New Hampshire
2023 Land Use Law in Review

New Hampshire Municipal Association

2023 Planning & Zoning Conference

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PART 1

2023 NH Statutory Changes

Noisy Farms Are OK, but…
2023 HB 252 (Ch. 83)

- RSA 31:39 is the town bylaws enabling statute
- Amend 31:39, I(n) to read as follows: (n) Regulating noise***, except that no "quiet hours" ordinance or bylaw that attempts to regulate noise from activities related to farms, agriculture, and farming as defined in RSA 21:34-a shall be enforceable within a town. This exception shall not apply to agritourism as defined in RSA 21:34-a, II(b)(5)***.
- Just towns? Probably also applies to cities
- Partly supersedes waiver process in RSA 674:32-c, II
- Effective August 19, 2023

Subdivision Improvement Surety
2023 SB 78 (Ch. 208)

- RSA 674:36, III – VI
  - III(b): Phased release of security "when substantial improvements are made"
  - III(b): Cost escalation changed from 10% to 15% annual maximum. No escalation "for engineering, administration, or other non-construction reasons"
  - III(c): post-final-approval security expressly permitted for landscaping and final pavement
  - IV (new):
    - Letter of credit/cash/passbook shall not be the only means of surety (conflict with existing language in II?)
    - Planning board *shall allow* road and utility construction to begin without a bond – **but** a bond for infrastructure/roads/ utilities *must be in place* prior to sale of any lot or building permit application for structure for human occupation

Subdivision Improvement Surety 2023 SB 78 (Ch. 208)(cont'd)

- RSA 674:36, III – VI
  - V (new):
    - Inspections for bond release must be done within 30 days of request (and additional process for incomplete work); release within 90 days of sign-off
    - Formal communications must be made by hand delivery or by courier or service (prob. incl. USPS) – No phone! Email?
  - VI (old IV): eliminates confusing (but well-intentioned) "conditional" language for optional sprinklers in 1- and 2-family dwellings
  - Effective October 3, 2023
  - **Practice Points:** review your process and ensure that it complies with these new standards; what type of surety? Bond or LOC

Driveway Permits and Fire Code
2023 HB 296 (Ch. 187)

- RSA 153:5, VI
- State fire code doesn't supersede Title LXIV local land use board authority over driveways (when not governed by RSA 236:13 for 1- and 2-family dwellings)
- *Provided* – minimum 12' width if over 150' long
- Local land use board shall consider fire chief recommendations on "width, vertical clearance, grade, suitability of road surface, bridges, dead-ends, and the ability to pass and turn around once…"

Driveway Permits and Fire Code 2023 HB 296 (Ch. 187)(cont'd)

- But what does it mean?
- Consider a 3-lot subdivision with a common driveway; a condition of approval could include specifications for that driveway
- Consider a site plan approval that includes internal traffic circulation ("driveway")
- In either case, the planning board's jurisdiction controls; the fire chief's view is advisory
- Effective October 3, 2023
- **Practice Points:** listen to your fire chief, but use your own judgment too!

Housing Champions
2023 SB 145 (included in HB 2 by Senate)

- Voluntary program – qualifications:
  - Adoption of regulations that promote workforce housing
  - Training of land use board members
  - Implementation of sewer and water and/or walkability measures to support workforce housing
  - Adoption of financial tools
- 3-Year Designation; preferential access to discretionary state infrastructure funding
- 3 Funds for municipal grants: planning and zoning; per-unit workforce housing production; infrastructure
  - Originally $29M; budget includes $5M
- Program rule drafting is underway

Land Use Docket
2023 HB 147 (included in HB 2 by House)

- Establishes a specialty docket in superior court to hear appeals of all local land use decisions
- Timeline:
  - Structuring conference within 30 days of appeal;
  - Deadline set for certified record;
  - Hearing on the merits within 60 days of receipt of certified record
  - Decision on the merits within 60 days of hearing
- Establishes a new judge position (HB 1 & 2)
- No impact on concurrent jurisdiction of Housing Appeals Board

A Few That Didn't Make the Cut

- HB 44 – the four-plex bill (killed)
- HB 423 – expanding ADU requirements (killed)
- SB 224 – enabling mandatory inclusionary zoning (interim study by Senate)

Pre-2023 NH Statutory Changes

The Big Bill (a.k.a. “Community Toolbox”) 2022 HB 1661 (Ch. 272) (nee SB 400)

- 2019 Governor’s Housing Task Force
  - Array of legislative recommendations – municipal incentives (e.g., revenue sharing) and obligations (e.g., process requirements)
- 2020: HB 1629 and HB 1632 – hung up in Covid
- 2021: HB 586 – hung up in House
- 2022: SB 400 – hung up in House, then…
  - Included as part of compromise bill HB 1661 (the “parking garage” bill)
  - Much left on the cutting room floor, especially in comparison with the 2020 bills as introduced

RSA 673:3-a – Training for Boards
HB 1661 §70

- Rewrites the law on board member training
  - Office of Planning and Development to develop standard self-training modules and tests
- It's still *voluntary!*

- Effective August 23, 2022

RSA 673:16, III – Publication of Fees HB 1661 §71

- Local land use boards must publish all fees in a location accessible to the public – may be done on the municipal website
- Failure to post fees prior to a particular application will result in their *waiver* for that application
- **Practice Point:** A schedule may be appropriate, allowing an applicant to calculate the fee that will be applicable to their development
  - For example, building permits, impact fees, etc.

- Effective August 23, 2022

RSA 674:17, IV – Workforce/Elderly Housing; HB 1661 §72

- Elderly housing development dimensional or procedural incentives *may* also be offered for workforce housing
  - Increased density, reduced lot sizes, expedited permitting
- As of July 1, 2023: elderly housing incentives *shall* be deemed applicable to workforce housing development
  - Any incentive you provide for elderly housing will automatically be available for workforce housing
  - Known as “Housing for Older Persons” – RSA 354-A:15
- Effective August 23, 2022

An Historical Aside
Purposes of Zoning – RSA 674:17

- Text taken from the *Standard State Zoning Enabling Act* from the 1920s – focus then was *urban* settings
  - Promulgated by the US Department of Commerce
- Original purposes – 1925 NH Adoption
  - Lessen congestion in the streets
  - Secure safety from fires, panic and other dangers
  - To promote health and the general welfare;
  - Provide adequate light and air
  - Prevent overcrowding of land
  - Avoid undue concentration of population
  - To facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements

RSA 676:3, I – Findings of Fact Required HB 1661 §73

- Adds to "notice of decision" statute
  - Specific findings of fact required in support of all final decisions on an application by all local land use boards
  - Failure to make findings in *disapprovals*: grounds for automatic reversal and remand, unless the court finds other factors supporting disapproval
- Purpose of findings (esp. for disapprovals)
  - Instructions for the applicant
  - Tells a reviewing court your reasons
- Issues to address
  - What is the level of controversy?
  - Can create decision deadline challenges
  - Don't confuse findings with conditions of approval

RSA 676:3, I – Findings of Fact Required HB 1661 §73

- What's a finding of fact?
  - Not a recitation of facts (e.g., "There was a traffic study.")
  - Should be lodged in your ordinances, regulations, and application checklists (how were they met or not met?)
- Examples:
  - Approval: "Sufficient evidence was presented to demonstrate that the proposed development will not have a significant adverse impact on traffic in the neighborhood."
  - Disapproval: "Sufficient evidence was presented to demonstrate that the proposed development is likely to have a substantial adverse impact on traffic in the neighborhood and would cause unremediated hazards to pedestrians."

RSA 676:3, I – Findings of Fact Required HB 1661 §73

- **Practice Points:**
  - If there's no controversy, findings can be simple
    - No one spoke against the application and you've approved it
  - If there's controversy, consult with legal counsel
  - Take the time to do it right, but be mindful of your decision deadlines (planning board, 65 days; ZBA 90 days)
  - Identify the fact-based conclusions supported by the board

- Effective August 23, 2022

RSA 674:33, VIII – ZBA Deadline
HB 1661 §74

- Establishes a 90-day deadline for ZBA action on any application
  - Counted from date of receipt of application
  - Applicant may grant an extension
  - If there's insufficient information for a final decision and applicant won't grant an extension, ZBA may deny without prejudice

- **Practice Point:** most applicants will grant an extension, but don't abuse this practice; be efficient

- Effective August 23, 2022

RSA 676:4, I(c)(1) – Planning Board Procedures; HB 1661 §§75-76

- Planning board has 65 days to make a decision after accepting an application (current law)
- Extensions may be granted by the applicant, but what if the planning board never asks for one – and does nothing?
  - Prior law had a never-used non-discretionary process that may result in approval in then event of planning board inaction
  - This change eliminates that process, and calls for finality at 65 days (or an extension from the applicant)
  - Without a decision by the board or an extension from the applicant, the application will be *deemed approved* – same result as before, just faster

RSA 676:4, I(c)(1) – Planning Board Procedures; HB 1661 §§75-76

- Practice Points:
  - Pay attention to your deadlines!
  - If you're anywhere near 65 days, unless you're ready to make a decision ask for an extension
  - If the applicant refuses and you have insufficient information then deny without prejudice – be clear about what information is missing (findings of fact!)
  - If you have enough information, make a decision!
  - After 65 days and no extension, the local governing body still must certify approval; if they don't, then applicant may petition the court, which must act within 30 days

- Effective January 1, 2023

RSA 677:20 – Bonds and Fee Shifting HB 1661 §77

- Court may require a bond to be posted by a person challenging a land use board decision; for damages and costs sustained by the person benefiting from the decision
- Protects the applicant who got approval by the board
- Attorney's fees and costs may be awarded
  - Against a board only gross negligence, bad faith, malice
  - Against the appellant if filed in bad faith or with malice

- Effective August 23, 2022

RSA 162-K – TIFs for Housing
HB 1661 §§78-79

- Enables the use of tax increment finance districts for the development of housing
  - This does not mean municipalities will build housing
  - It generally only means they can build infrastructure in anticipation of housing construction and have the tax revenue from the value of the housing (the “tax increment”) pay for the cost of the infrastructure
  - Use of eminent domain for this purpose is strictly forbidden

- Effective August 23, 2022

RSA 674:76 – Religious Land Uses 2022 HB 1021 (Ch. 291)

- 674:76 Religious Use of Land and Structures.
  - No zoning ordinance or site plan review regulation shall prohibit, regulate, or restrict the use of land or structures primarily used for religious purposes;
  - provided, however, that such land or structures may be subject to objective and definite regulations concerning the height of structures, yard sizes, lot area, setbacks, open space, and building coverage requirements
  - as long as said requirements are applicable regardless of the religious or non-religious nature of the use of the property
  - and do not *substantially burden* religious exercise.

RSA 674:76 – Religious Land Uses HB 1021 (cont'd)

- What does this mean?
  - When presented with a proposal that is *primarily* for religious purposes, regulation is dramatically constrained
    - Limited to "…height of structures, yard sizes, lot area, setbacks, open space, and building coverage"
    - Must also apply to non-religious uses and structures
    - And must not "substantially burden religious exercise"
    - Nothing else in zoning or site plan regulations may apply
  - Things outside zoning and site plan regulations continue to apply
    - Driveway permits, septic standards, local enforcement of state shoreland protection, building and fire codes
- Effective July 1, 2022

RSA 674:76 – Religious Land Uses HB 1021 (cont'd)

- What does "primarily religious purposes" mean
  - Tax exemption for religious use (RSA 72:23, III) can help identify some of what's in this box, but others may also exist
  - Federal RLUIPA* law may also provide guidance on what constitutes a religious use of land and a *substantial burden* on religious exercise
    - But note that RLUIPA's "compelling governmental interest" exception allowing a substantial burden to be imposed may not apply here

* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc, et seq.

RSA 674:76 – Religious Land Uses HB 1021 (cont'd)

- What should you do?
  - At the first inkling of an application for a religious land use or structure, talk to your attorney – including before conducting non-binding pre-application processes (preliminary conceptual consultation or design review)

- For both HB 1661 and HB 1021, review the information published by NHMA/OPD
  - Recording of August 10, 2022 webinar
  - Guide for Municipalities (includes a helpful sample affidavit regarding religious land uses)
  - Both available at https://www.nh.gov/osi/resource-library/legislation/index.htm

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?

PART 2

NH Supreme Court Decisions

- All NH Supreme Court opinions are available on its website – go to www.courts.nh.gov, click on the Supreme Court and look for “Case Decisions”
  - Opinions – decisions on cases argued before the court
  - Case Orders – decisions without oral argument
  - 3JX – accelerated decisions not for precedent
- You can also get onto the Supreme Court’s email list for notices of decisions.

Short-Term Rentals / Enforcement

- ***Town of Conway v. Kudrick (2023)***
  - Conway voters rejected STR zoning changes in 2021, then town enforced against STR non-occupant owners
  - Zoning definitions:
    - Residential/dwelling unit – "one or more persons living as a household…"; no reference to level of transiency
    - Owner-occupied lodging house/boarding house – nontransient
    - Owner-occupied tourist home/rooming house – transient/semi-transient
  - Defendant says STR is a "residential/dwelling unit"
  - Superior court analyzes "living as a household" – "does not relate to who is using the property or for how long they choose to do so, but rather requires the nature of the use to be residential and not commercial."
    - Defendant's use as STR is "residential"

Short-Term Rentals / Enforcement

- ***Town of Conway v. Kudrick (2023)***
  - On appeal, Town argues that "living as a household" "demands a level of stability in the occupancy of a residential unit that is not satisfied by merely being alive in the same place and sharing a meal."
    - Court: dictionary treatment of living and household; stability and duration are ambiguous
    - Court: "living as a household" means residential use
  - Town also argues that the absence of "transient" from residence definition means it couldn't be intended for STR use
    - Court: "the town knew how to include durational requirements and specifically chose not to do so for 'residential/dwelling unit'"

Short-Term Rentals / Enforcement

- ***Town of Conway v. Kudrick (2023)***
  - Town argues that STRs as residences violates the purpose of the zoning ordinance
    - Court: “the duration for which a property is used does not impact whether the property is used for residential purposes.”
  - Court declines to address policy issues – that’s the role of the Legislature; until that is done, courts will address this case by case with varying results
  - Hantz Marconi concurrence (CJ joins)
    - Use of property is a fundamental right; land regulations curtail that right; “land use regulations require clarity to inform landowners of uses that are permitted and not permitted
    - “Any ambiguity arising from language chosen for the regulation of land use should be resolved in favor of vindicating a landowner’s property rights.”

Short-Term Rentals

- ***What does this mean for you?***
  - Whether STRs are allowed/restricted/prohibited is a question of ***local*** definitions
    - Compare: *Conway v. Kudrick* and *Working Stiff Partners v. Portsmouth* – same issue, different definitions, different results
    - Both support the proposition that STRs can be regulated
  - Be mindful of Justice Hantz Marconi's admonition – legally instituted zoning is a non-compensable taking of property; to be legal, it must be clear (remember also not to go "too far" in regulating land use)
  - Don't assume that your understanding of a term is universally accepted
    - What does it mean to be a "household"?

Short-Term Rentals / Enforcement

- ***Andrews v. Kearsarge Lighting Prec. (2023)*****(NP Order)**
  - Note: KLP is a village district that has zoning power
  - 2017 complaints of disruptive behavior at short-term rentals (STR)
  - Public hearing; previously unenforced zoning "Guest Provision"

    "All residential properties that offer sleeping accommodations to transient or permanent guests shall be owner occupied and operated."
  - ZBA member – is it now unenforceable? Legal counsel says it is enforceable, and the Board of Commissioners (BOC) gets to work enforcing on four properties (resulting in different plaintiffs)
  - One goes to the ZBA for an administrative appeal – denied
  - All then go to the ZBA, appealing the citations – ambiguous Guest Provision, historical lack of enforcement – BOC upheld; owners required to remain on the property "in order to serve as a check on guest behavior…"
  - Rehearing denied; trial court affirms ZBA

Short-Term Rentals / Enforcement

- ***Andrews v. KLP (2023)(cont'd)***
  - Supreme Court deals with multiple constitutional issues
  1. Procedural due process (Part I, Art.15, NH Constitution) – ultimately a question of fundamental fairness
  - Was there bias among the ZBA?
    - One member's son was one of the complainants to the BOC
    - And they talked about it over dinner!
  - Court: but this wasn't raised early enough to preserve it for review
  - Concerns about bias must be raised at the earliest possible time to allow the tribunal to correct the issue
  - (Even if they had been raised…) Emails show only that there were conversations, not that the ZBA member had expressed bias; (And…) members may use their own knowledge, experience, and observations – and *common sense*
  - **Practice Point:** It's OK to live a normal life, but be careful of expressing views outside the meeting on pending matters

Short-Term Rentals / Enforcement

- ***Andrews v. KLP (2023)(cont'd)***
  2. Substantive due process – protection of fundamental rights from undue governmental intrusion
  - In the motion for rehearing – Guest Provision prohibits residential properties from being used as STRs w/o owner occupancy, but doesn't similarly prohibit apartment owners from doing the same
  - Trial court – KLP could rationally treat long-term rentals differently from STRs
  - Argument to the Supremes is different: application of provisions governing the hospitality business to the rental of single-family homes was not "rationally related to a legitimate governmental interest" (but shouldn't property be entitled to a higher standard?)
  - Supremes: this change of argument means it wasn't preserved for review – it all goes back to the motion for rehearing
  - **Practice Point:** How you decide a case will inform your success on appeal.

Short-Term Rentals / Enforcement

- ***Andrews v. KLP (2023)(cont'd)***
  3. Equal Protection – did the government treat similarly situated individuals differently?
  - Court: property is an important substantive right; governmental action (zoning) must be substantially related to an important governmental action
  - But this claim was argued and decided below as a selective enforcement claim, so the court sidesteps this question

Short-Term Rentals / Enforcement

- ***Andrews v. KLP (2023)(cont'd)***

4. Standing – are the plaintiff's rights affected in an actual, not hypothetical, dispute that is capable of judicial redress?

  - Claim that KLP acted "ultra vires" by adopting a Guest Provision interpretation that would prohibit *any* rentals (long or short); at trial, asserted that it would impact housing affordability and violate the holding of *Britton v. Chester*
  - Trial court rejected that argument, as the plaintiffs were not and never intended to engage in affordable housing
  - Refined argument with Supremes: focus is on banning any rentals,
  - Supremes: not barred completely from making this argument; not hypothetical
  - Reversed for further proceedings – *stay tuned!*

Short-Term Rentals / Enforcement

- ***Andrews v. KLP (2023)(cont'd)***

  5. Grab-bag of arguments

  - Estoppel: Court – KLP did not affirmatively (falsely) interpret the ordinance in a way that induced the plaintiffs to purchase and use their properties
  - Selective Enforcement: "…to show that the town's enforcement was discriminatory, a plaintiff 'must show more than that it was merely historically lax.'" Failure to enforce ≠ ratification of policy
  - Administrative Gloss: an ambiguous clause consistently interpreted requires a *legislative* amendment to change course; here, there was no prior consistent interpretation applied to similarly situated applicants
  - Takings – Part I, Art. 12, NH Constitution; Court – takings claims are for damages, not to invalidate an ordinance

Variances and Rehearings

- ***Weiss v. Town of Sunapee (2023)***
  - Variance for a side-yard setback sought
  - 4/1/21: ZBA denies – insufficient evidence of hardship, not in keeping with the spirit of the ordinance (written decision not issued until 8/3/21)
  - 4/27/21: motion for rehearing
  - 6/17/21 rehearing: ZBA denies – hardship, spirit of the ordinance, **and** lack of proof that the variance was not contrary to the public interest (written decision on 6/27/21 but not given to Weiss)
  - Appeal contesting the three points in the denial of the rehearing – town moves to dismiss for lack of subject matter jurisdiction: when the basis of an appeal changes following a decision on a rehearing, an additional rehearing is required before appealing to court (consistent with *Dziama v. Portsmouth* (1995))
  - The application for rehearing serves as the basis for court appeal (RSA 677:3)

Variances and Rehearings

- ***Weiss v. Town of Sunapee (2023)(cont'd)***
  - Trial court dismisses for lack of subject matter jurisdiction
  - Supremes: *not so fast!* – there is SMJ in the two points in the motion for rehearing (hardship and spirit of the ordinance)
  - Statute also allows court to consider additional grounds for "good cause shown"
  - Weiss: ZBA's failure to provide written decisions compromised their ability to properly frame any motion for rehearing
  - Reversed and remanded – hear those two arguments and consider whether good cause was shown to allow the third argument (public interest)
  - **Practice Point:** written decisions (including findings of fact) should be timely issued to the applicant/appellant

Variances, Voting, and Facts

Housing Appeals Board

- ***Appeal of Town of Derry (2023)*****(NP Order)**
  - 2003 variance for frontage denied
  - 2021 variance also denied (no *Fisher v. Dover* issue because of statutory changes);
  - Motion to approve fails 2-3; two members cite "spirit of the ordinance"; one finds diminution of surrounding property value
  - HAB: ZBA decision was unreasonable – no facts in the official record to counter applicant agent's statement on diminution of value (but unofficial record may have had something)
  - Supremes: HAB's decision was reasonable; "vague concerns" based on a member's personal opinions are not adequate
  - **Practice Points:** Does a failed motion to approve constitute a denial? How does your ZBA count its votes on variances? See RSA 674:33, I(c) – voting should be in your rules of procedure. Distinguish between your opinions and your fact-based knowledge

Excavations / Special Exceptions

- ***Lonergan v. Town of Sanbornton (2023)***
  - ZBA grants a special exception for an excavation operation
  - 29 days later, abutters file a motion for rehearing; denied
  - Superior Court upholds ZBA
  - Supreme Court – Town and intervenor argue that appeal was untimely
  - RSA 155-E: planning board is the regulator of excavations, unless town meeting says select board or ZBA
  - Here: zoning ordinance designates ZBA as the regulator; therefore, the special exception serves as an RSA 155-E permit
  - RSA 155-E:9 – motion for rehearing within ***10 days***

Who's an Owner?

- ***Kymalimi, LLC v. Town of Salem (2023)*****(NP Order)**
  - Parties: DSM ("owner"); Transform (lessor); Kymalimi (sub-lessor)
  - Transform has an exclusive lease for a former K-Mart; Kymalimi is a sublessor seeking to establish a charitable gaming facility
  - Site plan application made by Kymalimi with permission from Transform; DSM objects – regulations and forms refer to "owner," "owner of record," and "property owner" – no definition
  - Planning board accepts, then rescinds acceptance of application
  - Appeal – trial court orders planning board to accept the application
  - Supremes – reconsideration of acceptance was OK
  - Context of regulations show that "owner" means DSM, even though Transform has a *recorded* lease
  - **Practice Points:** Definitions are good, but common sense should prevail; you can backtrack on earlier decisions, up to a point – be careful of "detrimental reliance" (see *Batakis v. Belmont* (1992))

Subdivisions

Housing Appeals Board

- ***Appeal of Town of Amherst (2023)***
  - Planning Board grants conditional use permit for “increased density” – 54 units, some 62+ age-restricted; granted under “Integrated Innovative Housing Ordinance”, later repealed
  - Subdivision/site plan application – reduced to 49 units (14 62+ age restricted, 35 unrestricted)
  - Planning Board denies
    - Conflict with federal and state law – condominium documents require only one household member to be 62+ in age-restricted units; not all units are age-restricted, and those owners could be out-voted; town also asserts that all units should be 62+
    - Design “does not protect and preserve the rural aesthetic the Town has consistently valued, as is required by Section 4.16A of the Zoning Ordinance.”
  - Housing Appeals Board vacates and remands

Subdivisions

Housing Appeals Board

- ***Appeal of Town of Amherst (cont'd)***
  - Appeal to Supreme Court
  - HAB had noted that compliance with federal and state law was an issue, but should have been resolved as a condition, if the plan were approved; could be addressed in condominium documents, which were never reviewed by legal counsel (as was the custom of the board) – Supreme Court agrees
  - Town complains that the 65-day clock was consumed by the applicant, so they ran out of time; but the record shows that the applicant granted an extension waiver

Subdivisions

Housing Appeals Board

- ***Appeal of Town of Amherst (cont'd)***
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  - HAB had noted that compliance with federal and state law was an issue, but should have been resolved as a condition, if the plan were approved; could be addressed in condominium documents, which were never reviewed by legal counsel (as was the custom of the board) – Supreme Court agrees
  - Town complains that the 65-day clock was consumed by the applicant, so they ran out of time; but the record shows that the applicant granted an extension waiver

Subdivisions

Housing Appeals Board

- ***Appeal of Town of Amherst (cont'd)***
  - Rural character: town focuses on density – 49 units are "too much"; HAB says density was already implicitly considered in the approved CUP (impact on the neighborhood)
  - Town claims that it can reconsider the question of "rural aesthetic" because of the specific standards in subdivision and site plan regulations. HAB: "The 'density' concern left the station when the CUP for up to 54 units was approved in accordance with the then-existing IIHO."
  - Supreme Court: rejects the Town's contention that the regulations provide an opportunity to reconsider the CUP determinations – "including determinations related to a 'rural aesthetic.'"

Subdivisions

Housing Appeals Board

- ***Practice Points***
  - *You're there to help:* The HAB and the Court don't cite this, but remember your constitutional obligation to assist the applicant – searching for obtuse reasons for denial is not "assistance"
  - *Collateral Estoppel* – Court also doesn't reference this, but once you've made a decision on an issue, you likely can't reconsider the same question based on the same facts in a different process.
  - *Hoisted on their own petard:* Developers complain about 2-pronged processes where they must get a CUP requiring a lot of detail, then go through the site planning process (requiring a lot of detail). That typically thwarts some development. Here, however, the planning board was caught in a device of its own making.
  - *Not in the Court's opinion:* Board membership may change over time. A "new" board has to live with the old board's decisions.

DRI Digression

- **Does this have the potential for regional impact?**
  - RSA 36:57, I: "A local land use board, as defined in RSA 672:7, upon receipt of an application for development, shall review it promptly and determine whether or not the development, if approved, reasonably could be construed as having the potential for regional impact. Doubt concerning regional impact shall be resolved in a determination that the development has a potential regional impact."
- **Criteria – RSA 36:55, including, but not limited to…**
  - I. Relative size or number of dwelling units as compared with existing stock
    II. Proximity to the borders of a neighboring community
    III. Transportation networks
    IV. Anticipated emissions such as light, noise, smoke, odors, or particles
    V. Proximity to aquifers or surface waters which transcend municipal boundaries
    VI. Shared facilities such as schools and solid waste disposal facilities
  - What's your DRI process? Check with your regional planning commission for its guidance
  - Ask the question or risk the consequences!

Developments of Regional Impact

- ***Anthony v. Town of Plaistow (2023)***
  - Planning board approves a site plan for a construction equipment rental and maintenance facility in a commercial zone
  - Residential abutter claims that DRI was never properly considered by the planning board, whose decision is void "ab initio"
  - Superior Court found that DRI was adequately considered
  - Supreme Court: "…the planning board considered and implicitly found that the project did not have a potential for regional impact."
    - Planning director discussed it at a public hearing
    - The planning board was "aware that the project would not impact ground or surface water, that the site was located in the center of town, and that the project would minimally impact traffic in the area."
  - Conclusion: the planning board got away with it (*this time!*) – purpose of "prompt" review is to provide opportunity for input

Other Cases of Interest

- ***Christ Redeemer Church v. Hanover (2023)***

  Non-precedential order

  - Special exceptions upheld, but CRC was granted relief from "hours and occupancy" conditions imposed by the ZBA
  - How would this litigation have proceeded under new law on religious land uses?

- ***Transfarmations, Inc. v. Town of Amherst (2022)***

  - Innovative Housing CUP denied – traffic study was incomplete; invitation by chair to apply again
  - New application with complete traffic study – denied for not being materially different from the first application (and traffic study substantiated the board's concerns)
  - Supreme Court: whether a subsequent application is materially different is the first step; what was deficient in the first application? Here: lack of a traffic study. Next step is "full consideration"
  - Remanded

US Supreme Court

Waters of the United States

- ***Sackett v. Environmental Protection Agency (2023)***
  - 5-4 decision (Alito) dramatically curtails the scope of the Clean Water Act's jurisdiction; adopts Scalia's 2006 *Rapanos* dissent
  - 2-prong test to determine whether a wetland is CWA-covered
    - The adjacent body of water constitutes WOTUS (relatively permanent and connected to navigable waters); and
    - The wetland has a continuous surface connection with water (making the boundary between the two "indistinguishable)
  - 2017 Trump Administration report indicated such a test would reduce wetland CWA applicability by 51%
  - Unlikely to have a significant impact in NH because of intervening state standards/DES regulations