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COURT UPDATE

A compilation of case summaries prepared by the New Hampshire Municipal Association for the period covering October 1, 2022 through September 30, 2023.

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INTRODUCTION

The Court Update is a compilation of case summaries that appeared on the New Hampshire Municipal Association's (NHMA) website during the past year and are presented here as instructional material for municipal officials. Summaries have been compiled primarily from New Hampshire Supreme Court slip opinions; U.S. Supreme Court, federal, superior court and Housing Appeals Board decisions of significance have also been included. The cases in this book cover the period from October 1, 2022 to September 30, 2023. Procedural aspects not germane to the central holding of a case have been left out.

Commentary is intended for municipal officials and is meant simply as a starting point in the local decision- making process. Nothing included in these summaries should be construed as legal advice on pending controversies or as a substitute for consultation with your municipal attorney.

NHMA's Legal Services attorneys are available to answer inquiries and provide general legal assistance to elected and appointed officials from member towns and cities. Attorneys can be reached by phone at 603.224.7447, or by email at *legalinquiries@nhmunicipal.org*.

46 Martin Road, LLC v. Town of Epping
Housing Appeals Board
Case No. ZBA – 2022-16
December 5, 2022

Equivocal public safety evidence did not support denial of a variance on the issue of public safety

46 Martin Road LLC (hereinafter Martin Road) applied for and received four variances and one special permit for a 315 rental unit project but was denied a fifth variance for the height of the proposed structure. Martin Road sought a variance to build a three-story structure where Epping's zoning ordinance only permitted two habitable stories. The Epping ZBA's notice of decision stated the request for three habitable stories was denied and referred to the Board's public meeting minutes for specific details.

On appeal to the Housing Appeals Board (hereinafter HAB) Martin Road first argued the ZBA's decision was unlawful because it failed to provide written reasons for the disapproval. The HAB reviewed the ZBA's minutes and concluded it could be reasonably discerned that the variance was denied on the basis of public interest related to safety concerns. Based on that finding the Board denied the request that the ZBA decision was unlawful based on the failure to provide written reasons for disapproval.

The HAB instead focused on whether there was evidence in the record to support the board members' conclusions on whether the variance will not be contrary to the public interest. The NH Supreme Court's decision in *Harborside Assocs., L.P. v. Parade Residence Hote*l, 162 N.H. 508 (2011) provides that this requires a determination whether by granting the variance that this would unduly and in a marked degree conflict with the zoning ordinance such that it violates the basic zoning objectives. Because the ZBA had received equivocal testimony and written submissions from the Epping Fire Department, including whether Martin Road would contribute to the cost of an aerial firefighting vehicle, the HAB concluded the hearing record did not reasonably support the ZBA's decision on the issue of public interest.

The HAB reversed the ZBA's decision and granted the variance to permit three habitable stories. The HAB denied Martin Road's request for an award of damages, as the HAB did not find any bad faith conduct by the ZBA to warrant an award of costs under RSA 677:14 or attorney's fees under *Harkeen v. Adams*, 117 N.H. 687 (1977).

Practice Pointer: When addressing the question of public interest the two established pathways to determine whether a variance will violate a zoning ordinance's basic zoning objectives are to examine: (1) whether the variance would alter the essential character of the neighborhood; and (2) whether the variance would threaten the public health, safety, or welfare.

Christopher Andrews & a. v. Kearsarge Lighting Precinct
New Hampshire Supreme Court
Case No. 2021-0543
August 31, 2023

*Failure to enforce a municipal ordinance in the past does not per se bar enforcement in the future.**

In 2017, the Board of Commissioners of the Kearsarge Lighting Precinct held a public hearing in response to "disruptive" behavior by visitors staying at short-term vacation rental properties in a residential district. The Kearsarge Lighting Precinct is a village district within Conway and Bartlett, and the Board of Commissioners is its primary governing body. The Andrew plaintiffs were Massachusetts residents who own two properties in the district that they use as short-term rentals.

At the 2017 hearing, public commenters complained that short-term rentals likely violated the district's zoning ordinance. That ordinance contains a "Guest Provision" in its section on permitted uses: "All residential properties that offer sleeping accommodations to transient or permanent guests shall be owner occupied and operated." The Andrews and others did not occupy the vacation properties; this was not contested. Even though it was noted that this had not been enforced up to that time, the Board of Commissioners voted to issue citations regarding four properties, including the two belonging to the Andrews. The Andrews appealed their notice of violation and citations, and their hearing was held in February 2018.

Through counsel they raised the issue of past non-enforcement, but the ZBA unanimously denied the appeal, finding that the plain meaning of the Guest Provision was clear, and the Board of Commissioners acted accordingly. The ZBA said the provision's purpose was to "maintain a quiet, peaceful neighborhood made up of residents, not transients," and requiring owners to reside at relevant properties can "serve as a check on guest behavior that might otherwise be incompatible with the neighborhood." It also ruled that the plaintiffs failed to show a previous instance wherein the Board of Commissioners interpreted the Guest Provision in a way that would not apply to short-term rentals. After applying for rehearing and being denied, the plaintiffs appealed to the Superior Court under RSA 677:4. The trial court heard the case in 2021 and ruled in favor of the ZBA. It denied a motion to reconsider, after which the property owners appealed to the Supreme Court.

First, the plaintiffs argued that the district committed a violation by depriving them of certain property rights without due process. Specifically, they say there was no due process because ZBA members were biased and may have decided how to vote before the hearing. The primary target of this complaint was a member whose son had spoken in support of the citations at the original Board of Commissioners public hearing and whose son-in-law is an attorney. Evidence (emails) was presented that the member spoke to them both before the hearing, but the Court said there was no evidence of bias because the presented emails only showed that he had spoken about the "challenges" the district faced and did not demonstrate prejudgment in either direction. Additionally, the plaintiffs argued there was a due-process violation because ZBA members considered information not found in the record. Citing to *Biggs v. Town of Sandwich* and *Dietz v. Town of Tuftonboro*, the Court found no problem with members considering information beyond the record, saying that ZBA members may base their conclusions on their own knowledge, experience and observations, as well as upon common sense.

Second, the Supreme Court addressed whether the Superior Court should have heard the plaintiffs' complaint that the Guest Provision violated the state zoning statute. Plaintiffs argued that the plain meaning of the provision would ban not only short-term vacation rentals but all rentals, which would restrict affordable housing, expressly prohibited by law (see *Britton v. Town of Chester*, 134 N.H. 434 (1991)). The trial court did not rule on this complaint because it found the plaintiffs, who are not renting affordable housing, did not have standing. The Supreme Court overturned this. Standing under the New Hampshire Constitution requires parties with adverse rights and an actual dispute with possible legal redress. *Avery v. Comm'r,*

N.H. Dep't of Corr., 173 N.H. 726, 737 (2020). Here, the plaintiffs have an actual dispute rising from the district citations regarding their rights to certain property uses and the Court has the ability to declare the ordinance ultra vires, so all the standing requirements were met. The holding suggests it is not material whether the plaintiffs intended to use their property for affordable housing. That the ordinance plausibly revokes their right to rent affordable housing had they chosen to was sufficient to grant standing. The issue was remanded to the trial court for consideration.

Third, the Andrews argued that the district's history of not enforcing the ordinance makes enforcement now illegal. Within these arguments is the suggestion that this is a case of selective enforcement targeting the owners of these four properties. They argue that the district's failure to enforce demonstrated a policy of "de facto nonenforcement," which discriminated against the plaintiffs. However, the Court said that to prevail on this argument, a party must show more than just that the policy was "historically lax"; they have to show that there was selective enforcement with "conscious intentional discrimination." *Alexander v. Town of Hampstead*, 129 N.H. 278, 283 (1987). Past failure to enforce alone is not proof of discrimination. *Id*. Similarly, they argued that there was a "de facto policy" allowing short-term rentals until 2017 under the doctrine of administrative gloss. The doctrine of administrative gloss says that agencies (including a municipality) that have been interpreting an ambiguous ordinance one way over a period of years cannot change its interpretation without legislative action. *Nash Family Inv. Prop. V. Town of Hudson*,139 N.H. 595, 602 (1995). The Superior Court ruled, and the Supreme Court affirmed that this claim fails because there is no record of the Board of Commissioners interpreting the Guest Provision in the past in a way that would allow short-term vacation rentals.

Lastly, the plaintiffs argued that the zoning decision constituted an unconstitutional "taking" – the New Hampshire Constitution says no part of a man's property shall be taken from him … without his own consent – because government regulations can be takings if they deprive a property owner of rights and are arbitrary or unreasonable. N.H. Const. pt. I, art. 12; *Huard v. Town of Pelham*, 159 N.H. 567. 574 (2009). The trial court ruled that the Takings Clause is not a basis for finding that the ordinance was invalid, and the Supreme Court agreed.

The case was sent back to the Superior Court for consideration of whether the Guest Provision is ultra vires now that the Supreme Court ruled the plaintiffs have standing on that claim. The other findings of the Superior Court were affirmed.

Practice Pointer: If a municipality has a de facto policy of not enforcing an ordinance or consistently interprets that ordinance in a particular way, it cannot change that practice without legislative action; but absent such a policy or consistent interpretation, it can undertake enforcement of an otherwise dormant ordinance so long as it is reasonable.

**This decision is a final order of the court. Final orders are distinguished from court opinions in that they decide the merits of a case but do not create binding precedent. Final orders may be cited in briefs, but only if identified as a non-precedential order. They can be helpful as guidance but are not law. See N.H. Sup. Ct. Rule 12-D(3).*

Richard Anthony & a. v. Town of Plaistow
Supreme Court of New Hampshire
Case No. 2021-0410
May 16, 2023

Superior Court did not err when it dismissed the plaintiffs' untimely zoning appeal, and when it concluded that the Planning Board made a sufficient regional impact determination

Milton Real Properties of Massachusetts, LLC ("intervenor") made an application to Plaistow's Planning Board to consolidate two adjacent lots in Plaistow's commercial zoning district and to receive site plan approval for a proposed construction equipment rental and maintenance facility, a wash building, and a display and storage area. Richard and Sanaz Anthony ("plaintiffs"), informally expressed some displeasure about this proposal, but did not appeal the February 6, 2019, code enforcement officer determination that the proposed commercial uses were permitted under the zoning ordinance.

The planning board conditionally approved the site plan in June of 2019, thereby adopting the favorable code enforcement officer's zoning determination. Plaintiffs appealed that decision to the Superior Court. The Superior Court held that because the planning board's approval was conditional, the Court lacked jurisdiction over the site plan appeal, and remanded back to the board. Upon further clarification the Superior Court also ruled that it lacked jurisdiction to adjudicate the zoning issue until the Zoning Board of Adjustments (ZBA) rendered its decision on the zoning questions. The plaintiffs did not appeal that decision.

When the planning board issued its final approval decision, the plaintiffs appealed to the ZBA challenging the zoning determination that the project was a permitted use of land in the zoning district. The ZBA dismissed that appeal for lack of jurisdiction because the plaintiffs filed it in an untimely fashion. The plaintiffs moved for a rehearing and when that was denied, they appealed the ZBA's dismissal to the Superior Court. The Superior Court dismissed the ZBA appeal based on untimeliness, ruling that both the Court and the ZBA lacked subject matter jurisdiction. Plaintiffs did not appeal this dismissal and that became a final judgment.

While they filed their unsuccessful ZBA appeal, the plaintiffs filed an appeal in the Superior Court, challenging the planning board's approval of the intervenor's site plan for the same reasons they did in their appeal to the ZBA. However, as before, the Superior Court ruled that the untimeliness of the plaintiffs' ZBA appeal meant that they had failed to exhaust their administrative remedies with the ZBA; additionally, it held that the planning board had implicitly found that the proposed development would not have a regional impact and thus was compliant with RSA 36:56, and that the plan was reasonably considerate of abutters' interests. When the Superior Court denied the plaintiffs' motion to reconsider, they appealed to the Supreme Court of New Hampshire.

The plaintiffs argued that contrary to the Superior Court's ruling, the zoning issue was properly before the court. However, under RSA 677:15, I-a, anyone who takes issue with a planning board decision regarding a plat or subdivision may file a petition in the Superior Court within 30 days of the Board's official vote, except for PB decisions that are appealable to the ZBA under RSA 676:5, III. The Court ruled the zoning issue was not properly before the Court because the ZBA had previously ruled the appeal of the original zoning determination was untimely, and although the plaintiffs could have challenged the jurisdictional determinations of the ZBA and superior court they elected no to do so, and the superior court's decision became final in May of 2021.

The plaintiffs also argued that the Superior Court erred in concluding that the planning board made a proper regional impact determination. A local land use board must promptly review applications and "determine whether or not the development, if approved, reasonably could be construed as having the potential for regional impact." RSA 36:56, I. The Court found that the planning board

had satisfactorily reviewed any potential regional impact issues in compliance with that statute.

The plaintiffs also argued that the decision was unlawful and unreasonable for five reasons: first, because the lots in question were next to a residential neighborhood; second, because there were not enough visual buffers between two areas; third, because the ground and surface water, wetlands, and aquifer could potentially be impacted by the placement of the washing facility; fourth, because the potential contamination issues caused by the washing facility would not be addressed or resolved by the groundwater monitoring system in place; and finally, because the proposed project could affect the abutters' quiet enjoyment of their own properties. Based on the rigorous reviewing process the planning board applied to the site plan, including reviews by the town's outside consultant and its Conservation Commission the Court ruled against the plaintiffs on all five issues.

Practice Pointer: RSA 677:15, I, and RSA 676:5, III establish two separate avenues of appeal from a decision of the planning board, depending upon the nature of the claim. A party may appeal planning board decisions concerning a plat or subdivision directly to the superior court pursuant to RSA 677:15. When the planning board makes a decision based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, a party must first appeal that decision to the zoning board of adjustment pursuant to RSA 676:5.

Appeal of Town of Amherst
NH Supreme Court
No. 2021-0570
January 18, 2023

Planning Board deviation from past practices when reviewing a land use project can result in reversal of a board decision.

Migrela Realty Trust II and GAM Realty Trust (hereinafter Applicant) sought approval of a mixed elderly restricted and unrestricted housing project in the Town of Amherst. The project was granted a Conditional Use Permit for an increased project density of up to 54 units. During the review process for the subdivision/site plan the project was reduced to 49 units, with 14 of those units age-restricted 65-and-older consistent with RSA 354-A:15, and the remaining units unrestricted.

The Amherst Planning denied approval due to perceived conflicts between federal law on age restricted housing and concern the project would be under a common, condominium regime. The Applicant appealed to the Housing Appeals Board (HAB) and the Board vacated and remanded the matter back to the planning board with instructions to undertake a collaborative discussion of state and federal age-restricted housing rules and the provision of condominium documents that addressed concerns about mixed-age housing. The HAB ordered the planning board to make a new decision based upon legitimate unsatisfied planning board requests if the new vote is to deny, or if an approval include customary and reasonable approval conditions.

The Supreme Court affirmed the decision of the HAB finding that the original rejection by the planning board on the federal law age-restrict housing issue was inconsistent with the board's past practice of resolving those matters through town counsel review of condominium documents as a condition of approval. As stated by the Court "[w]e cannot say that it was unjust or unreasonable for the HAB to conclude that the Board's failure to follow this customary practice, and instead, to deny the application based on its own concerns about legal compliance, was unreasonable." The Court also affirmed the decision of the HAB that the rural aesthetic concerns of the planning board were previously addressed during the CUP process.

Practice Pointer: When a planning board deviates from well-established past practices when reviewing a land use project this could provide a basis to find the action of the board is unreasonable leading to overturning a board decision.

Appeal of Town of Windham
New Hampshire Supreme Court
Case No. 2021-0473
October 4, 2022

*Under RSA 672:1, III (e) municipalities must ensure the exercise of zoning and planning powers do not discourage the development of workforce housing.**

The Town of Windham appealed a decision of the Housing Appeals Board (HAB) concerning a housing project involving both workforce and market rate units. The applicant sought to construct sixteen single-family condominiums, which, together with the existing single-family house, would result in seventeen total units. Windham's zoning ordinance permitted workforce housing in the applicable zoning district but required that at least 50 percent of the units be workforce housing. The applicant sought a waiver of that percentage, as permitted under the ordinance, where the 50 percent requirement "creates a financial burden and makes the development not financially viable."

In support of its waiver request, the applicant submitted a workforce feasibility analysis from an independent engineering firm, which concluded that developing 50 percent of the units as workforce housing would not be financially feasible and would likely generate a financial loss of approximately $130,000. The Town's engineer reviewed and agreed with that analysis. The planning board denied the waiver because the applicant's financial information did not support the request. The applicant appealed the denial of the waiver request to the HAB. The HAB vacated the board's denial of the waiver and remanded to the board with instructions to reconsider an appropriate workforce housing percentage in light of the duty imposed under RSA 674:58, III to provide reasonable and realistic workforce housing development opportunities. The Town appealed that decision to the Supreme Court.

The primary focus of the Court's decision was on the alleged illegality of the HAB ordering the planning board to reconsider the denial of the waiver of the required percentage of workforce housing units under the zoning ordinance. The Town argued that it was the applicant's burden to propose a more appropriate percentage of workforce housing, and it was error to put the onus on the Town to determine the appropriate percentage of workforce housing. The Supreme Court rejected this argument, stating that the Town's position was in conflict with the mandate of RSA 672:1, III(e) that the opportunity for workforce housing shall not be unreasonably discouraged by municipal planning and zoning. Furthermore, the Court reasoned that the Town's approach would permit the planning board to engage in dilatory tactics, contravening its duty to assist citizens in the land use application process.

Practice Pointer: When addressing land use applications that incorporate workforce housing the burden is on the municipality to ensure that development of such housing shall not be prohibited or unreasonably discouraged by use of municipal planning and zoning powers or by unreasonable interpretation of such powers.

**This decision is a final order of the court. Final orders are distinguished from court opinions in that they decide the merits of a case but do not create binding precedent. Final orders may be cited in briefs, but only if identified as a non-precedential order. They can be helpful as guidance but are not law. See N.H. Sup. Ct. Rule 12-D(3).*

Ellen & Ronald Campbell v. Town of Pelham
Housing Appeals Board
Case No. ZBA – 2022-30
April 24, 2023

When overturning a ZBA decision the matter does not have to be remanded to the ZBA if the record is sufficient to permit reviewing court or board to render a final decision as a matter of law

Ronald and Ellen Campbell (Campbells) applied for and received dimensional variances from the Pelham ZBA. These variances allowed construction on a lot with 6,680 square feet where 43,560 square feet were required, a 50-foot frontage where 200 feet were required and eight-foot setbacks where 15-foot setbacks were required. Because the parcel only had frontage on a private road the ZBA decision noted the Campbells needed Select Board approval for a building permit after comment by the Planning Board as required by RSA 674:41.

The Campbells applied for a building permit with Pelham's planning department; the select board also did a site walk and denied the Campbells permit application because of safety concerns and the influence of the Planning Board's comment. The Campbells appealed the select board's denial to the ZBA citing RSA 674:41, II, which gives the ZBA the authority to grant a building permit where it was denied by the select board and exempt lots from the frontage requirements of RSA 674:41. After a public hearing the ZBA voted to deny the appeal citing deference to the select board's decision. The Campbells moved for rehearing, arguing that the ZBA had erred in its decision by applying an incorrect standard of review; the ZBA denied this also. Subsequently, the Campbells brought their appeal to the Housing Appeals Board (HAB).

Looking at the requirements or RSA 674:41, II the HAB found that the ZBA had indeed erred in failing to consider the Campbells' application for relief. The HAB concluded the ZBA misconstrued the Campbells' request in an unlawful manner, and instead of remanding the matter back to the ZBA the HAB determined it could rule the Campbells met the necessary legal standards under RSA 674:41, II. Upon examination of the entire record before the ZBA, Planning Board and Select Board the HAB reversed the ZBA decision and granted the relief sought by the Campbells under RSA 674:41, II.

Practice Pointer: Where the ZBA has not addressed a factual issue, the trial court ordinarily must remand that matter to the ZBA for further consideration. However, remand is unnecessary when the record reveals that a reasonable fact finder necessarily would have reached a certain conclusion. Upon a finding that a ZBA applied the wrong legal standard, the trial court or the Housing Appeals Board is ordinarily obligated to remand to the zoning board to reconsider the evidence using the correct legal standard. Provided, however, no remand is necessary and the reviewing court or board can issue a decision affirming or reversing and ZBA decision if it is determined, as a matter of law, that the aggrieved party had met the correct legal standard.

Chelmsford Hooksett Properties, LLC v. Town of Hooksett
Housing Appeals Board
Case No. ZBA-2022-10
November 14, 2022 & May 30, 2023

ZBA variance denial upheld by Housing Appeals Board on reconsideration; evidence in support of hardship must consist of more than conclusory statements by an applicant's attorney

Chelmsford Hooksett Properties, LLC sought a use variance from the Hooksett ZBA to convert a 100,000 sq. ft. commercial office building to market rate residential apartments. The building was vacant for several years due to the obsolete nature of the existing structure built in 1986. The property is in a zoning district reserved for a blend of commercial and retail uses but prohibiting residential uses.

In denying the variance the ZBA found the proposed residential apartments would be contrary to the public interest as the use would be inconsistent with the character of the surrounding neighborhood. The ZBA also ruled substantial justice would not be done as the loss to the applicant was outweighed by the harm to the public interest. On the question of hardship, the board ruled there were no special conditions that differentiated the property from others in the same area, and that the zoning prohibition was substantially related to public purposes of the ordinance making the proposed residential use not reasonable under the circumstances.

The Housing Appeals Board (HAB) examined the certified record to determine if there was evidence in the record to support the ZBA's decision. On the contrary to public interest issue the HAB primarily focused on whether the ZBA acted unreasonably in finding the requested variance would alter the neighborhood's essential character. The crux of that question turned on traffic impacts and that weighed in favor of Chelmsford since the only professional traffic assessment found the proposed residential use would generate considerably fewer vehicle trips than the former office use. Since the ZBA instead relied upon their own judgment and experience, the HAB ruled the ZBA's decision on the public interest issue was not supported by substantial evidence.

On the question of substantial justice, because the ZBA did not articulate what the public would gain if the property was not converted to a residential use, the HAB ruled the potential loss to Chelmsford would not be outweighed by potential harm to the public.

When the HAB examined the ZBA decision on the issue of hardship, it first concluded the obsolete office structure by itself created special conditions, even though the parcel itself was similar to surrounding properties. The HAB also found that the unique burden of the obsolete office structure severed the relationship between the permitted commercial and retail uses of the property and their application to the property.

After further reconsideration and rehearing the HAB reversed itself and in so doing ruled that the evidence on the question of hardship was entirely the product of conclusory statements by the applicant's attorney, not supported by any objective evidence. Consequently, the HAB ruled that the decision of the ZBA denying a variance to permit an 81-unit apartment building on the property was affirmed.

Practice Pointer: When denying a variance the ZBA must ensure each of its rulings is supported by evidence in the certified record. Whether a variance would be not contrary to the public interest and be consistent with the spirit of the ordinance, assess (1) whether the variance would alter the essential character of the neighborhood; and (2) whether the variance would threaten the public health, safety, or welfare. If a board concludes traffic will alter the essential character of the neighborhood, be sure to support that conclusion with a traffic study or direct personal observations. When ruling on substantial justice, the potential loss to the applicant must be outweighed by the potential harm to the public. Special conditions of the property, the first step in the hardship analysis, can arise from the property itself and not require a showing of how the property is different from surrounding properties. An applicant can demonstrate no fair and substantial relationship between the permitted uses of the property under the ordinance if the special conditions of the property itself sever the relationship between the ordinance's purpose and its application to the property. Provided, however, the evidence submitted in support of hardship must consist of more than conclusory statements by an applicant's attorney.

Christ Redeemer v. Town of Hanover
New Hampshire Supreme Court
Case Nos. 2021-0349 and 2021-0356
April 14, 2023

*New Hampshire Supreme Court reverses Superior Court's Decision Upholding Conditions Placed on Church's Special Exception Regarding Occupancy and Hours of Operation; Affirms Superior Court's Decision to Dismiss Constitutional Claims and Grant Wetlands Special Exception.**

The Christ Redeemer Church (Church) in Hanover purchased a set of lots on a two-lane road with a thirty-mile-per-hour speed limit and roughly 3,100-vehicle daily traffic and in 2018 applied to Hanover's Zoning Board of Adjustments (ZBA) for special exceptions from the town's zoning ordinance to build a church. The proposed church building would measure 21,250 square feet, would seat 415 people, would include a parking lot with a 120-car capacity, and would have necessary supporting infrastructure on the lot. One third of the parking spots and the entirety of the church would be built in Hanover's Single Residence District. Because the rest of the parking and the related infrastructure would be in the Rural Residence District, a use special exception from the ZBA would be required to proceed with building. Additionally, because the northwest portion of the property was in a wetland buffer zone, a wetlands special exception would be required. The Church submitted a traffic study and sound level assessment and the ZBA conducted a third-party technical review to determine whether the proposed building might affect water resources given the proposed location. After five public hearings, in which Jeff and Lara Acker (Ackers), who lived across the street from the lots in question, were involved, the ZBA granted the Church the wetlands special exception but denied the use special exception. The Ackers moved for rehearing and it was denied; the Church moved for the same and it was granted.

At the Church's 2019 rehearing, the ZBA granted the Church the use special exception with a number of conditions:

1) Seating numbers in the sanctuary and maximum occupancy of the building could be no more than 300 (down from the proposed 415);

2) Hours of occupation and operation would be 7am to 9pm on weekdays and 8am to 9pm on weekends;

3) Only 113 parking spaces would be permitted, with a traffic coordinator recommended;

4) The sanctuary windows must be closed at all times except during emergencies or in case of HVAC failure; and

5) The Church must install a noise mitigation screen around mechanical equipment.

Both the Church and the Ackers filed for rehearing and when it was denied, brought suit against the Town of Hanover in the Superior Court. The Ackers brought two appeals under RSA 677:4, one for each special exception; the Church brought a nine-count complaint challenging Hanover's Zoning Ordinance under the First Amendment, the Equal Protection Clause, and Substantive Due Process doctrine and the first, second, and fourth conditions of the use special exception under the Federal Religious Land Use and Institutionalized Persons Act and RSA 677:4. The Superior Court granted Hanover's motion for summary judgment on the Church's constitutional claims and denied the Church's and granted Hanover's motions for summary judgment under RLUIPA, except for the Church's challenge to the fourth condition (window closure). The Superior Court also affirmed the ZBA's granting of the special exceptions except for the window closure condition, and awarded the Church nominal damages in the amount of one dollar and court costs in the amount of $280. It denied the Church's requests for attorneys' fees and motion for reconsideration; the Church and the Ackers appealed to the Supreme Court of New Hampshire.

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he Supreme Court reversed the Superior Court's decision upholding the hours of operation condition because no evidence in the record indicated that church events a bit earlier in the day, such as a 6am prayer breakfast, would cause any detrimental effect on the surrounding area or road; the ZBA had based the condition on when other churches in Hanover held their events, but the Supreme Court held that because they were on different roads than the proposed church, the effects would be different. The Supreme Court also reversed the Superior Court's upholding of the maximum occupancy conditions, reasoning that basing occupancy limits on the number of allowed parking spaces and estimated vehicle occupancy was flawed because people could come to church by other means of transportation and because the ZBA did not give a justification for departing from the Ordinance or for the inconsistencies in occupancy numbers the departure would cause. The Court held that the Church's constitutional and RLUIPA claims and attorney fees, builder's remedy, and additional damages requests did not require further discussion.

The Supreme Court affirmed the Superior Court's decision upholding the ZBA's granting of the wetlands special exception because it found that the ZBA had evidence upon which it could have reasonably based its decision to grant the special exception.

Ultimately, the Supreme Court reversed the Superior Court's decision upholding the conditions on the Church's use special exception regarding hours of operation and occupancy limits and affirmed the Superior Court's decision rejecting the Church's additional claims and upholding the ZBA's granting the Church the wetlands special exception.

**This decision is a final order of the court. Final orders are distinguished from court opinions in that they decide the merits of a case but do not create binding precedent. Final orders may be cited in briefs, but only if identified as a non-precedential order. They can be helpful as guidance but are not law. See N.H. Sup. Ct. Rule 12-D(3).*

City of Laconia v. Robert Kjellander
New Hampshire Supreme Court
Case Nos. 2022-0276
August 10, 2023

*Municipalities can receive attorney's fees and costs under RSA 676:17, II in cases where they prevail in enforcing the municipal zoning ordinance; even if scrape or waste materials have an intended personal use they still constitute junk .**

On two lots on opposite sides of Roller Coaster Road in Laconia, Robert Kjellander stores property that the City of Laconia had defined as "scrap" and "junk." On the property were over 50 motor vehicles, over 30 boats, farm equipment, a coal stove, trailers of wood, and "vegetation growing in and around" other belongings. The City determined this was a nonconforming "junkyard," which was not allowed in the district according to the Laconia zoning ordinance. Beginning in 2004, the city sent at least ten notices to Kjellander informing him that his use of the property as a junkyard was a violation, but he never cured the violation. The ordinance defines a junkyard as follows:

Any business or any place of storage or deposit, whether in connection with another business or not, which has stored or deposited at the business or place: two or more unregistered motor vehicles which are no longer intended or in condition for legal use on the public highways; used parts of motor vehicles or old iron; metal, glass, paper, cordage, or other waste or discarded or secondhand material which has been a part, or is intended to be a part, of any motor vehicle, the sum of which parts or material shall be equal in bulk to two or more motor vehicles; or scrap, waste, reclaimable material or debris, whether or not stored, for sale or in the process of being dismantled, destroyed, processed, salvaged, stored, baled, disposed or other use or disposition.

Under RSA 676:15, the city brought action in Superior Court in 2019 seeking an injunctive order compelling the defendant to cure the zoning violation. The court ruled for the city, granting a preliminary injunction ordering Kjellander to "cease adding items or material of any sort to contribute to the junkyard conditions on the property" or obtain a variance from the Laconia Zoning Board of Adjustment to legally operate a junkyard. In 2021, the Superior Court found at trial for the city. It said the use was an illegal junkyard as defined in the ordinance and awarded the City attorney's fees and costs, as guaranteed by statute. Kjellander appealed to the Supreme Court.

Arguing that his own personal property and effects on his private property were not "scrap," thereby making the use not a junkyard, the defendant said they were materials he would make personal use of "in due time," including using iron in his blacksmithing and building a shack from the stored wood. He also said that while motor vehicles are commonly regarded as junkyards, his other materials were inconsistent with the definition of a junkyard. The Court disagreed, noting that the Laconia ordinance alludes to scrap as "used parts of motor vehicles *or* old iron" (emphasis added), indicating a broad reading of what can constitute scrap. Laconia's definition is consistent with RSA 236:112, I which defines a "junkyard" as anyplace that stores waste or other old or scrap ferrous or nonferrous material. As the Court only overturns trial court decisions based upon the interpretation of a statute or ordinance if there is an error in the law, it upheld the ruling that the use designation as junkyard was appropriate.

The defendant also argued that the trial court erred in its award of attorney's fees to the City of Laconia. In New Hampshire, customarily, attorney's fees can only be awarded if authorized by statute, which they are in this case.

In any legal action brought by a municipality to enforce, by way of injunctive relief as provided by RSA 676:15 or otherwise, any local ordinance, code or regulation adopted under this title, or to enforce any planning board, zoning board of adjustment or building code board of appeals decision made pursuant to this title, or to seek the payment of any fine levied under paragraph I, the municipality

shall recover its costs and reasonable attorney's fees actually expended in pursuing the legal action if it is found to be a prevailing party in the action. For the purposes of this paragraph, recoverable costs shall include all out-of-pocket expenses actually incurred, including but not limited to, inspection fees, expert fees and investigatory expenses. RSA 676:17,II. A municipality can recover reasonable attorney's fees and costs if the cause of action is to enforce by injunction a municipal ruling, ordinance, or similar. Again, the Supreme Court noted that it prefers to defer to the trial courts in determining the appropriateness of the award, writing "if there is *some support* in the record… we will uphold it" (emphasis added). The defendant's principal argument was that the zoning determination was wrong, thus the fees should not have been awarded. As the Court had already ruled to uphold the use determination, this argument was unsuccessful. The defendant also argued that the statute ought only be applied to "any zoning or planning board issue," but the Court held that the statute plainly includes enforcement of municipal ordinances.

The defendant also argued that there were possible unconstitutional takings and the attorney's fees should be pro-rated based on the city not winning on all of its injunctive requests, because the city did not genuinely "prevail" for the same reason. Because these issues were "insufficiently briefed," the Supreme Court did not consider those issues.

Practice Pointer: RSA 676:17, II allows municipalities to collect attorney's fees and costs if they prevail in enforcing through a court-issued injunction a local ordinance, in addition to a planning or zoning decision by land use boards. Scrap or waste materials will still constitute junk under the Junkyard Statute, RSA 236:111, et seq.

**This decision is a final order of the court. Final orders are distinguished from court opinions in that they decide the merits of a case but do not create binding precedent. Final orders may be cited in briefs, but only if identified as a non-precedential order. They can be helpful as guidance but are not law. See N.H. Sup. Ct. Rule 12-D (3).*

James Logan v. Candia
Housing Appeals Board
Case Number PBA-2022-28
April 10, 2023

Waiver of a conditional use permit element requires demonstration of unreasonable hardship; the Housing Appeals Board claims the ability to issue declaratory judgments

James Logan owns a parcel of unimproved land measuring 97.76 acres in the Town of Candia's residential zoning district with 1196 feet of frontage on a local roadway. Candia's residential zoning district requires a minimum of three acres to a lot. Under Candia's zoning ordinance, elderly housing projects are required to have two hundred feet of frontage on roads considered "arterial"; this property was on an arterial road but did not have that amount of frontage. Logan went to Candia's Planning Board on March 17, 2021 to discuss his idea to build an elderly housing unit on his lot, notifying them that this project would require a waiver for the frontage requirement. On July 5, 2022, Logan officially applied to the board for a site plan and subdivision review and conditional use permit to allow the construction of his elderly residential unit and submitted with his application site plans, a transportation impact assessment, and requests for three waivers including one for the frontage requirement. The PB held public hearings on the application over the course of both its August and October 2022 meetings, and on October 24, 2022 issued a notice of decision stating that they denied Logan's application for the following reasons:

The waiver Logan requested did not meet the criteria for unreasonable hardship and waiving the frontage requirement would be incongruent with the spirit and intent of the ordinance.

Logan's proposed project would conflict with the rural "character" of the town.

The project would adversely impact abutters.

On November 18, 2022, Logan appealed to the Housing Appeals Board (HAB) arguing that the planning board's denial of his application for the conditional use permit and waiver of the arterial road frontage requirement were unreasonable and unlawful. He also requested a declaratory judgment that the town's arterial road frontage requirement should be rendered void because it violated the equal protection provisions in both the United States and New Hampshire Constitutions. The Town of Candia moved to dismiss the constitutional complaint with the argument that the HAB lacks subject matter jurisdiction over declaratory judgment requests.

As far as Logan's complaints that the planning board's denial of his conditional use permit and arterial road frontage waiver applications were unlawful and unreasonable, the HAB ruled that while Logan's arguments demonstrated how his proposed use of the lot was reasonable, but that he had failed to meet the burden of proof that denying him the waiver would cause him unnecessary hardship. The HAB ruled that Candia also failed to establish that granting the waiver would cause it unnecessary hardship, as any roadway inadequacies would be ameliorated by Logan's pledge to donate $430,000 to road improvements if his application was granted. Because it found the planning board's denials not unlawful or unreasonable, the HAB did not need to analyze the spirit and intent of the ordinance issue.

With respect to Logan's constitutional complaint and Candia's subsequent motion to dismiss, the HAB found that it does have jurisdiction. Under RSA 679:5, I, the HAB has jurisdiction over appeals of planning board decisions and innovative land use controls, and under RSA 679:5, II, it has the authority to award all remedies available to superior courts in similar cases.

Practice Pointer:

The HAB said that when ruling on granting a waiver of a conditional use permit requirement under Innovative Land Use Control, RSA 674:21, the party seeking the waiver must demonstrate that the CUP regulation as applied to a property must demonstrate an unreasonable hardship. The HAB also asserted that it has the authority to issue declaratory judgments.

Juliana Lonergan & a. v. Town of Sanbornton
New Hampshire Supreme Court
Case No. 2022-0142
May 31, 2023

Where town ordinance combined a special exception process with excavation permitting under RSA 155-E, with the ZBA acting as regulator, appeals were governed by the 10-day motion for rehearing deadline in RSA 155-E:9

R.D. Edmunds Land Holdings, LLC (hereinafter "the intervenor") owns a 19-acre tract of land in Sanbornton's General Agricultural District. In July 2020, they applied to the Zoning Board of Adjustments (hereinafter ZBA) for a special exception to the town zoning ordinance (hereinafter "ordinance") to operate a gravel pit excavation site upon this tract. In Sanbornton, the ZBA may grant special exceptions to allow uses of land for excavation of earth materials within certain statutory restrictions. In August of the same year, the ZBA held a public hearing on the application, at which Juliana and David Lonergan (hereinafter "the plaintiffs"), abutters of the tract in question, expressed concerns that this excavation site would create noise and dust and affect traffic and the nearby aquifer; the ZBA decided they could not rule without additional information. Two hearings later, in February 2021, the ZBA granted the intervenor the special exception; in March 2021 the plaintiffs filed with the ZBA for a rehearing and, when the ZBA denied this, appealed the ZBA's decision to the Superior Court, which denied it and affirmed the ZBA's decision. The plaintiffs then appealed the Superior Court's decision to the Supreme Court.

The Town of Sanbornton and the intervenor moved to dismiss the appeal, arguing that the Supreme Court lacked subject matter jurisdiction under RSA 155-E:9 because the plaintiffs had not filed for rehearing in a timely manner. The Supreme Court noted that a party may challenge subject matter jurisdiction at any time during the proceedings, including on appeal. In this instance, the town ordinance designated the ZBA as the regulator of excavation permits under RSA chapter 155-E and it incorporated the excavation permitting process into the special exception process allowing for a one-time permit process benefiting all parties. Thus, when the ZBA granted the special exception that also constituted the grant of an excavation permit under RSA chapter 155-E. Consequently, the timeliness of plaintiffs' motion for rehearing was measured by a 10-day deadline specified under RSA 155-E:9 and not the 30-day deadline specified under RSA 677:2. Since the motion for rehearing was not submitted within 10 days of the ZBA's decision, that rendered plaintiffs' appeal untimely denying the Supreme Court subject matter jurisdiction to consider plaintiffs' appeal.

The plaintiffs attempted to argue that the town meeting that designated the ZBA as the regulator was not duly warned and was thus invalid under RSA 155-E:1, III (a). However, under RSA 31:126, claims of statutory invalidity against municipal legislation are barred after five years, and the ZBA was made regulator more than five years prior to these proceedings, so the Court dismissed this argument. Additionally, the plaintiffs tried to claim that RSA 155-E:9 was not applicable to their untimely filing because RSA 155-E as a whole has to do with excavation permits, not special exceptions, and that this discrepancy meant that the notice of public hearing for the intervenor's application constituted insufficient notice under RSA 676:7. The Court disagreed with this argument noting that RSA 676:7 only mandated notice of the time and place of the required public hearing and was silent on other information the notice must include.

The Court held that RSA 155-E:9 indeed applies to the plaintiffs' appeal and that because they failed to file their appeal in a timely fashion, the ZBA and accordingly both Courts lack subject matter jurisdiction over it. The Supreme Court vacated the Superior Court's order and remanded the issue with instructions for dismissal of the appeal.

Practice Pointer: An appeal of a combined zoning and excavation permit granted under a local zoning ordinance and under RSA chapter 155-E, Local Regulation Excavations, is governed by the 10 day deadline found in RSA 155-E:9, and not the 30 day deadline for zoning permit appeals found in RSA 677:4.

Jeffrey E. Raymond, Trustee of J&R Realty Trust v. Town of Plaistow
New Hampshire Supreme Court
Case Nos. 2022-0236
July 28, 2023

New Hampshire Supreme Court affirms that zoning boards cannot factor anticipated future noncompliance with zoning laws into its decisions, even if an applicant has previously violated the zoning ordinance at other properties.

In 2020, property owner J&R Realty Trust submitted a site plan application to the Town of Plaistow regarding a 1.18-acre lot in the town's "Commercial 1" zoning district. The plan showed an existing building to be razed and replaced with a two-story, 2,200-square-foot office building and one-and-a-half-story, 3,400-square-foot warehouse for use under lease by a home improvement business involved in the sale, service, and installation of windows, siding, roofing, decks, and gutters. The Commercial 1 district allows several uses, including "Trade Business." Upon reviewing the proposed development, Plaistow's building inspector determined the plan's proposed use constituted a "Contractor's Storage Yard" under the zoning ordinance, which is not permitted in the Commercial 1 district. The Trust appealed to the Zoning Board of Adjustment arguing that the use would be more akin to Trade Business, and also sought a variance, hoping that the use be allowed even if the decision was not reversed.

In December 2020 and January 2021, the ZBA heard these arguments. In both hearings, the prospective tenant's zoning violations at other properties were raised by ZBA members concerned that enforcement costs would be high and they could not rely on voluntary compliance, calling it "a trust issue." The property owner said that the new warehouse would create the storage space needed to cure the noncompliance. In both hearings, the ZBA decided against the application. It said that the primary use would be "industrial in nature," which it interpreted as adverse to the intent of the ordinance and refused to grant a variance. In declining to overrule the building inspector's determination that the use was Contractor's Storage Yard, the ZBA noted that the company calls itself "contractors" on its website and, commented again, it could not be trusted adhere to the zoning requirements in light of its past transgressions.

The Trust appealed to Superior Court, claiming that the ZBA's denials were insufficiently supported by the record and "influenced by improper considerations" (the prospective tenant's zoning violations at other properties). The Superior Court found for the Town of Plaistow, saying the plaintiff failed to show how the ZBA's decision violated the law or was unreasonable. The Supreme Court overturned the Superior Court's orders decision It addressed both issues: whether the proposed use is a Trade Business or Contractor's Storage Yard, and whether it was lawful and reasonable for the ZBA to consider violations at other properties.

First, the Supreme Court found that the proposed use does fall within the plain language of the zoning ordinance's definition of a Trade Business, because there would be an office building with management, sales, and retail workers, plus a showroom. The plaintiff also convinced the court that "light vehicles" including box trucks and trailers would not violate the prohibition against heavy equipment. The Supreme Court said the website's mention of "contracting work" was not dispositive and that certain types of contractors are allowed under Trade Business according to the ordinance.

Second, the Supreme Court found that "the ZBA erred in considering evidence of the purported zoning violations at the other Plaistow property when it affirmed the zoning determination…" Citing a Connecticut case *Miklus v. Town of Fairfield*, the Court wrote that a ZBA cannot base a decision on anticipating that a company might violate the ordinance by unauthorized use later. 225 A.2d 637, 659 (Conn. 1967). The proper way to handle future violations, according to the Court, is to use the proper enforcement mechanisms when the time comes. The Court pointed to *Farrar v. City of Keene*, in which it held that arguments that a company would not use a site for the proposed and allowed use "is an issue for code enforcement," not the ZBA. 158 N.H. 684, 692 (2009).

The Supreme Court reversed the Superior Court's and ZBA's decisions, ordering the site plan be treated as a Trade Business, thus making its approval likely and confirming that it conforms to the zoning ordinance.

Practice Pointer: the evidence that zoning boards are permitted does not include past zoning violations at other properties by owners or prospective tenants, and decisions made on those grounds alone will be subject to overturning by the courts.

Town of Conway v. Kudrick
New Hampshire Supreme Court
Case No. 2022-0098
May 2, 2023

Under the definitions provided by the Conway Zoning Ordinance, short-term rentals are allowed in the residential district.

The defendant owns several properties in the residential district of the Town of Conway that he rents for periods of time as short as a single night. In June 2021, the Town sought a declaratory judgment ruling in superior court that the zoning ordinance prohibits short-term rentals (STRs) like these in residential districts if the rentals are not owner-occupied. The superior court ruled against the Town and the Town appealed.

The appeal before the Supreme Court presented a single issue: whether the zoning ordinance permits non-owner occupied STRs in residential districts based on the meaning of the term "residential/ dwelling unit" as defined by the ordinance. Importantly, that definition required that the persons occupying the dwelling unit were "living as a household," and the Court's determination as to whether STRs were allowed in that zone required an analysis of the meaning of that phrase.

In examining the question, the Court held that "[i]t is the occupants' use of the property, however, not the owner's, that dictates how the property is being used." Therefore, the relevant question was not how the owner of the property treated its use, but how the occupants of the property treated its use. In looking to the activities of those occupying the defendant's property as compared to other properties, the Court found that "the occupants of the defendant's properties exclusively engage in residential activities" and "the duration for which a property is used does not impact whether the property is used for residential purposes."

The dissent disagreed that duration does not impact use. However, the concurring opinion addressed the dissent's argument by stating that "land use regulations require clarity to inform landowners of uses that are permitted and not permitted ...Where, as here, there are many ways to define a household, it is imperative that we focus on the activities taking place on the land, rather than the identity of the individuals conducting them. Any ambiguity arising from language chosen for the regulation of land use should be resolved in favor of vindicating a landowner's property rights."

Practice Pointer: Municipalities wishing to regulate STRs should review their zoning ordinances to determine whether the terms used are sufficiently clear that an average person will understand what qualifies as an STR and where STRs are and are not allowed within the municipal boundary. Municipalities should follow the lead of the City of Portsmouth in *Working Stiff v. Portsmouth,* 172 N.H. 611 (2019) and define "dwelling unit" as "[a] building or portion thereof providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation. This use shall not be deemed to include such transient occupancies as short-term rentals, hotels, motels, rooming or boarding houses." It would also be prudent to define the word transient - here is one example: "A dwelling unit where lodging is provided for compensation for stays of between one and 14 consecutive nights, and where the dwelling unit would normally be considered a residential living unit not associated with regulated commercial activities such as a hotel, motel, rooming/boarding/lodging house, or bed-and-breakfast."

Transfarmations v. Town of Amherst
New Hampshire Supreme Court
Case No. 2021-0214
11/14/2022

A previously denied land use application can be materially different under Fisher v. Dover if information sought at the time of the first application is provided as part of the second application

Transfarmations applied for a conditional use permit (CUP) from the Amherst Planning Board seeking permission for a 64 unit planning residential development with a mixture of workforce housing and over-55 housing under the Town's Integrated Innovative Housing Ordinance. The town ordinance required that the applicant must establish that there will be no significant adverse impacts upon the public health, safety and general welfare from the proposed use. At a public hearing held on December 4, 2019 the board voted to deny the application in part because a traffic study had not yet been completed. After the vote to deny was taken the Board chair then stated that the applicant could reapply for a CUP with more information.

After filing an appeal with the Superior Court, Transfarmations resubmitted its application along with a 43-page traffic study. The planning board first scheduled a public hearing to address whether the application met the materially different standard for subsequent applications that were previously denied under *Fisher v. Dover* and *CBDA Development LLC v. Thornton*. A planning board having rejected one land use application may not review subsequent applications absent a material change of circumstances affecting the merits of the application. Following its discussion, the Board voted that the revised application was not materially differ from the first precluding acceptance and consideration of the application on the merits.

On appeal the NH Supreme Court stated its post-*Fisher* cases recognize that evidence of an invitation to submit a modified application to meet a land use board's concern acts as additional evidence that a subsequent application so modified is materially different. The Court observed that the only information mentioned by any voting Amherst Planning Board member as missing from the first application was a traffic study. Accordingly, the Court agreed with Transfarmations that the Board expressly invited a revised application with more information, a completed traffic study.

The court reiterated that when a denial identifies a lack of information as the deficiency in the initial application, the court has held that a reapplication proposing a project substantially identical to the prior proposed project is materially different under *Fisher* if the new application provides the information missing from the prior application.

Practice Pointer: When a ZBA or planning board decision denies approval of an application, and that denial identifies a lack of information as the deficiency in the initial application, a reapplication proposing a project substantially identical to the prior proposed project is materially different under *Fisher v. Dover* if the new application provides the information missing from the prior application

Bradley M. Weiss & a. v. Town of Sunapee
New Hampshire Supreme Court
Case No. 2022-0309
August 23, 2023

New Hampshire Supreme Court says that untimely orders may open Towns to court appeals as "good cause" for plaintiffs not exhausting their municipal requests for rehearing.

Bradley Weiss and Cathleen Shea sought a variance for an "east side setback" for a residential property in Sunapee, New Hampshire, in 2021. On April 1, 2021, Sunapee's ZBA held a hearing to consider the application for a variance (due to protocols associated with the COVID-19 pandemic, the hearing was held remotely), but denied the motion by a vote of 3 to 2. Members voting no said the applicants showed insufficient evidence of hardship. The meeting minutes were approved at a subsequent meeting on May 25, 2021, but the written decision confirming the rejected application was not issued until August 3, 2021. RSA 676:3, II (2022) requires the written decision be "placed on file in the board's office and shall be made available for public inspection within 5 business days of such vote." Nevertheless, on April 27, 2021, plaintiffs moved for a rehearing. That rehearing occurred in June, when the board again denied the variance. Next, the plaintiffs appealed to Superior Court, foregoing a second motion for rehearing.

Ordinarily, an aggrieved party could be required to file a new motion for rehearing to address any new issues that are thrust upon the appealing party due to a ZBA's rehearing decision; to hold otherwise would deny the board of adjustment an opportunity to correct its errors and would limit the court to consideration of the errors alleged in the original rehearing motion. *Dziama v. City of Portsmouth*, 140 N.H. 542, 545 (1995). In this matter, the plaintiffs argued that through the June rehearing decision the ZBA applied the same grounds as in the April hearing, negating the second rehearing requirement; the focus in both, they say, was on "hardship." The Town argued the bases for denial included newly raised issues, and so moved to dismiss, arguing that the court did not have jurisdiction because the appeal-exhaustion requirement was not met.

RSA 677:3, I (2016) controls whether a second motion for rehearing is required of the plaintiffs. It reads in part:

No appeal from any order or decision of the zoning board of adjustment, a board of appeals, or the local legislative body shall be taken unless the appellant shall have made application for rehearing as provided in RSA 677:2…

The application for rehearing must meet the RSA 677:2 requirement of being made within 30 days. The Superior Court only has subject matter jurisdiction for appeals regarding the grounds set forth in the application for rehearing, but only those grounds (unless they show good cause for including additional grounds). Additionally, the ZBA must have the opportunity to consider specified grounds for appeal before a party can prosecute a Superior Court appeal; for the Superior Court to hear an appeal on an issue, that issue must be considered by the board, subject to a motion for rehearing, and either re-heard or dismissed by the board.

The Superior Court dismissed for lack of subject matter jurisdiction because the lack of a second rehearing motion meant the appeal-exhaustion requirement had not been met, but in doing so it did not consider the question of whether the plaintiffs could show good cause for not requesting a second rehearing. The plaintiffs argued that the good cause arose from the Town's failure to make a timely written order of its decision, such that the two denials could be compared. Without the written decision, they argued, they could not have identified the additional grounds that may have arisen in the first rehearing.

The Supreme Court reversed the Superior Court's ruling to dismiss for lack of subject matter jurisdiction and remanded it to the Superior Court to determine whether the plaintiffs showed good cause to be allowed to specify additional grounds for their appeal. Material to the Court's decision in favor of the plaintiffs was the four-month delay in issuing its written decision.

Practice Pointer: Boards should heed the requirement in RSA 676:2 that written decisions be posted within five business days of the meeting where the decision was made, or they may extend the petitioner's window to motion for rehearing, opening further avenues for judicial appeals.

In Re ***Town of Warner***
Merrimack County Superior Court
Case No. 217-2023-CV-370
July 24, 2023

The resignation of select board members was effective upon delivery and did not require acceptance by the remaining select board member

On the morning of July 12, 2023, two members of the Town of Warner's three-person select board sent resignations via email to the other member, the Town Administrator, and the Assistant. Under RSA 669:63, when a vacancy arises in a select board, the remaining members have the power to appoint a replacement if they comply with RSA 41:8 and act with a majority. However, the one remaining member, Harry Seidel, was not a quorum by himself. In such cases, under RSA 669:63, where the select board cannot appoint a replacement to fill a vacancy, "the superior court or any justice thereof, on petition of any citizen of the town, and after such notice as the court shall deem reasonable, may appoint a suitable person to fill the vacancy." Later that same day, town officials approached the members who resigned requesting that they briefly return to the board for a meeting to create a quorum and help Seidel appoint a replacement member; after some deliberation and the near appointment of a new member Seidel decided to instead file a petition for a court appointment. On July 18, Seidel held a public meeting to give notice of the petition and date of the Superior Court hearing, at which the two resigning members, Frost and Sloane, gave notice that they were both rescinding their resignations and they subsequently moved to intervene and to dismiss Seidel's petition.

Under common law, resignations became binding when accepted by some authority; Frost and Sloane each stated in their emails that their resignations were "effective immediately." In this instance, there was no "authority" that had time to formally accept the resignations before Seidel petitioned for Superior Court action. It is accepted practice to interpret statutory language congruent with its plain and ordinary meaning. RSA 652:12 defines a vacancy as an elected official leaving their position prior to the completion of their term and lists a variety of circumstances that would create a vacancy; however, the statute does not state that a vacancy depends on an authority's acceptance of a resignation. The Superior Court chose to interpret "resign" as "give up deliberately" and "resignation" as "formal notification of relinquishment" of a position. There is no provision in New Hampshire law or Warner ordinance that predicates effective resignation on acceptance in the case of select boards, though some laws exist to regulate other public office resignations.

Because New Hampshire law differs from the common law regarding public office resignations, Frost and Sloane's resignations were effective upon delivery, not upon acceptance, and thus Frost and Sloane could not just rescind their resignations; if they wanted to rejoin the select board, they would need to be elected or appointed to fill a vacancy. If New Hampshire did require acceptance of resignations, without a quorum, the select board could not lawfully accept the resignations anyway. In that event, any citizen of Warner would have had the power to petition the court to appoint a replacement.

Ultimately, the Superior Court denied Frost and Sloane's motion to dismiss and granted Seidel's petition to appoint Minton to the Warner Select Board.

Practice Pointer: For local elected officials in New Hampshire, resignations are valid upon delivery, and do not require acceptance by any authority.

RIGHT-TO-KNOW LAW

Colquhoun v. City of Nashua
New Hampshire Supreme Court
Case No. 2021-0253
October 26, 2022

Government must provide a record, if the records request enables a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.

The City of Nashua denied a Right-to-Know Law records request filed by Colquhoun for all email communications between two City employees during a specific two-month period. Subsequently, Colquhoun filed an action in Superior Court asking for the records and requesting attorney's fees. At issue was whether the request "reasonably described" the desired records. Ultimately, the City provided several hundred emails between the two City employees during the specified time period, and the trial court denied the award of attorney's fees to Colquhoun. Colquhoun appealed the denial of the award of attorney's fees.

In deciding the issue of the award of attorney's fees, the Supreme Court focused on the second part of the statutory requirement that attorney's fees shall be awarded if the trial court finds that the lawsuit was necessary to make the requested information available and that the public body knew or should have known that its conduct violated the statute.

In analyzing the question of whether the City knew or should have known that its conduct violated the statute, the Court determined that, due to the fact that the City provided some responsive records after suit was filed, and in light of Court's prior ruling in ATV Watch v. N.H. Dep't of Trans. requiring a public body to make a "reasonable search" for records, the City knew or should have known that its conduct violated the statute when it did not provide any records.

The Court also rejected the City's argument that it would be unduly burdensome to search and locate all records sought in a particular request, since then the City would be relieved from having to undertake any search.

Although the Court expressly declined to determine when a records request "reasonably describes" the records sought, it affirmed that such a determination "is highly context-specific." Further, the Court stated that, for the purposes of this appeal, it agreed with the City that "[a] reasonably described request would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort."

As the Plaintiff had limited both the time frame and the scope of her request to "a clearly delineated group of documents" – all email communications between two City employees during a specific two-month period – the Court held that the City knew or should have known that it had an obligation to make a "reasonable search" pursuant to the decision in ATV Watch.

The dissenting justices argued that the lack of prior determination by the Court about what constitutes a "reasonably described" request meant that the Court need not compel payment of attorney's fees in this case as the law is unsettled and, therefore, the City would not have been on notice of what the law is.

Practice Pointer: If a records request is limited in time frame and scope to a clearly delineated group of records, the government has an obligation to make a reasonable search for those records and make them available pursuant to the Right-to-Know Law.

Laurie A. Ortolano v. City of Nashua
New Hampshire Supreme Court
Case No. 2022-0237
October 10, 2023

If a governmental record has been retained in an electronic format, including on back-up tapes, it may be expected for a municipality to recover those documents pursuant to a Right-to-Know request.

In June of 2021 the Plaintiff, Laurie Ortolano, submitted a request under RSA 91-A for correspondence, including emails sent and received by certain current and former City employees. The City responded by saying that it no longer had "reasonable access" to one of the former employees emails from the time of her employment.

Ortolano filed suit, and at trial an Information Technology specialist for the city testified that by the time Ortolano requested these emails they had been automatically deleted from the email server pursuant to the City's record retention policy. He also testified that the City utilized a backup drive, called a U-drive, and this drive did not contain any relevant emails either. However, he went on to state that the emails may still exist in yet another location. The City engaged in regular system back-ups of their computers which created "back-up tapes". He testified that it was possible to convert records from those back-up tapes into a readable format and search them. This process of converting the backup-tapes to a searchable format would have only added "a couple of hours" to the time it took to search for the responsive documents, however this type of search was not originally performed.

The court ordered that the City perform a search of their back-up tapes. The City contended that the back-up tapes are not readily accessible as defined in the statute and that because the City had already deleted the emails from the email serve and U-drive, the records were "initially and legally deleted" under RSA 91-A:4, III-b. The court, however, stated that it was undisputed that the City's back-up tape system exists, can be searched, and that files such as those requested by the petitioner are retrievable from the back-up tapes". Consequently, the court found that these files were reasonably accessible and not initially and legally deleted. As a result of its failure to search the back-up tapes, the City was ordered to perform remedial training.

These findings of the lower court were upheld by the New Hampshire Supreme Court. The Supreme Court largely relied on its interpretation of the term "readily accessible". Essentially, the court concluded that the back-up tapes were readily accessible, and thus should have been searched because the process of searching those tapes would only have taken a few hours. Furthermore, files are only initially and legally deleted when they are no longer readily accessible. Consequently, the City violated the requirements of RSA 91-A when it denied the plaintiff's Right-to-Know request without first searching the back-up tapes for records.

Practice Pointer: It is unclear to what extent municipalities will be expected to search through "back-up" tapes for records, but if it will only take a few hours to perform any type of search, municipalities will be expected to do so. Furthermore, when deleting electronic records it is vital to ensure that they are deleted from every location where they may have been backed up in order for them to be considered initially and legally deleted.

Clearview Realty Ventures v. Laconia
New Hampshire Supreme Court
Case No. 2022-0196
April 18, 2023

Purely economic loss caused by COVID-19 without physical damage to buildings does not support a claim for proration of taxes

Nine owners of hotels sought proration of real estate taxes under RSA 76:21, I due to being closed or partially closed due to COVID-19. The statute requires assessing officials to prorate taxes when a taxable building is damaged due to unintended fire or natural disaster. The proration is based on the number of days that the building was available for its intended use divided by the number of days in the tax year, multiplied by the building assessment. RSA 76:21, II. Each owner claimed their commercial properties were damaged because they were not allowed to carry on business and the reduced income negatively affected the fair market value of the taxable buildings.

Upon examination of the plain and ordinary meaning of the statute, the court reasoned that to qualify for proration the aggrieved owners must establish that their buildings were damaged due to unintended fire or natural disaster. However, the basis for the alleged damage in this instance was purely economic loss, not actual physical damage to buildings. The court ruled that RSA 76:21, I requires physical damage to the buildings before considering any economic loss. Consequently, the court concluded that the taxable buildings were not "damaged" so as to be entitled to a proration of real estate taxes under RSA 76:21, I.

Practice Pointer: In order to be eligible for a proration of taxes under RSA 76:21 the taxable buildings must suffer physical damage to the structure due to unintended fire or natural disaster. Purely economic loss not resulting from physical damage to a taxable building will not support a proration claim under the statute.

Tyler v. Hennepin County, Minnesota, et al.
United States Supreme Court
Case No. 22-166
May 25, 2023

County keeping substantial excess profit from sale of tax-deeded property violates the Takings Clause of the Fifth Amendment; the amount of a 10% assessed value penalty imposed under RSA 80:90, I (f) upon redemption of tax deeded property may be deemed an Excessive Fine under the Eight Amendment of the US Constitution.

Minnesota resident Geraldine Tyler moved into a senior facility in 2010 and did not pay taxes on her condominium after she left; by 2015 the property had accrued approximately $15,000 in unpaid real estate taxes, interest, and penalties. In accordance with Minnesota law regarding forfeitures, Hennepin County took possession of the condominium and sold it for $40,000. This satisfied Tyler's $15,000 debt and made an excess profit of $25,000, which Hennepin County retained. Following this, Tyler filed suit claiming the county's actions violated the Takings Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. This action was initially dismissed by the District Court for failure to state a claim; and the Eighth Circuit affirmed the dismissal arguing that Tyler had forfeited her property interest in the condominium and thus it was not a taking and that the seizure and sale of her home was executed to remedy her unpaid taxes, not to penalize her for failure to pay. The US Supreme Court reversed.

In his opinion, Chief Justice Roberts argued that property taxes and associated late fees and interests, along with seizure and sale of delinquent properties, are not inherently takings under the Takings Clause. However, a tax forfeiture process that results in a taxpayer losing her $40,000 home to the State to fulfill a $15,000 tax debt, with the State retaining the $25,000 surplus is a taking of private property without compensation in violation of the Fifth Amendment. This decision aligns with the NH Supreme Court's ruling in Polonsky v. Town of Bedford, 173 N.H. 226 (2020) that municipalities are not entitled to keep any of the "excess proceeds" from the sale of tax deeded property.

However, another question posed in the Hennepin County decision but not answered is whether the retention of excess proceeds from sale of tax deeded property also constitutes a violation of the Excessive Fines clause of the Eighth Amendment. As noted by Justice Gorsuch in a concurring opinion, the retention of excess proceeds from a tax sale might also be considered a violation of the Excessive Fines clause, citing to Austin v. United States, 509 U.S. 602 (1993). In that regard NH municipalities should consult with their regular legal counsel and decide whether to impose the 10% assessed value penalty under RSA 80:90, I (f). That provision states that when a property owner redeems property from tax deed the owner (except if the property was the principal residence of the owner) shall pay "[a]n additional penalty equal in amount to 10 percent of the assessed value of the property as of the date of the tax deed, adjusted by the equalization ratio for the year of the assessment." In those circumstances where the amount of that penalty is grossly disproportionate to the outstanding tax debt and other interest and fees due, that penalty might be construed to be an Excessive Fine contrary to the Eight Amendment.

Practice Pointer: NH municipalities should consult with their regular legal counsel and decide whether to impose the 10% assessed value penalty under RSA 80:90, I (f). That provision states that when a property owner redeems property from tax deed the owner (except if the property was the principal residence of the owner) shall pay "[a]n additional penalty equal in amount to 10 percent of the assessed value of the property as of the date of the tax deed, adjusted by the equalization ratio for the year of the assessment." In those circumstances where the amount of that penalty is grossly disproportionate to the outstanding tax debt and other interest and fees due, that penalty might be construed to be an Excessive Fine contrary to the Eight Amendment.

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