 90 days; and
 - Court decisions within 120 days of a planning board or ZBA appeal
- Also would have allowed mandatory inclusionary zoning

Municipal and Developer Housing Incentives – 2020 HB 1632

- Would have extended RSA 79-E relief for housing from 4 to 8 years
- Would have allowed TIF districts for housing
- Would have created voluntary “housing champion” certification by OSI

- Bill as originally passed also would have provided “housing champions” with BPT revenue sharing and economic development project access to bond proceeds

RSA 79-E Community Revitalization

2020 HB 1248

- Would have established discretionary authority to create “housing opportunity” districts for new housing construction
- Provide RSA 79-E tax relief to developments in such zones for 10 years



Federal Issues

Telecommunications

5G and Small Cell Deployment

- Significant activity at the FCC
 - March 2018 – environmental and historic preservation review no longer necessary; state and local review still required
 - August 2018 – ban on moratoria
 - September 2018 – small cell order
 - Significantly alters the process and timelines for local boards and officials
 - Go to www.nhmunicipal.org and search “small cell”