
New Hampshire 2012-13 Land Use Law in Review

Statutes and Cases



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Today's Roadmap

- I. Finding the Law
- II. Recent NH Statutory Changes
- III. A Touch of Federal Issues
- IV. Recent NH Supreme Court Decisions

PART I

Finding the Law

Finding the Law

NH Statutes and Bills

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

NH Supreme Court Decisions

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

For Other Jurisdictions

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

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- www.nh.gov/oep/programs/MRPA/PlanLink.htm

PART II

Recent NH Statutory Changes

Cons Comm Entry to Private Property 2012 Ch. 202 (HB 514)

- RSA 36-A
 - Introduced to prohibit any access (by anybody) to private property for gathering data without owner's written permission; as enacted, scope limited to conservation commissions – oral permission is OK, but record must be made
 - Prior to requesting permission, commission will notify the owner of the purpose of the data gathering, features to be evaluated, manner of data collection, and possible known consequences of its collection
 - No data gathered without permission may be used; administrative warrants are an alternative to permission
- Note well: While this applies to Conservation Commissions alone, all public agents should tread carefully on property rights

Impact Fees on State Highways 2012 Ch. 106 (SB 291)

- RSA 674:21, V
 - (k) Impact fees collected for improvements to the municipal road system may be expended on improvements to the state highway system only for improvement costs related to a development's impact
 - No new or additional impact fees allowed
 - Not for use on interstate highway system
 - Allows greater flexibility in the use of highway impact fees, but not in their calculation and assessment
- **Remember:** planning boards still have the ability to require exactions for off-site improvements, and to impose other appropriate conditions of approval (RSA 674:21, V(j)) – potentially broader authority

Impact Fee Reporting 2012 Ch. 106 (SB 291)

- RSA 674:21, V
 - (l) "No later than 60 days following the end of the fiscal year, any municipality having adopted an impact fee ordinance shall prepare a report listing all expenditures of impact fee revenue for the prior fiscal year, identifying the capital improvement project for which the fees were assessed and stating the dates upon which the fees were assessed and collected. The annual report shall enable the public to track the payment, expenditure, and status of the individually collected fees to determine whether said fees were expended, retained, or refunded."
- This is what communities should already be doing! Let people know how (and if) their money is being spent. And after 6 years, return if not used.

Building Code Board of Appeals 2012 Ch. 242 (HB 137)

- 674:34 repealed and reenacted
 - Powers of Building Code Board of Appeals. The building code board of appeals shall hear and decide appeals of orders, decisions, or determinations made by the building official or fire official relative to the application and interpretation of the state building code or state fire code as defined in RSA 155-A:1. An application for appeal shall be based on a claim that the true intent of the code or the rules adopted thereunder have been incorrectly interpreted, the provisions of the code do not fully apply, or an equally good or better form of construction is proposed. The board shall have no authority to waive requirements of the state building code or the state fire code.

Shoreland Protection 2012 Ch. 276 (HB 1484)

- RSA 483-B:11, IV
 - Decks and open porches allowed to extend 12 feet toward the reference line on non-conforming structures built before 7/1/1994

Prime Wetlands 2012 Ch. 235 (SB 19)

- RSA 482-A
 - Eliminates statutory 100-foot buffer, except for those designated between 8/17/07 and 8/24/12
 - Formerly allowed DES to enforce “adjacent to,” then “within 100 feet” of a prime wetland. Now can only enforce within the mapped designated area
 - Minimum standards for designation: 2 acres, minimum 50 feet wide, cannot only be open water, demonstrate at least 4 wetland functions (including wildlife habitat)
 - Wetland functions: ecological integrity, wetland-dependent wildlife habitat, fish and aquatic life habitat, scenic quality, educational potential, wetland-based recreation, flood storage, groundwater recharge, sediment trapping, nutrient trapping/retention/transformation, shoreline anchoring, and noteworthiness.
 - Municipal board (BOS, PB, CC) must give notice to all affected owners prior to designation hearing

Junkyard Setbacks 2012 Ch. 108 (SB 340)

- RSA 236:118, III
 - Existing: Statutory setbacks from highways, may be reduced by zoning
 - Class I, II, III, III-a: 660 feet
 - Class IV, V, and VI: 300 feet
 - New: If there's no zoning, Selectboard may adopt an ordinance establishing lesser setbacks

Sprinklers **2013 HB 278 (pending)**

- RSA 674:36, IV and 674:51, V
 - As passed by the House, would allow developers to voluntarily offer sprinklers in 1- and 2-family structures and for such offers to be enforceable conditions of approval
 - Response to Legislature's 2011 prohibition against requiring sprinklers in such structures
 - Improves developers' options and planning board flexibility
 - Hearing in Senate held

Shoreland Protection **2012 HB 513 (pending)**

- RSA 483-B
 - Modifies some definitions (ground cover, unaltered state)
 - Amends the point system (again)
 - Refines the standards for DES entry to private property
 - Permission;
 - Attempt to notify in writing at least 23 hours in advance; or
 - Evidence of activity that would impact water quality
 - Different versions passed by House and Senate

Water Resource Plans 2013 HB 634 (pending)

- RSA 674:67 (new)
 - Enables municipal development of water resource management and protection plans – part of a master plan
 - Adequacy of water resources
 - Encourage the integration of comprehensive land use planning with planning for the protection and management of surface and groundwater resources.
 - Provide statistical and scientific data to support proposed municipal ordinances intended to protect and manage water resources.
 - Senate likely to amend
 - Would repair an inadvertent statutory deletion that generally addressed OEP

Planning Board Appeals 2013 SB 49 (pending)

- RSA 677:15
 - Addresses the problem faced by parties appealing planning board decisions that involve an interpretation of zoning; until now, prudence required simultaneous appeals to ZBA and superior court
 - Bill would require all matters appealable to ZBA to be decided there first; then appeal to court could be made within 30 days after ZBA's decision on rehearing
 - Court may also stay its own proceedings (*sua sponte* or by motion of a party) if it finds an issue that should have been decided by ZBA; limited to first 30 days after service of process on defendant; appeal must be presented to ZBA within 30 days of court's order to stay
 - Passed both Senate and House, but differences remain

Variance / Special Exception Expiration 2013 SB 50 (pending)

- RSA 674:33
 - Establishes a statewide 2-year period to exercise a variance or special exception; may be extended by local ordinance or by ZBA "for good cause"
 - But no expiration until 6 months after planning board action, if any
 - Passed both Senate and House (no differences!)

 - **NOTE:** if your ordinance has a shorter period for exercising a variance or special exception, it must be changed to comply with this (if enacted)

Cell Tower Collocations 2013 SB 101 (pending)

- RSA 12-K, RSA 674:33, RSA 674:43
 - Modifications to existing cell towers (PWSFs) shall not require variance, special exception, or site plan review, unless it is a "substantial modification"
 - Increases height by more than 10% or 20 feet, whichever greater
 - Horizontal extension by more than 20 feet
 - Increases equipment compound more than 2,500 s.f.
 - Defeats effect of camouflage
 - Accounts for successive modifications
 - Passed both Senate and House, but differences remain
 - **NOTE:** building inspector will be the gatekeeper of what "substantial modification" means

Integrated Land Development Permit 2013 SB 124 (pending)

- RSA Ch. 489 – DES
 - Establishes an optional process at DES for projects that require different permits from different divisions and bureaus
 - Adds ILDP as an innovative land use control in RSA 674:21
 - Clarifies RSA 676:4, I(b) and RSA 674:33 – planning board and ZBA cannot require state or federal permits to be granted prior to accepting submission of application
 - Passed both Senate and House, but differences remain

Coastal Management Plans 2013 SB 164 (pending)

- RSA 672:2, III
 - Adds new optional section to master plans
 - (o) A coastal management section which may address planning needs resulting from projected coastal property or habitat loss due to increased frequency of storm surge, flooding, and inundation.
- Passed both chambers; Senate version that included assistance by OEP was stripped by House

PART III

A Touch of Federal Issues

Federal Telecom. Act “Shot Clock”

- Telecommunications Act of 1996
 - “Preservation of local authority”
 - Requirement for local boards to act within a “reasonable period”
 - **2009 FCC Order** → “reasonable period” =
 - 150 days for a new tower; 90 days for a collocated antenna*; more than that is presumptively unreasonable, applicant may sue in federal or state court
 - 30 days (inclusive) from receipt of application (not “acceptance”) for local boards to request information; doing so tolls the clock until applicant provides information; failure means the clock still ticks
 - **Implications:**
 - Date stamp materials, especially initial applications
 - Develop a means of checklisting applications quickly to identify missing, incomplete, or inadequate material for purpose of requesting within 30 days
 - Denials: must be in writing supported by substantial evidence (more than a scintilla, less than a preponderance); minutes are insufficient
 - Pending US Sup. Ct. case: *City of Arlington v. FCC*; decision imminent!
 - See: www.nh.gov/oepr/resourcelibrary/technical_bullefins/pwt/index.htm for further guidance and resources

* Includes height increases of 20' or 10%, whichever is greater

Federal RLUIPA

- Religious Land Use and Institutionalized Persons Act
 - **General Rule:** No government shall impose or implement a land use regulation in a manner that imposes a **substantial burden** on religious exercise, unless in furtherance of a **compelling governmental interest** and using the **least restrictive means**
 - Comes into play when individualized assessments are made (such as a local land use approval)
 - Religious exercise – not necessarily compelled by, or central to, a system of religious belief
 - "Substantial burden" is undefined
 - "Equal Terms" Rule: cannot treat religious land use on less than equal terms with similar nonreligious uses
 - Discrimination among religions prohibited, as is outright exclusion
 - Practice points: be careful what you say (it's evidence!); it's OK to demand anything you would of similar proposals for nonreligious uses; get advice of counsel early and often

PART IV

Recent NH Supreme Court Decisions

- All NH Supreme Court opinions are available on its website – go to www.nh.gov, find the Judicial Branch link on the right side, then click on the Supreme Court tab and select “Slip Opinions.”
- You can also get onto the Supreme Court’s email list for notices of decisions.

Inverse Condemnation

- *J.K.S. Realty, LLC v. City of Nashua (2012)*
 - 26.8-acre property rezoned for multi-family in 1985; 80’ ROW dedicated for the Broad Street Parkway (BSP)
 - Over the years, many efforts to sell the property; last in 2002, for \$4M. Fell through because buyers were concerned that the City would take the entire property by eminent domain for the BSP; property not marketed since 2004
 - 2009 petition for inverse condemnation – seeking 2004 fair market value; delays and uncertainty about the BSP deprived them of all economically viable use of the property
 - Trial court: uncertainty has not been substantial enough to rise to a taking
 - Appeal to the Supremes

Inverse Condemnation

- *J.K.S. Realty, LLC v. City of Nashua* (cont'd)
 - Inverse condemnation: when a governmental body takes a property in fact but does not formally exercise the power of eminent domain
 - Here, the City “did not evince an unequivocal intention to take the petitioner’s property for purposes of the BSP.”
 - AND – the owners or future purchasers were free to pursue permits to develop the property in the meantime.
 - Petitioner cites the burden caused by the City’s uncertainty
 - Court: planning a large project like this requires public disclosure, which gives community groups and property owners the opportunity to provide input.
 - If disclosure constituted a compensable taking, “this process would be frustrated as would the ‘orderly procedures to be followed in’ the planning process.”
 - **Lesson:** transparency is a good thing; but its burdens may fall on some property owners more than others – it’s a price of the process, and is not a constitutional taking

Planning Board Waivers

- *Property Portfolio Group, LLC v. Town of Derry* (2012)
 - Site plan regulations require waste storage to be at least 25’ from property boundary
 - Owner requests waiver to allow them to move dumpsters closer to the lot lines, citing traffic flow, emergency access concerns; abutter objects (residential apartment owner);
 - Planning board’s waiver standards – unnecessary hardship would result from strict compliance
 - (1) the waiver does not “nullify the intent and purpose of the regulations; (2) the board requires such conditions as will, in its judgment, secure the objectives of the regulations which are waived”; (3) the request is in writing; (4) the waiver is supported by evidence submitted by the applicant; (5) the board formally votes on the request; and (6) the waiver is noted on the final plan
 - Compare with statutory standard for waiver; second option is missing (no need to demonstrate hardship)

Planning Board Waivers

- *Property Portfolio Group, LLC v. Town of Derry (2012)*
 - RSA 674:44, III(e) requires that site plan review regulations adopted by a planning board authorize it to waive any portion of them. A planning board may grant a waiver under the statute if it finds, by majority vote, that either:
 - (1) Strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations; or
 - (2) Specific circumstances relative to the site plan, or conditions of the land in such site plan, indicate that the waiver will properly carry out the spirit and intent of the regulations
 - Abutter asserts that the board must clearly state its findings
 - Supremes: no, there's adequate information in the minutes to support the board's conclusion; but even so, no real discussion of hardship by the board, as required by their regulations
 - **Caution:** planning board got lucky – follow your own rules; follow the statutes

Timing of Appeals

- *Bosonetto v. Town of Richmond (2012)*
 - Owner has 3 mobile homes on a private road; Selectboard denies building permit to replace one with a 3-bedroom residence at a different location; appeal to ZBA pursuant to RSA 675:41, I
 - ZBA determines that owner has vested right to continue the 3 mobile homes, but not to replace in a different location with a different footprint (8/10/09)
 - ZBA reviews draft notice of decision (8/17/09), placed in file (8/18/09)
 - Clerk gives owner instructions on rehearings: "the motion must be made within 30 days after the decision is filed and first becomes available for public inspection."
 - Motion for rehearing made on 9/14/09

Timing of Appeals

- *Bosonetto v. Town of Richmond* (cont'd)
 - ZBA addresses motion, reviews rehearing statute,
 - RSA 677:2: motion must be filed within 30 days after any order or decision of the ZBA; "This 30-day time period shall be counted in calendar days beginning with the date following the date upon which the board voted to approve or disapprove the application in accordance with RSA 21:35"
 - ZBA rejects the motion for rehearing as untimely
 - Court construes this strictly; but is the Town *equitably estopped* from raising timeliness of the appeal? The owner was given incorrect information by the clerk
 - Supremes: the clerk's error was unintentional; the instructions also referred to the statute, and recommend the reader to be familiar with them; ZBA's decision upheld

Vesting and Plan Amendments

- *Harborside Associates v. City of Portsmouth* (2012)
 - Parade's hotel plan approved in 2008, including restaurant
 - 12/21/09, City adopts new zoning with new parking requirements
 - 1/19/10 Parade submits application to amend site plan, replacing restaurant with 300-person conference center; planning board approves without requiring compliance with new zoning;
 - Harborside objects, appeals to ZBA; ZBA affirms planning board – exempt under RSA 674:39; rehearing denied
 - Trial court vacates ZBA – Parade presented a "major change" to its previously approved plan; does not qualify for the exemption under RSA 674:39; Parade appealed to Supremes

Vesting and Plan Amendments

- *Harborside Associates v. City of Portsmouth* (cont'd)
 - Using the old RSA 674:39
 - I. Every subdivision plat approved by the planning board and properly recorded in the registry of deeds and every site plan approved by the planning board and properly recorded in the registry of deeds . . . shall be exempt from all subsequent changes in . . . zoning ordinances . . . for a period of 4 years after the date of approval; provided that:
 - (a) Active and substantial development or building has begun on the site . . . in accordance with the approved subdivision plat within 12 months after the date of approval, or in accordance with the terms of the approval . . .
 - Parade argues that because the statute doesn't address amendments, it is ambiguous, and so the City can apply "administrative gloss" (consistent interpretation of an ambiguous clause will be given deference)

Vesting and Plan Amendments

- *Harborside Associates v. City of Portsmouth* (cont'd)
 - Supremes: any amendment "that substantially changes a plan is, by definition, not 'in accordance with the terms' of the original approval" – therefore, there is no ambiguity (and so the "administrative gloss" doctrine doesn't apply)
 - Parade: amendment was not a substantial change
 - Supremes: "...we have no occasion to identify the precise degree of change to a site plan that is substantial enough to require compliance with new zoning ordinances passed after construction has begun; wherever that line may be, Parade's proposed amendment crossed it."
 - City's zoning ordinance treats restaurants and conference centers differently
 - **Practice Point:** have a general idea of where the gray lines are that should limit your jurisdiction; when in doubt, ask legal counsel

Site Plan Jurisdiction

- *Town of Barrington v. Townsend (2012)*
 - Enforcement action brought by Town against owner who used his property to accommodate up to 50 RV guests per year with hook-ups; no fee, but reimbursement for utility costs
 - Zoning: non-residential development requires site plan review; "non-residential" is undefined
 - Supremes: residence – "a place where one actually lives or has his home... as distinguished from a place of temporary sojourn or transient visit" – "place," as opposed to a "thing"
 - Zoning also says that RVs can't be used as a residence
 - **NOTE:** RSA 676:17 – recovery of costs and reasonable attorney's fees by enforcing municipality is mandatory. Here: \$15,450.48.
 - **Practice Point:** "non-residential" doesn't necessarily mean "commercial"

Sprinkler Jurisdiction

- *Town of Atkinson v. Malborn Realty Trust (2012)*
 - Enforcement action brought by Town against owner who occupied home without a certificate of occupancy
 - ZBA granted variance to convert seasonal camp to year-round residence, conditioned upon meeting Police and Fire Department requirements; Fire Chief wants sprinkler system
 - Driveway with 23% grade proposed; Fire Chief agrees to 10% and no sprinkler; owner builds 13.7%, builds house without sprinklers, and moves in without CO
 - Enforcement action brought on 12/14/09; owner vacates on 7/1/10; court imposes civil penalty of \$55,000 (plus costs and fees) – RSA 676:17, I: \$275/day for the first offense

Sprinkler Jurisdiction

- *Town of Atkinson v. Malborn Realty Trust* (cont'd)
 - What about the ban on sprinkler requirements?
 - Laws of 2010, chapter 282 prohibits sprinkler requirements in 1- and 2-family dwellings
 - But NFPA Fire Code gives the Fire Chief flexibility to mandate sprinklers when “site conditions or unique structure designs” result in access design that doesn’t meet specific requirements of NFPA.
 - This is *dicta*, but the court may be showing its hand on how it would handle a future case

Excavations and Preemption

- *Town of Carroll v. Rines* (2013 – replaces 2012 decision)
 - Enforcement action to enjoin continued excavation until owner gets a variance and planning board excavation permit
 - Trial court approves stipulation that owner won’t excavate until he gets a variance; owner continues to remove stockpiled earth material for use on highway projects; planning board approves subdivision and owner starts excavating; owner seeks relief from variance requirement, and court denies
 - Trial court found that owner had engaged in two types of excavation: excavation for highway purposes prior to subdivision; and excavation “incidental to construction” and/or for highway purposes after subdivision
 - Both types exempt from an excavation permit under RSA 155-E; but because statute didn’t preempt local regulation, variance was required – zoning still applies

Excavations and Preemption

- *Town of Carroll v. Rines* (cont'd)
 - Supremes: zoning does not permit excavation in district; town has a permissive zoning ordinance (permitted uses are listed), so requirement for variance need not be stated
 - “Administrative gloss” from past failure to require excavation permit for building construction? Court: ordinance is unambiguous, so application of administrative gloss doctrine is precluded
 - But trial court erred by requiring variance for excavation incidental to construction (remanded)
 - Permissive zoning allows those uses that are expressly permitted or incidental to uses so permitted
 - Not clear if necessary permits had been obtained
 - Not clear what excavation was incidental to construction
 - **Practice Point:** subdivision plan, building permit with septic plan, or approved site plan should provide the “incidental to construction” detail; excavation for highways requires DOT hearing

Excavations and Preemption

- *Town of Carroll v. Rines* (cont'd)
 - Preemption may be found when the comprehensiveness and detail of the State statutory scheme evinces legislative intent to supersede local legislation.
 - RSA 155-E is a comprehensive scheme – but does not totally preempt local regulation
 - Excavations requiring permits are subject to greater municipal standards
 - Preemption for “highway-purpose” excavations only if State Transportation Appeals Board authorizes DOT
 - Remand: to what extent was the excavation incidental to building construction?
 - **Practice Point:** multiple regulatory schemes may seem to overlap, but they are distinct and separate jurisdictions of different bodies

Signs, Signs...

- *Bartlett Board of Selectmen v. Bartlett ZBA (2013)*
 - River Run, owner of Attitash condos, received permit for sign, then later added "REGISTRATION .3 MILES BACK ON LEFT" – Selectmen deny permit, zoning prohibits outdoor signs "on any premises other than the premises where the activity to which the sign pertains is located"
 - Appeal to ZBA; no definition of "premises" in zoning; determines it's a "directional" sign, exempt from off-premises restriction
 - Selectmen move for rehearing (denied), then appeal; argue that it's not directional and that "premises" cannot include more than one lot
 - Supremes: ordinance defines "lot" as "a tract, parcel, or plot of land"; if the drafters had wanted to limit "premises" to one lot, they could have instead said "lot" – here, premises may be multiple lots on which a single business conducts its activity
 - **What's in a word?** Lots, if the word is premises!

ZBA Variance Process

- *Bartlett v. City of Manchester (2013)*
 - Brookside Congregational Church – non-conforming use since 1958; sought permit for a "work-based, self-help organization" for mentally ill adults; denied by City as prohibited by zoning
 - Variance sought (no administrative appeal) – use would be "similar to other church activities" – neighbors object; variance granted; rehearing denied
 - Trial court: no hardship demonstrated; BUT, the use is a lawful accessory use and no variance is necessary
 - Supremes: permitted uses and hardship are interconnected, so the trial court could provide relief that was not sought – here, accessory uses are permitted
 - The mere filing of a variance application doesn't limit ZBA's consideration of whether the applicant's proposed use of property requires a variance in the first place
 - **Practice Point: ZBA's threshold variance question – is the variance necessary? Line up your ducks carefully.**

Filing Deadlines

- *Trefethen v. Town of Derry (2013)*
 - RSA 677:4 – appeals of ZBA decisions must be made within 30 of board's decision
 - RSA 21:35, II – filing deadlines that fall on a Saturday, Sunday or legal holiday will be extended to the next business day
 - Applies to all statutes, unless it would be inconsistent with legislative intent or repugnant to the statutory context
 - No such language in RSA 677:4

Standing

- *Hannaford Bros. Co. v. Bedford (2013)*
 - Market Basket granted variance to build 78,332 s.f. building on Route 114 in a zone that limits buildings to 40,000 s.f.; ZBA found the limitation was intended to apply to Route 101, not to Route 114 – consistent with the “spirit of the ordinance”
 - Hannaford built a 36,541 s.f. store on Route 101 – 3.8 miles away from Market Basket site; Hannaford moves for rehearing – ZBA denies, finding Hannaford not to be a “person directly affected” (RSA 677:2)
 - Trial court: RSA 677:4 – “any person aggrieved” by the ZBA; court finds Hannaford lacks standing

Standing

- *Hannaford Bros. Co. v. Bedford* (cont'd)
 - Supremes: Weeks test for standing
 1. Proximity of challenging party's property
 2. Type of change proposed
 3. Immediacy of the injury claimed
 4. Challenging party's participation in administrative hearings
 5. (And anything else that's relevant to the circumstances)
 - Hannaford concedes on proximity (#1)
 - Court: variance allows for a big change, and Hannaford was active at the ZBA (Nos. 2 & 4 in its favor)
 - Focus on #3: ZBA compared the Hannaford Rt. 101 site to Market Basket's Rt. 114 site in considering "spirit of the ordinance"; Hannaford claims this affects its ability to expand
 - Court analyzes the "spirit of the ordinance would be observed" criterion – but this is approached in the negative: would it be "inconsistent with the spirit?" and if not, then it would be consistent

The Spirit of Zoning

- *Hannaford Bros. Co. v. Bedford* (cont'd)
 - The test: granting a variance would be inconsistent with the spirit of the ordinance if it would violate the ordinance's basic zoning objectives (this is a required part of the test)
 - *One way* to ascertain if a variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality
 - Locality is a judgment call – while the ZBA compared the two properties, that doesn't mean they're the same locality
 - Market Basket site: variance was consistent with zoning
 - Inference: Hannaford site would not be – but this speculative – not a "direct, definite interest in the outcome"; therefore, no standing; business competition does not confer standing – there is no "injury in fact"
 - **Practice Point:** all variances go against the ordinance – the question is one of *degree*; you can't say that a variance shouldn't be granted because it's needed to allow a proposed use