

2022 NHPA Conference

Land Use Law Update

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Agenda

- Important Legislative Actions in 2022
- Important Cases from Summer 2021- Summer 2022

Legislation

Passed by the 2022 Legislature and Likely to Become Law

SB 400 / HB 1661: Introduction

- Although not identical, SB 400 as introduced was substantially similar to **HB 1629** and **HB 1632** from 2020 and **HB 586** from 2021.
- Cited by Governor Sununu in his State of the State speech as an important measure to address the state's housing crisis.
- Portions of the bill ended up attached to HB 1661 after the House committee considering the bill recommended adding unrelated matters to the original bill, and the surviving portions underwent additional modification in the Committee of Conference.

Housing Bill Summary

- Section 70: Training – Replaces existing language on permissible training offered by OPD. OPD already offers training and has materials available but may be engaging in more web-based training.
- Section 71: Publication of Fees – Requires a fee-schedule to be available to the public for any land-use board fees.
- Section 72: Gives municipalities a one-year period (until July 1, 2023) to make any adjustments to their incentives for housing for older persons prior to those incentives automatically becoming available for workforce housing.

Housing Bill Summary Continued

- Section 73: Expands language about land use boards being required to provide specific, written findings upon disapproval.
- Section 74: Provides that the ZBA has 90 days to begin consideration and approve or disapprove an application, unless a mutually agreed to extension occurs. If a determination that insufficient information was provided, a denial does not preclude a refiling.
- Section 75: Removes the governing body's order a planning board to act on an application within an additional 30 days if it has failed to act within the statutorily required timeframe after submission of the application. Instead, the governing body must certify the application as approved, and failure to do so gives rise to cause to file an action in Superior Court, which now has 30 days to act on the petition. (See last year's Chapter 69, HB 332.)
- Section 76: Eliminates the ability of the planning board to request a 90-day extension from the governing body for it to act on an application.

A Potential Conflict w/Last Year's Amendment

- 2021's HB 332 extended the planning board's deadline by 30 days to act to approve, conditionally approve, or disapprove an application where the board determines that the development is one of regional impact.
- However, 2022's HB 1661 Section 75 references the 65-day timeline for the original application. As such, there *may* be a conflict that needs to be resolved to ensure that the 30-day deadline still exists.
 - Reference in that section is no longer to the 30 additional days that the governing body gives in its order to act, but now the original 65 days that is required under the statute for action.

TIF Statute Changes in Housing Bill

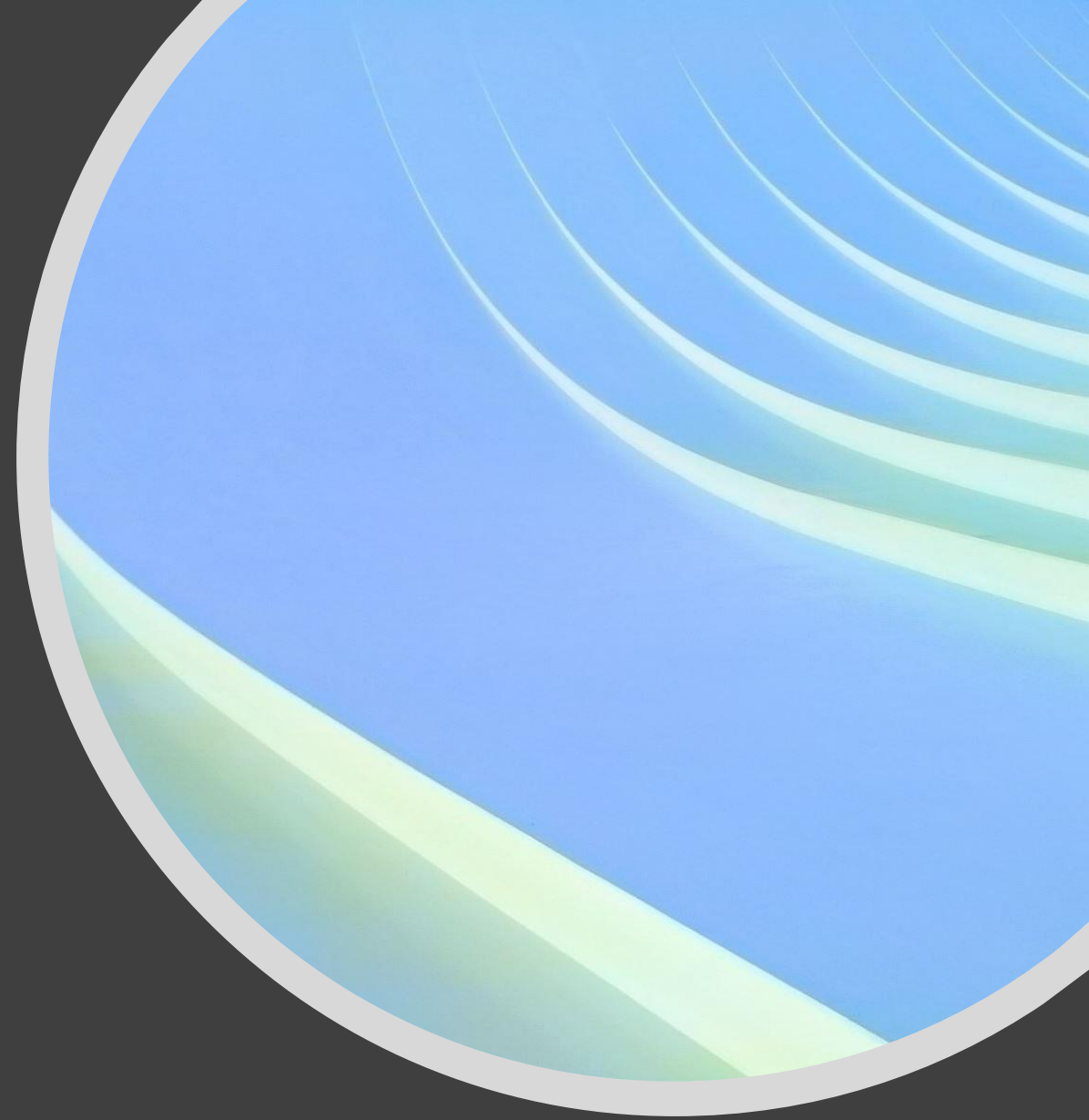
- Section 78: Allows municipalities to acquire property – except by eminent domain – for the purpose of constructing workforce housing whether construction is a private or public enterprise.
- Section 79: Allows municipalities to designate municipal economic development and revitalization districts for the purpose of increasing housing stock.

Primarily Religious Use: HB 1021

“No zoning ordinance or site plan review regulation shall prohibit, regulate, or restrict the use of land or structures primarily used for religious purposes;”

“[P]rovided, 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.”

Modeled after Massachusetts's [Dover Amendment](#).





Adoption of 2018 Building Code

HB 1681 updates the following:

- International Building Code [2015] **2018**, the International Existing Building Code [2015] **2018**, the International Plumbing Code [2015] **2018**, the International Mechanical Code [2015] **2018**, the International Energy Conservation Code [2015] **2018**, the International Swimming Pool and Spa Code [2015] **2018**, and the International Residential Code [2015] **2018**, as published by the International Code Council *Inc.*, and the National Electrical Code [2017] **2020**, *as published by the Nation Fire Protection Association, Inc.*, as [amended] *reviewed and recommended* by the state building code review board, *including all amendments reviewed and approved by the board as of November 30, 2021*, and ratified by the legislature in accordance with RSA 155-A:10.

Contact NH Building Officials Association / Fire Marshal for Training.

Local Building & Fire Code Amendments: SB 443

- Municipal amendments: municipalities shall submit proposed amendments to the state building code to the board for review and confirmation prior to adoption. Municipalities may submit proposed language to the board for an advisory opinion at any time.
 - Cities shall submit the final proposed building code amendment no later than 90 days before final adoption. Towns shall submit the final proposed building code amendment no later than 10 days after the conclusion of the final public hearing.
- Municipal submissions shall include the final text for each amendment.
- The board shall act to review and confirm proposed municipal amendments within 90 days of submission for cities, and 45 days for towns. Failure of the board to act within these timeframes shall constitute a confirmation of the municipal amendment.
- The board's review shall be limited to a confirmation that the local amendment does not establish requirements conflicting with, or less stringent than, the requirements of the state building code, and to verify with the state fire marshal that there is no conflict with the fire code.

- Repeals the exemption allowing any person who desires to submit plans and specifications for a sewage or waste disposal system for the person's own domicile to do so without a permit.
- Continues to require DES to adopt rules relative to requiring a permit holder to be a licensed professional engineer with a civil or sanitary designation in order to submit applications for construction approval in certain complex situations.

A Couple of Committees of Interest

SB 398: Advisory Committee on State Building and Fire Codes.

- The committee shall work with the building code review board and board of fire control. The committee shall meet at least annually and on an as-needed basis to address building and fire code issues identified by the committee.

SB 334: Committee to Study Property Blight in New Hampshire Cities and Towns, to study:

- The definition of vacant and abandoned real properties in New Hampshire;
- The prevalence and scope of real property blight and problems related to reaching the party responsible for the blight of a real property;
- The feasibility of establishing legislation requiring a party to register a blighted real property, to register that property with the relevant New Hampshire city or town in which it is located, and to take steps to mitigate the circumstances present; and
- Any other related information the committee believes to be relevant.

Court Decisions

Since Summer 2021

Municipal Sign Regulation: *City of Austin v. Reagan National,* SCOTUS

- Rule: Municipalities can adopt sign codes that impose more stringent regulations or prohibitions for off-premise signs as opposed to on-premise signs.
- A sign code can define an off-premise sign as one advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed.
- A sign code that bans off premise signs should provide protection for pre-existing, non-conforming off-premise signs under RSA 674:19.
- Under prior First Amendment rulings, anytime a sign code requires the government to read and interpret the content of a sign, a much more stringent level of legal scrutiny applies that in many instances renders the sign code provision unconstitutional under the First Amendment. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). However, in this instance the Court concluded that the challenged sign code only requires reading a billboard to determine whether it directs the reader to the property on which it stands or to some other, offsite location, not the content.



Cell Tower Locations: *GMR Holdings v. Lincoln,* US Dist. NH.

- Municipalities should be aware that the federal Telecommunications Act governs placement of cell towers and where, as here, a gap in coverage exists for a particular carrier, the overlay map comprised of the RF map and zoning map showing permissible areas for a tower will likely determine where a cell tower will be allowed to be located.
- To prevail on a claim of “effective prohibition” claim, a claimant must establish: (1) that there is a gap in cellular service coverage in the area of the proposed tower; and (2) that there are no feasible alternatives to the site proposed to, and rejected by, the Planning Board.
- As all parties agreed that there was a gap in cellular coverage for AT&T in Lincoln, the only issue was whether there were feasible alternatives to the site proposed.

Waiver of Grandfathered Rights: *Sullyville, LLC v. Town of Carroll*, NH Supreme Ct.

- In 1979, the town adopted a zoning ordinance that prohibits the operation of campsites in residential (R-1) districts but allows them via special exception in residential-business districts (R-B).
- As the parcel passed through several owners over the years, one filed a “note” at the registry of deeds waiving the use of part of the parcel as a campsite. Subsequent purchasers were put on notice of the “note” through purchase and sales agreements as well as via title searches.
- Voluntary waiver of nonconforming use occurs when the holder voluntarily or intentionally relinquishes a known right, as occurred here.
- Failure by the municipality to take enforcement action (even over decades) does not eliminate the waiver.

HAB Jurisdiction: *William Evans, Trustee v. Town of Pembroke*, HAB.

Applicant sought approval from the Pembroke Select Board to reclassify a Class VI Road as Class V to facilitate the residential development of Applicant's abutting, 45-acre property.

In *Green Crow* the Court made clear that the legislature did not intend for a select board to use its authority to determine occasion for the layout or upgrade of a highway under RSA 231:8 as a vehicle for effectively conducting land use planning or zoning. Thus, a select board could not consider the anticipated impact associated with the development that might result from the upgrade of a road.

Applicant appealed the denial of the road reclassification to the Housing Appeals Board (HAB).

This decision demonstrates that the HAB can exercise jurisdiction over a highway reclassification determination by a select board where that determination is a municipal permit "applicable to housing and housing developments." RSA 679:5, I (g).

“Good Cause” Further Defined: *Brady Sullivan Prospect Hill v. City of Lebanon*, HAB.

On March 23, 2020, the City sent an e-mail reminding the Brady Sullivan that the active and substantial development deadline of December 10, 2020 and provided a list of the conditions of approval that still had to be satisfied prior to commencing any site work for Phase II. Despite this warning, Brady Sullivan did not achieve active and substantial development by December 10, 2020, and the City declared the project in default on January 6, 2021.

HAB determined that, when judging “good cause” to extend commencement and completion deadlines established by a planning board under RSA 674:39, IV, the following factors merit consideration: 1) how regulatory changes since the original approval would necessitate significant revisions to approved plans; 2) the applicant’s ability to commence active and substantial development considering the existing business conditions. The fact that the Applicant has previously requested and received plan extensions should not be factored into any decision making.

STRs:
The Coming Fight:
*Christopher
Andrews & Kelly
Andrews v.
Kearsarge Lighting
Precinct*

- The plaintiffs own two properties in the Kearsarge Lighting Precinct (KLP) that they use as short-term vacation rentals and have dumpsters outside.
- KLP has a zoning ordinance provision requiring owner-occupation of residential properties that offer sleeping accommodations (Guest Provision), and a provision requiring that dumpsters meet setback requirements and be enclosed by a privacy fence (Dumpster Provision).
- Letters regarding the violations were sent to the owners of four subject properties, including the plaintiffs.
- In Superior Ct., KLP prevailed but *now on Appeal to NH Supreme Ct.*