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# **New Hampshire 2015-16 Land Use Law in Review**

## ***Statutes and Cases*** *(and more, oh my!)*

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**Spring Planning & Zoning Conference**

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# Today's Roadmap

- I. Finding the Law
- II. Accessory Dwellings
- III. Agriculture and Agritourism
- IV. Other NH Statutory Changes
- V. Signs in the US Supreme Court
- VI. NH Supreme Court Decisions
- VII. Miscellany

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# **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](http://www.gencourt.state.nh.us/rsa/html/indexes/default.html)
- Search for Bills
  - [http://www.gencourt.state.nh.us/bill\\_status/](http://www.gencourt.state.nh.us/bill_status/)

## NH Supreme Court Decisions

- [www.courts.state.nh.us/supreme/opinions/index.htm](http://www.courts.state.nh.us/supreme/opinions/index.htm)

## For Other Jurisdictions

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

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

- <http://www.nh.gov/oep/planning/services/mrpa/plan-link.htm>

# Legislative Tracking

- Legislature's website
  - [http://www.gencourt.state.nh.us/bill\\_Status/](http://www.gencourt.state.nh.us/bill_Status/)
- NH Municipal Association Bulletins
  - [www.nhmunicipal.org](http://www.nhmunicipal.org)
- New Hampshire Planners Association (NHPA)
  - [www.nhplanners.org](http://www.nhplanners.org)

New Hampshire Planners Association			2015 Legislative Session				As of 4/17/2015		
Bill No. Sponsor	Title	Position	HOUSE			SENATE			Chapter
			Comm. Status	Comm. Action	Floor Action	Comm. Status	Comm. Action	Floor Action	
<b>HOUSE BILLS</b>									
<a href="#">HB1</a> <a href="#">HB2</a> Kurk	HB1: making appropriations for the expenses of certain departments of the state for fiscal years ending June 30, 2016 and June 30, 2017  HB2: relative to state fees, funds, revenues, and expenditures	Watch / amend OEP sections	Finance Hg 3/5/15 Hg 3/9/15 ES 3/23/15 ES 3/24/15	OTPA for 4/1/15	Passed w/amend 4/1/15	Finance Hg 5/5/15 3:00-5; 6:00-8 Reps' Hall			
<a href="#">HB102</a> Belanger	Relative to consideration of warrant articles	Watch	M&CG Hg 1/20/15	OTP (18-0) CC	Passed 2/4/15	P&MA Hg 3/25/15			
<a href="#">HB108</a> Horriگان	Relative to the content and sealing of minutes in nonpublic sessions under the right-to-know law	Watch	Judiciary Hg 1/15/15 ES 2/4/15 ES 3/2/15	OTPA (17-0) for 3/11/15 CC	Passed w/amend 3/11/15	Judiciary Hg 4/21/15 9:00 100 CH			

## Other Sources

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

*"An ounce of prevention..."*

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# **PART II**

## **Accessory Dwellings**

# ADUs – What Are They?

- Early 20<sup>th</sup> century – a common feature in SF homes
- A second, smaller **dwelling** on the same grounds as a single-family house – attached or detached
  - An apartment over the garage, in the basement, in an outbuilding
  - Also called *granny flats, in-law apartments, family apartments, or secondary units*
- With post-WWII suburbanization and deployment of “Euclidean” zoning, ADUs became far less prevalent
  - Baby boom | Car boom | Sprawl
  - Less interest in efficient use of space

# Benefits of ADUs

- Increases a community's housing supply without further land development
- Facilitates efficient use of existing housing stock & infrastructure
- An affordable housing option for many low- and moderate-income residents
- Improves homeowner cash flow
- Helpful to elderly and/or disabled people who may want to live close to family members
  - or caregivers, empty nesters, young adults, etc.

# Background to 2016 SB 146 (Ch. 6)

- NH Center for Public Policy Studies 2014 reports:  
*“Housing Needs and Preferences in New Hampshire”*
  - Slower population growth; aging population
  - Mismatch of housing stock and needs and desires of changing population-young and old
  - Older adults want to “age in place” or “age in community”
- Homebuilders unable to fulfill homeowner requests to create ADUs for a family member or caregiver
  - Stymied by local land use restrictions

# SB 146 – The Basics

## ■ Defining Characteristics

- Independent living unit (sleeping, cooking, eating, sanitation)
- Adequate water supply and sewage disposal required
- Interior door between primary unit and ADU required

## ■ Municipal Role

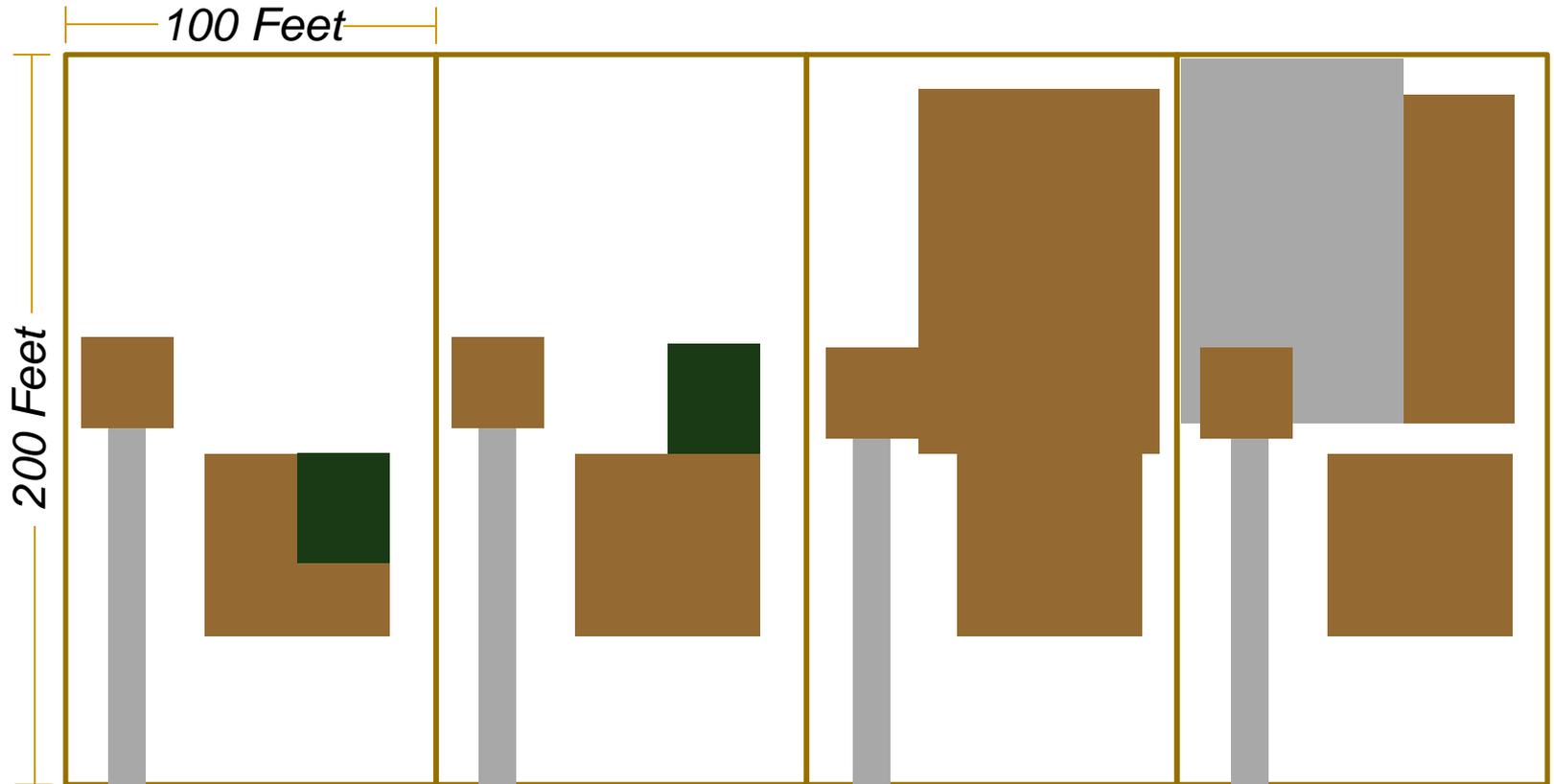
- Municipalities must allow an attached ADU in any single-family zone by right, special exception, or conditional use permit
- If the zoning ordinance is silent on ADUs, then they are allowed in any single-family home (regardless of zone)
- Standards for a single-family home also apply to combined SF and ADU (e.g., setbacks and frontage)

**Lot A**  
 2500 sf house  
 (incl. 750 sf ADU)  
 625 sf garage  
 1000 sf driveway  
 4125 sf total  
**20.6% coverage**

**Lot B**  
 2500 sf house  
 625 sf garage  
 1000 sf driveway  
 750 sf ADU  
 4875 sf total  
**24.4% coverage**

**Lot C**  
 2500 sf house  
 625 sf garage  
 1000 sf driveway  
 6500 b-ball bldg  
 10625 sf total

**Lot D**  
 2500 sf house  
 2700 sf garage  
 7000 sf driveway  
 12200 sf total  
**61.0% coverage**



20,000 sf lot size

*Mulberry Street*

# SB 146 – Options

- Municipality may
  - Require adequate parking to accommodate an ADU
  - Require owner occupancy of one of the units (but it can't say which one)
  - Require demonstration that a unit is the owner's *primary* dwelling unit
  - Control for architectural appearance (“look and feel”)
  - Limit the number of ADUs per single family dwelling
  - Limit the number of unrelated individuals that occupy a single unit (concern of college towns)

# SB 146 – Prohibitions

- Municipality must not
  - Limit ADU to 1 bedroom or to be less than 750 s.f.
  - Require familial relationship between occupants of principal dwelling and ADU
  - Require additional lot area or other dimensional standards for ADU (but it may increase lot size for a detached ADU)
  - Require door between primary unit and ADU to remain unlocked

# SB 146 – Miscellany

- Other elements
  - Detached ADUs
    - Municipalities may allow at their discretion
    - A municipality may require increased lot size, but other statutory standards for attached ADUs will apply
  - Amends NH RSA 674:21 Innovative Land Use Controls
    - ADUs are removed from list along with its definition – no longer a voluntary land use regulation
- SB 146 signed by Governor Hassan on March 16
- Effective date: June 1, 2017
- OEP Technical Bulletin
- NHHFA materials forthcoming

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# **PART III**

## **Agriculture and Agritourism**

# Agriculture and Agritourism Defined

- Statutory definition of agriculture – RSA 21:34-a
  - I. Farm defined
  - II. Agriculture and farming – all operations of a farm, including lots of activities, as well as practices on a farm incident to or in conjunction with its operations; includes “*commercial Christmas tree operation*” but does not specifically include *agritourism*
  - III. Farm stands
  - IV. Best management practices
  - V. Farmers markets
  - VI. The term "agritourism" means attracting visitors to a working farm for the purpose of eating a meal, making overnight stays, enjoyment of the farm environment, education on farm operations, or active involvement in the activity of the farm which is ancillary to the farm operation (*added in 2007*)

# Agriculture and Agritourism (cont'd)

- References to agriculture in other statutes
  - 674:17, I(i) – zoning ordinances should encourage agriculture
  - 672:1, III-b – agriculture cannot be unreasonably limited
  - 674:32-a – agriculture allowed if ordinance is silent
  - 674:32-b – establishes baseline protections for agriculture allowed pursuant to 674:32-a
  - 674:32-c, I – growing of crops cannot be prohibited
  - 674:32-c, II – allows ZBA to “waive” regulations that are “unreasonable” in the context of an agricultural use
- None mentions agritourism – but if it’s part of the definition of agriculture, then why would they?

# The Wedding Fight in Henniker

- *Forster v. Town of Henniker* (2015)
  - Christmas tree farm in the rural residential district, where agricultural uses and accessory uses are permitted – includes home businesses (max.2, if with off street parking) and B&Bs
    - Zoning ordinance refers to statutory definition of agriculture
  - Petitioner also used his property to host weddings and other events (8 in 2011, 5 in 2012); venue capacity 150
    - In 2012, the town issued a notice of violation, claiming the events were not permitted in the zone
  - Petitioner appealed to the ZBA, which determined that the events are not accessory uses and are not permitted in the zone
  - Trial court upheld the ZBA's determination

# The Wedding Fight (cont'd)

- Forster asserted that
  1. Agritourism is included in the statutory definition of agriculture (and hence, also in the town's ordinance)
  2. Municipal regulation is preempted
  3. Weddings are accessory uses to a farm
- The Court rejected the Petitioner's assertions:
  1. "Agritourism" not considered "agriculture" per "plain meaning" of RSA 21:34-a, rather it is defined separately
    - The Court noted that hosting events is not a "practice incidental to farming operations" since it is not a practice that is similar to those listed
    - Statutory history supported this conclusion – 2007 change to HB 56 in the Senate, later accepted by the House
    - "Of course, if the legislature disagrees with our statutory interpretation, the legislature is free to amend the statute as it sees fit."

# The Wedding Fight (cont'd)

## 2. Municipal regulation is not preempted

- RSA 21:34-a is simply a catalog of definitions and contains no mandate to municipalities
- Other statutes (e.g., RSA 674:17) merely call on municipalities to encourage agriculture

## 3. Events are not accessory uses

- Accessory uses are “incidental to a permitted principal use”; the Town’s ordinance defines them as “subordinate and customarily incidental to the main use”
- “Habitual association ... associated with a frequency that is substantial enough to rise above rarity.”
- Landowner’s burden to prove: “...petitioner failed to establish this his proposed uses have ‘commonly, habitually and by long practice been established as reasonably associated with the primary ... use’ in the local area.” (but see the strong dissent by Justice Hicks)
- Only 10 out of 4,200 NH farms shown to accommodate similar commercial events (only one of which is a Christmas tree farm – in Bethlehem, 100 miles distant)

# Agritourism – New Statute Pending

## 2016 SB 345

- SB 345 – adopted by both House and Senate
  - Repeals definition of agritourism and inserts new definition into “marketing or selling” in RSA 21:34-a, II (agriculture definition)
    - Text: (b)(5) The marketing or selling at wholesale or retail, [~~on-site and off-site, where permitted by local regulations,~~] ***of any products from the farm, on-site and off-site, where not prohibited by local regulations. Marketing includes agritourism, which means attracting visitors to a farm to attend events and activities that are accessory uses to the primary farm operation, including, but not limited to, eating a meal, making overnight stays, enjoyment of the farm environment, education about farm operations, or active involvement in the activity of the farm.***

# Agritourism – New Statute Pending

## 2016 SB 345

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

# The Wedding Fight Redux

- In 2016, Henniker modified its zoning ordinance to allow agritourism, as defined by statute, by conditional use permit
- On April 27, 2016, the planning board approved a minor site plan/conditional use permit for wedding events
- Abutters have appealed to ZBA and filed suit, arguing that the Supreme Court has already held that weddings are “not ancillary to the principal farm operation.”
- Stay tuned...

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# **PART IV**

## **Other NH Statutory Changes**

# Phased Development

## 2015 SB 143 (Ch. 31)

### ■ RSA 674:21

- ❑ Adds a definition for “phased development” to accommodate “large-scale projects”
- ❑ Limitations on building permits for subsequent phases of a plan subdivision or site plan approved by the planning board are to be based solely on the completion of prior phases
- ❑ To limit building permits otherwise must be done through a growth management ordinance under RSA 674:22 or moratorium under 674:23
- ❑ Effective July 6, 2015

# Third Party Review Consultants

## 2015 SB 98 (Ch.

- RSA 676:4-b, I “Board’s procedures on plats”
  - Applicant may request a different reviewing consultant, and may suggest a replacement
  - If such a request is made, planning board has an additional 45 days to take action on the application (65 + 45 = 110 days)
  - Effective August 8, 2015
  
  - Text: “The applicant may request the planning board choose a different third party consultant and the request may include the name of a preferred consultant. The planning board shall exercise reasonable discretion to determine whether the request is warranted. When such a request is granted by the planning board, the 65-day period for the board’s action on an application stated in RSA 676:4, I(c)(1) shall be extended 45 days to provide the board adequate time to identify a different consultant.”

# Traditional Commercial and Recreational Fishing Protection Act, 2015 HB 464 (Ch. 236)

## ■ RSA 674:67-70

- Prohibits local ordinances that would declare commercial or recreational fishing operations to be a nuisance solely because of what they are, including zoning that “unreasonably burdens or forces the closure” of an operation – including those done as home occupations
- This statutory subdivision is not to be construed to allow for expansions that create more noise or odor
- Effective September 11, 2015

# Mining and Reclamation

## 2015 HB 233 (Ch. 162) and HB 451 (Ch. 193)

- Chapter 12-E regulates mining activities
  - Prohibits any person from engaging in mining activities without first obtaining a mining permit from DES (RSA 12-E:4, I)
  - Certain mining activities are exempt (RSA 12-E:1, IX)
- Summary of Amendments:
  - Clarify that mining activities requiring a mining permit from DES are also subject to local land use regulations (RSA 12-E:4, IV)
  - Provide that, “A local ordinance shall not be inconsistent with this chapter unless it attempts to impose a less stringent standard or requirement than those established in this chapter” (RSA 12-E:4, IV)
  - Municipalities may regulate mining activities that are exempt from state permits (RSA 12-E:1, IX(a))
  - Clarify that any required local permits or approvals for “zoning” be submitted with the mining permit application (RSA 12-E:4, IV,(h))

# Planning Board Application Deadline

## 2016 HB 1202 (Ch. 81)

- RSA 676:4, I(b)
  - ...The applicant shall file the application with the board or its agent at least [~~45~~] **21** days prior to the meeting at which the application will be accepted. ...
- Helps to address the problem faced by boards that had incomplete applications but too little time to review prior to sending out notices for public hearings.
- NOTE: many planning boards already required submissions to be made at least 21 days in advance – but there has been no authority to do this.
- Effective July 18, 2016

# Mergers and Mortgages

## 2016 SB 411 (pending)

- RSA 674:39-a
  - Most of the existing statute becomes I.
  - New: II. If there is any mortgage on any of the lots, the applicant shall give written notice to each mortgage holder at the time of the submission of the application. The written consent of each mortgage holder shall be required as a condition of approval of the merger, and shall be recorded with the notice of the merger pursuant to paragraph I. Upon recordation of the notice and each consent, the mortgage or mortgages shall be deemed by operation of law to apply to all lots involved in the merger. The municipality shall not be liable for any deficiency in the notice to mortgage holders. (emphasis added)
- Conference committee report has been adopted; soon on its way to the Governor for signature (effective 60 days thereafter).

# Restoration of Involuntarily Merged Lots

## 2016 SB 411 (pending)

- RSA 674:39-aa (SB 411)
  - Involuntary mergers outlawed in 2010 (see RSA 674:39-a)(owner consent required)
  - In 2011, this law allowed owners to petition the local governing body for restoration of lots that were involuntarily merged by the municipality
  - Law set to sunset on December 31, 2016
- This extends the sunset to December 31, 2021; but no more notices required in municipal annual reports!
- For some fun historical background, read *Sutton v. Town of Gilford*, 160 N.H. 43 (2010)

# A Few That Didn't Make the Cut

## ■ 2015

- HB 286 – allowing building inspectors to enforce private covenants
- HB 487 – requiring election of planning board and ZBA members
- SB 83 – conservation commission powers
- SB 141 – variance voting

## ■ 2016

- HB 1203 – variance voting
- HB 546 – exactions for innovative land uses
- SB 334 – OEP study commission
- CACR 14 – local community self government



# **PART V**

## **Signs**

# First Amendment

*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; **or abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”*

*Applied to states through the 14<sup>th</sup> Amendment*

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# **Reed v. Town of Gilbert, U.S. Supreme Court (June 18, 2015)**

The Good News Community Church and its pastor, Clyde Reed placed temporary signs in the public right of way to direct people to its Sunday services. The Church did not have a permanent location, and used the temporary signs as a simple way to alert parishoners about the location, date and time of its events

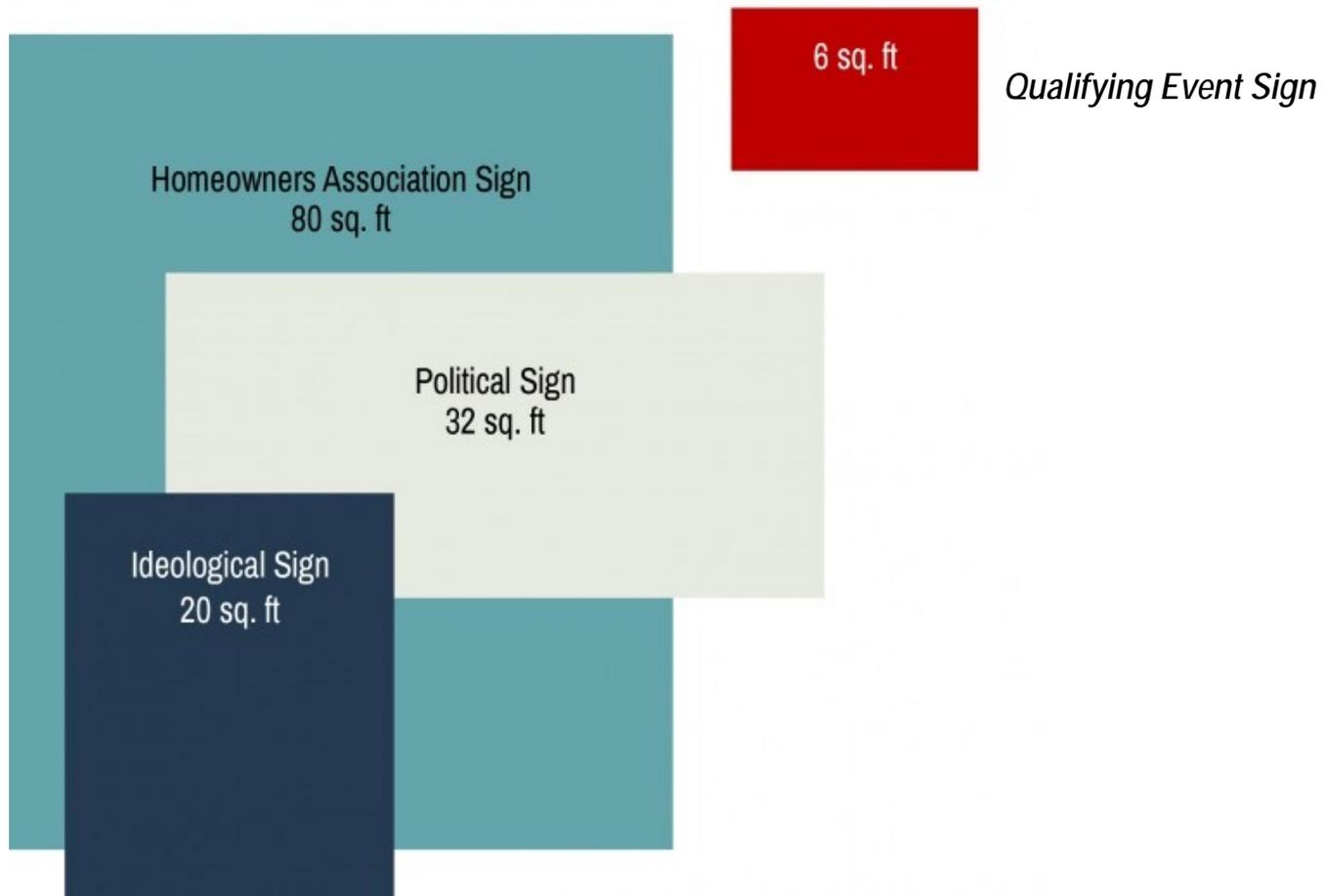
# Gilbert's Sign Standards

- Nonpolitical, non-ideological, non-commercial  
“Qualifying Event” signs can't exceed 6 sq. ft.
- Maximum time up: 12 hours before, until 1 hour after the event
- Political temp signs may be up to 32 sq. ft. (in nonresidential zones)
- Maximum time up: 60 days before and 15 days after elections

# And “Ideological” Signs

- They can be larger (i.e. 20 sq. ft.) than “qualifying event” signs but not as big as political signs
- They can be displayed for an unlimited period of time
- However, they can’t be displayed in the right-of-way

# Maximum Noncommercial Temporary Sign Sizes in Gilbert



# Majority Opinion

“A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”

*Note: “Strict scrutiny” – content-based restriction is necessary to serve a compelling governmental interest and is narrowly drawn to achieve that end.*

## Majority Opinion

“The Town’s Sign Code is content based on its face. It defines ‘Temporary Directional Signs’ on the basis of whether a sign conveys the message of directing the public to church or some other ‘qualifying event.’”

# Majority Opinion

“The Town’s Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination.”

# Majority Opinion

“Yet the [Gilbert]Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. **The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.**”

# Majority Opinion

“An innocuous justification cannot transform a facially content-based law into one that is content neutral.”

“Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech.”

**Outcome: Event-based** regulations are not content neutral; ∴ unconstitutional. But how far does this go?

# “Signs” of Hope in the Court

## *OPINION OF THE COURT*

*Thomas*

Roberts

Scalia

Alito

Kennedy

Sotomayor

## *CONCURRING OPINIONS*

*Alito*

*Kagan*

*Breyer*

Kennedy

Ginsburg

Sotomayor

Breyer

*The Court's Middle Ground*



# Helpful Hints from Justice Alito

- Some things that are content neutral:
  - Size and location standards
  - Lighting
  - Fixed vs. changing (e.g., electronic)
  - Commercial vs. residential property
  - On-premises vs. off-premises
  - Sign limits per unit of distance
  - Time restrictions on signs for one-time events
  - Government speech OK
- Time, place, manner restrictions must still be narrowly tailored to serve government's legitimate, content-neutral interests.

# Concrete Solutions

- Every residence is allocated a particular amount of square feet of signage that they can use for any noncommercial signage on their property
  - For example: ten square feet per resident, in a residentially-zoned area
- For particular periods (which can relate to the dates of elections), all size and number restrictions on noncommercial signs are suspended
- Universal message substitution –any legal sign (location, structure) can display any legal message

# Concrete solution: exempt signs based on activity on the site, not sign content

- Before Reed: an exemption allowing “for sale or rent” signs
- After Reed: an exemption allowing an extra sign on property that is currently for sale or rent
- Before Reed: an exemption for “drive-in” directional sign
- After Reed: exemptions allowing an extra sign (<10 sq. ft., < 48 inches in height, and <six feet from a curb cut), for a lot that includes a drive-through window

# Concrete solution: issuing temporary sign permits tied to the date of *issuance*

- Citizens can apply, by postcard or perhaps online, for seven-day sign permits, and receive a receipt and a sticker to put on the sign that bears a date seven days after issuance, and the city or county's name.
- The sticker must be put on the sign, so that enforcement officers can determine whether it's expired.
- Because the expiration date is tied to the date of issuance, there is no risk of content-discrimination.
- The sticker itself would be considered government speech.

# Immediate Practice Pointers

- **Talk with your legal counsel:** Municipal zoning regulations that give greater leeway in terms of time of display and size for political and ideological type signs when compared to directional signs for non-profits and religiously affiliated organizations will likely be found to violate the First Amendment.
- But remember that *Reed* is about non-commercial speech. Commercial speech regulations are subject to intermediate scrutiny (furthering an important government interest by means that are substantially related to that interest).

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**PART VI**

**NH Supreme Court Decisions**  
**(other than agritourism!)**

# ZBA Power to Modify Appeals

- *Accurate Transport v. Town of Derry (2015)*
  - “Dumpster Depot” proposed for Industrial District
  - November 12, 2012 meeting with Town’s technical review committee, including Code Enforcement Officer, who believed the proposed use was permitted
  - Planning board approved site plan on August 21, 2013, issued written decision on August 28, 2013
  - Abutter appealed CEO’s determination on September 13, 2013
  - Not a timely appeal (8 months elapsed), but *ZBA converted the appeal to be that of the planning board’s decision* – timely, because zoning ordinance allows administrative appeals to be taken within 20 days of a written decision
  - **Editorial Question:** why is the deadline for an administrative appeal to the ZBA in the zoning ordinance? It should be in ZBA’s rules, per RSA 676:5, I.

# ZBA Power to Modify Appeals (cont'd)

- *Accurate Transport v. Town of Derry* (2015)
  - ZBA determined that the use was not allowed in the district; planning board was in error
  - Trial court ruled that while an appeal of the planning board's decision would have been timely, that's not the appeal that was made; the planning board accepted the CEO's determination when it took jurisdiction over the application on July 19, 2013
  - Supreme Court reversed, agreeing with the ZBA
    - Abutter's appeal was fashioned as an appeal of the CEO's "determination," but actually contained allegations relating to the planning board's actions in construing the zoning ordinance
    - Planning board's determination is ripe for appeal when it is made; merely accepting an application is not a decision on zoning compliance
    - Compare *Bartlett v. City of Manchester* (2013)

# Sequential Appeals Under Different Laws

- *Merriam Farm, Inc. v. Town of Surry* (2015)
  - Petitioner owns property on a Class VI road
    - Proposal to construct a single family dwelling
    - The zoning ordinance requires that a lot must have at least 200 feet of frontage on a public street in order to build
    - The ordinance defines “public street” as a Class V road or better
  - 2009 application to Selectboard for a building permit; denial appealed to ZBA pursuant to RSA 674:41, II (“...practical difficulty or unnecessary hardship...”); ZBA upheld the denial; trial court appeal was unsuccessful
  - 2013 variance application to ZBA was denied
  - On appeal, the trial court concluded that the variance request could not be considered by the ZBA because of the previous denial of the building permit – “claim preclusion”

# Sequential Appeals Under Different Laws

- “Claim preclusion” (a.k.a. *res judicata*) doctrine prevents parties from relitigating matters *actually litigated*
- The Petitioner here could not have added the variance claim to its appeal of the ZBA’s denial of its building permit application
  - Because the standards for a “reasonable exception” per RSA 674:41, II are *distinct and separate* from the variance standards set forth in RSA 674:33, I(b)
- **Conclusion:** Claim preclusion will not bar a subsequent application for the same proposal where the new application is filed pursuant to a different statutory scheme than the prior application.

# Repetitive Planning Board Applications

- **CBDA Development, LLC v. Town of Thornton (2016)**
  - Does *Fisher v. Dover* (1980) apply to the actions of planning boards? Previously only applied to ZBA actions
    - ZBA cannot review repetitive variance applications absent
      - A material change in circumstances affecting the merits of the application, or
      - Application is for a use that materially differs in nature and degree from its predecessor

# Repetitive Planning Board Applications

## ■ CBDA Development (cont'd)

- Planning board denied a site plan for a 250-site campground where “campers” would be permanent and camper owners would be required to sign long-term leases and purchase units from campground owners
- Denied because it didn't resemble a traditional campground (more like “mobile homes”)
  - Exclusive occupancy by site lessees and purchase of RVs from campground owners
  - Permanent occupancy (and professional removal of units)
- No appeal

# Repetitive Planning Board Applications

## ■ CBDA Development (cont'd)

- New application for 267-site campground for the same property
- Differences?
  - Purchase of RVs from owners not required, no long-term lease required; some sites for smaller campers and tents; transient public welcome
  - But RVs could be stored on site when not used
- Board: public access resolved, but permanency (the board's greater concern) was not
- Board refused to accept application, citing *Fisher v. Dover*
- Trial court upheld planning board's decision; CBDA argued that *Fisher v. Dover* doesn't apply to planning boards – process is different from ZBA, because planning board determines through its regulations what constitutes a complete application; alternatively argued that its new application was materially different

# Repetitive Planning Board Applications

## ■ CBDA Development (cont'd)

- Supremes: *Fisher v. Dover* applies also to planning board's review of site plans
  - Provides administrative finality, conserving the resources of the reviewing agency and interested third parties
    - Planning boards also act in a quasi-judicial capacity; issues are similar to those of a ZBA considering a special exception or a variance
    - Because a planning board determines what is a complete application doesn't change the situation – whether an application is materially different is a fact-based inquiry requiring independent judgment
  - Upholds the integrity of the zoning plan
    - Planning board decisions are not mere mechanical exercises, but have the potential to impact a community and neighboring property owners
- Court agreed that the new plan was not materially different



# **PART VII**

## **Miscellany**

# “Disparate Impact” Theory Upheld

- **Texas DHCA v. Inclusive Communities Project (US Supreme Court, 6/25/15)**
  - Federal Fair Housing Act prohibits housing discrimination on the basis of race and other factors (“protected classes”)
  - Must an intention to discriminate be demonstrated, or is it only necessary to show a resulting effect of actions?
  - Held: Intent need not be shown
  - Important for states and municipalities – land use laws may have a discriminatory effect – a disparate impact

# Telecommunications Shot Clock

- **FCC Order, May 18, 2015**
  - **30 Day shot clock**. Following an application for collocation from the applicant, the state or local government will have 30 days to determine whether the application complies with its requirements. The compliance notification shall be in writing and clearly and specifically delineate all missing documents or information. | **Compare with RSA 12-K:10, II – 45 days**
  - **10 Day shot clock**. After supplemental submission from the applicant, the State or local government will have 10 days to determine whether the submission complies with its incompleteness notice. Grounds for incompleteness are limited to those in the original notice of incompleteness. | **No similar in NH law (time burden on applicant)**
  - **“Deemed Granted” Letter**. The applicant must file a notice in writing stating that the review period has expired (accounting for any tolling) and that the application has been deemed granted | **Similar to RSA 12-K:10, III**