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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2017-0634

NH Alpha of SAE Trust

v.

Town of Hanover and Town of Hanover Zoning Board of Adjustment

BRIEF OF THE APPELLEES/RESPONDENTS, TOWN OF HANOVER AND TOWN OF HANOVER ZONING BOARD OF ADJUSTMENT

Mandatory Appeal Pursuant to Supreme Court Rule 7
From the Final Order of the Superior Court of Grafton County in
Docket No. 215-2016-CV-00283

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STATEMENT OF THE CASE

NH Alpha of SAE Trust ("appellant" or "the fraternity") was formally and permanently de-recognized by Dartmouth College, effective March 15, 2016 because its charter was suspended by SAE National due to "violations of the Fraternity's health-and-safety policies." Appendix to Brief of Appellant ("App.") at 1. The Hanover Zoning Ordinance requires that student residences in the "I" Institution zoning district be operated in conjunction with another institutional use (here, Dartmouth College). Because SAE was de-recognized by Dartmouth College, its property (utilized as a student residence) was no longer operated in conjunction with an institutional use, and the zoning administrator informed it on February 12, 2016, that the continued use of the property as a student residence after March 15, 2016 would be a violation of the zoning ordinance. See App. at 16. Nonetheless, the property remains occupied as a student residence to this day.

SAE appealed that administrative decision to the Hanover Zoning Board of Adjustment which, in a decision dated April 18, 2016, initially concluded that, based on the evidence before it, SAE was grandfathered from the requirement in the zoning ordinance that the student residence be operated in conjunction with another institutional use. See App. at 449. Upon rehearing at the request of Dartmouth College, see App. at 456, the zoning board found that the additional evidence provided by the College proved that in fact the property had been used in conjunction with Dartmouth College prior to 1976 (the date of the adoption of the zoning ordinance requiring that conjunction), and therefore appellant was not grandfathered from the "in conjunction with" requirement. See App. at 1137. As a result, subsequent to the formal

de-recognition by Dartmouth College, the property was no longer operated in conjunction with another institutional use, and was no longer allowed to operate as a student residence. SAE moved for rehearing, see App. at 1151, and on September 1, 2106, the Zoning Board of Adjustment denied that motion. See App. at 1658.

An appeal to the superior court followed. The *Verified Petition for Appeal Pursuant to RSA 677:4* consisted of 61 pages and 230 numbered paragraphs. See App. at 1666. It claimed that the decision of the zoning board was illegal and unreasonable for 19 different reasons. A 1665 page certified record was transmitted to the trial court in conjunction with that appeal, and is included as the first 1665 pages of the Appendix.

Although the superior court generally confines hearings on zoning matters to 30 minutes (15 minutes per side), in this case the trial court held an almost two hour hearing on the appeal. See Transcript of April 5, 2017 Final Hearing on the Merits Before the Honorable Lawrence A. MacLeod, Jr., Judge of the Superior Court, included as an Appendix to this brief at page 31. It accepted trial memoranda from the parties, as well as supplemental memorandum regarding the effect of this Court's decision in Dartmouth Corporation of Alpha Delta v. Town of Hanover, 169 N.H. 743 (2017) on the issues raised in the appeal. Appellant submitted 175 pages of argument to the trial court in these two documents. See App. at 1729 and 1884. Thereafter, appellant also submitted a further Post-Trial Memorandum in July of 2017 (though the version of the Post Trial Memorandum contained in the Appendix at 1854 not only is not the version that was eventually filed with the trial court in July, but also mis-represents that it was filed in April).

On August 3, 2017 (Clerk's notice dated August 7, 2017), the trial court issued its 12 page decision in this matter. That decision is attached to the Brief of Appellant. The trial court held that given this Court's ruling in Dartmouth Corporation of Alpha Delta, supra, it could summarily find that:

1. the question before the court was not whether appellant's fraternity house was nonconforming with the zoning ordinance, but whether the use of the building as a student residence was nonconforming from the "in conjunction with" requirement;

2. the Hanover Zoning Board of Adjustment's interpretation of the "in conjunction with" requirement was legal and reasonable; and

3. lax enforcement of the "in conjunction with" requirement in the past did not prohibit enforcement of that requirement in the present.

See Order at 6.

The trial court then went on to address the questions of fact and the other issues raised by appellant. First, it found that the zoning board's factual finding that appellant operated "in conjunction with" Dartmouth College prior to the amendment of the zoning ordinance formalizing that requirement (which finding is deemed prima facie lawful, see RSA 677:6) was supported by the evidence. See Order at 7. The trial court next found that there was no unconstitutional classification of different types of fraternity properties based on previous decisions of the zoning board, holding that this argument was essentially the same as appellant's selective enforcement claim, which this Court disposed of in Dartmouth Corporation of Alpha Delta. See Order at 7. The trial court then held that there was no administrative gloss on the zoning provision because, as this Court found in Dartmouth Corporation of Alpha Delta, the meaning of the ordinance

was not ambiguous. See Order at 8. Fourth, the trial court found that there was no taking of appellant's property because appellant's claim that without the student resident use the property was valueless was "starkly contradicted by SAE's own claims" of the property's other uses. See Order at 9-10. Along these same lines, the trial court disposed of appellant's claim that the zoning board's decision violated its right to expressive association, holding that only appellant's use the property as student residence was unpermitted and its right to use the property for other lawful purposes remained intact. See Order at 10-11. Finally, the trial court found that the zoning board did not err by encouraging Dartmouth College to present evidence regarding its connection to appellant in 1976 or in Board Member Waugh's participation in the proceedings before any objection was raised thereto. See Order at 11-12.

This appeal followed. Although counsel for both appellant and *amici curiae* focus most or all of their briefs on the issue of whether the Hanover Zoning Ordinance's requirement that student residences be operated "in conjunction with" another institutional use is an illegal delegation of authority to Dartmouth College; the Court will note that this issue was not addressed in the trial court's decision. This is because appellant did not pursue it below in a manner which preserved it for appeal. See *Appellees' Motion for Ruling on Whether Issue of Alleged Illegal Delegation Is Properly Before the Court*, previously filed with this Court. This Court should therefore refuse to consider this issue at this time, and confine its focus to the other issues raised by appellant in its brief.

STATEMENT OF FACTS

The Hanover Zoning Ordinance allows by special exception Student Residences, including fraternities, in the Institutional Zone (the "I" Zone), which is where appellant's property is located. At all times relevant to this matter, the Ordinance defined Student Residence in the I Zone as:

> A building designed for and occupied by students, and operated in conjunction with another institutional use, which may include individual living units with social rooms and kitchen facilities for any number of students.

Hanover Zoning Ordinance §902.[1]

Appellant owns and operates a building designed for, and presently illegally occupied, by students. Until March 15, 2016, appellant had operated in conjunction with another institutional use, namely, Dartmouth College, for a period dating back to the early 1900s. The evidence of this conjunction in the record includes the following:

*1902 vote by Dartmouth College to limit the number of residents in fraternity houses to 14, except for Tri Kappa Fraternity, which was permitted to have 17 residents "as its investment was made before the policy of the College in regard to fraternity houses was adopted." App. at 475

*1920 vote of Dartmouth College that "the plans and location of proposed new fraternity houses shall require approval of the Trustees." App. at 476

*1925 vote of Dartmouth College to reaffirm the "longstanding limitation of the number of students permitted to room in a house to sixteen," to limit the total size of

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[1]The Zoning Ordinance first adopted the "in conjunction with" requirement in 1976, by defining Student Residence as: "Student Residence shall include dormitory (including social rooms and limited kitchen facilities), sororities, fraternities, residences for nurses, and medical interns operated in conjunction with another institutional use such as for educational purposes or health purposes." App. at 969.

fraternity houses to 95,000 cubic feet, and to require approval for any require material enlargements of existing fraternity houses. App. at 476

*1949 letter from the Dartmouth College President reporting "permission for house parties this spring and hereafter will be dependent upon the houses complying with pertinent fire regulations." App. at 478

*1949 Memorandum informing the fraternities and their faculty advisors that "[e]ffective September 1, 1949, fraternity houses at Dartmouth will be approved for student residence only if and insofar as the houses have complied with all pertinent laws and regulations pertaining to the protection of life from fire," and that "permission will be granted for the housing of guests in fraternity houses at houseparty times only on the basis that such guests will not be housed in the house in numbers or in manner contrary to the provisions of the law and regulations governing occupancy of the house for such purposes." App. at 479

*Dartmouth College inspections of fraternities in the 1960s and 1970s. See, e.g., App. at 498, 509.

*1964 vote of Dartmouth College "to require that each fraternity, as a condition of *continued recognition* of its house as a suitable residence for Dartmouth College students, have in operation a fire alarm system approved by Dartmouth College." App. at 508 (emphasis added)

*1971 establishment of the Fraternity Governing Board by Dartmouth College, which Board included College officials. App. at 522, 748.

Although appellant argues that all of these acts of conjunction between the College and fraternities should be disregarded because its members do not recall any

such recognition by the College, the facts and evidence before the Court are that since the early 1900s, the College and the fraternities, including appellant, have worked in conjunction with each other and the College has imposed certain rules and regulations that fraternities were required to meet to be recognized by the College as suitable housing for its students.

Effective March 15, 2016, Dartmouth College de-recognized the fraternity because its charter was suspended by its national organization due to hazing. See App. at 1, 5. As a result of this de-recognition, appellant's property is no longer recognized by Dartmouth as a college approved residential facility. See App. at 1. The fraternity has exhausted its appellate rights with regard to the College's decision to de-recognize it, yet it continues to occupy the property, despite the decision of the zoning board of adjustment and the trial court.

As a result of this de-recognition, the town's zoning administrator informed appellant that because it had been de-recognized by the College, the property was no longer considered to be operated in conjunction with another institutional use, and that continued use of the property as a student residence was a violation of the zoning ordinance. See App. at 16. Appellant appealed that decision. See App. at 49. Following two public hearings on the appeal, the zoning board of adjustment, on the information available to it at the time, originally agreed that appellant was not required to operate in conjunction with the College because the one sided evidence that had been presented to it by appellant demonstrated that the property was not used in conjunction with the College in 1976, when that requirement was adopted by the town. See App. at 452. Dartmouth College filed a motion for reconsideration on May 16,

2016, See App. at 456, which was granted on June 2, 2016. See App. at 556. Upon rehearing, and based on the additional information presented by Dartmouth College, the zoning board reversed itself, finding "that Dartmouth College engaged in appreciable health and safety oversight activities with regard to the fraternities generally and to the appellant in particular in 1976, especially in the area of fire safety." App. at 1140. The board went on to reject the other arguments made by appellant, and denied its appeal of the administrative decision. See App. at 1137. The result of this denial was that appellant could no longer legally operate a student residence at its property.

On August 17, 2016, appellant filed a 500 page motion for rehearing. App. at Tab 1151. The ZBA considered that motion for rehearing on September 1, 2016, and voted to deny the request. See App. at 1658.

SUMMARY OF ARGUMENT[2]

The superior court's review in zoning cases is limited. The party seeking to overturn a decision of a ZBA bears the burden of establishing that the board's decision was unlawful or unreasonable, and the findings of fact made by a ZBA are deemed prima facie lawful and reasonable. A party alleging that a use is a preexisting non-conforming use bears the burden of demonstrating that the use legally existed prior to the adoption of a zoning provision prohibiting the use.

This Court will uphold the superior court's decision unless it is not supported by the evidence or is legally erroneous. The inquiry is not whether this Court would find as the trial court found, but rather whether the evidence before the court reasonably supports its findings. However, interpretation of a zoning ordinance is a question of law which this Court reviews *de novo.*

Appellant and *amici curiae* argue for the first time on appeal that the Hanover Zoning Ordinance's requirement that student residences be operated "in conjunction with" another institutional use is an unlawful, standardless delegation of the town's zoning authority to Dartmouth College which, it alleges, could arbitrarily or even maliciously, revoke recognition and therefore deprive appellant and other fraternities of their right to exist. This is not what the ordinance does.

Hanover's zoning requirement that a student residence be operated in conjunction with another institution is materially different from the delegations found to be improper in the cases cited by the appellant and *amici curiae*–Guillou v. State Division of Motor Vehicles, 127 N.H. 579 (1986) and Fernald v. Bassett, 107 N.H. 282

[2]For ease of reading, citations have been removed from the summary of the argument.

(1966). In those cases, the ability to permit or prohibit specific activities was conferred upon entities without any standards to be applied by those entities.

To the contrary, Hanover's ordinance sets forth the specific standards required for a special exception and does not delegate standardless authority to any one body, nor does it require the approval of any other body. Instead, it merely requires that student residences be operated in conjunction with another Institution. As this Court held in Dartmouth Corporation of Alpha Delta v. Town of Hanover, 169 N.H. 743 (2017), in order to demonstrate the requisite "conjunction," appellant must demonstrate that it has some "union, association or combination with the College." Id. at 754. While recognition by the College might be the easiest way to demonstrate this conjunction, it is not the only way. Appellant produced no evidence of any association or relationship with the College after its de-recognition. It therefore may not lawfully continue to operate as a student residence.

The trial court did not err in finding that the prohibition on the use of the property as a student residence did not substantially destroy the value of appellant's property, and thus did not effectuate a taking. Despite appellant's efforts to paint the use of the property as a "fraternity," as a matter of law, appellant's property is a student residence as that term is defined in the zoning ordinance. As a student residence, appellant was required to conform with the requirement that it be utilized "in conjunction with" another institutional use. Once that requirement was no longer met, the student residence use was no longer permitted. This finding does not constitute a taking of appellant's property, which may be utilized for any number of uses permitted as of right or by special exception. Though appellant alleges that the "gathering hall/fraternity" is not

financially feasible without the residential use, there is no evidence in the record to this effect.

Appellant argues that it is an "Institution" as that term is defined in the Hanover Zoning Ordinance because it allegedly provides educational public services, and therefore, it is the only Institution with which the student residence needs to operate in conjunction. The exact educational purposes are not identified, though appellant claims it holds classes on its property in conjunction with the apparently defunct ExL University.

Instead, appellant is a trust which is "in the business of leasing the Property as a fraternity and derives its income from the payment of rent from both Dartmouth College Students and alumni of the Fraternity." Appellant's purpose, then, is an alumni association and a title holding entity, neither of which would make it an educational institution. Consistent with these facts, the zoning board properly that appellant is simply not an Institution as that term is defined by the Ordinance and this Court should so find.

Appellant next argues that the trial court erred in failing to adopt its claim that the town created different classifications of institutions which treated it differently. It alleges that the town created two different classifications of institutions: one between "major" and "minor" institutions; and one between "pre-2015" fraternities and "post-2015" fraternities. This second argument is nothing more than petitioner's abandoned selective enforcement claim wrapped in different verbiage. Essentially, appellant argues that the cases it has cited demonstrate that the town has not enforced the "in conjunction with" requirement when other fraternities became unassociated with the

College, either through de-recognition or voluntary disassociation. This Court dismissed this very argument in Dartmouth Corp. of Alpha Delta, 169 N.H. 743 (2017). Appellant's counsel has identified no evidence presented in this case that differs from the cases she presented in connection with that case, and there is therefore no reason why this Court should reach a different conclusion on this issue.

Appellant's other argument is that the zoning board's decision illegally creates a distinction between "major" institutions, such as Dartmouth College, and "minor" institutions, such as appellant, which the voters never intended to create in adopting Section 902 of the Hanover Zoning Ordinance. This is not what the zoning board did. What the zoning board did was to quote language from the 1976 Ordinance and then conclude that appellant is not an Institution as that term was defined or intended by the voters of Hanover. There was no error in that finding and there is no equal protection claim to be analyzed.

In its decision, the ZBA found that the property was operated in conjunction with the College prior to the adoption of that requirement in the Ordinance. This was a factual finding, which is deemed prima facie lawful. The trial court therefore could not set aside this factual finding absent errors of law, unless the court was persuaded by a balance of probabilities on the evidence before it that the zoning board decision was unreasonable. It was not so pursuaded. This Court reviews the trial court's decision to determine whether the evidence reasonably supports the trial court's finding. Here, the evidence does, in fact, support the factual findings of both the board and the trial court.

Appellant argues that the acts relied upon by the zoning board and trial court to find that it operated in conjunction with the College all occurred prior to 1976 and

therefore should not have been considered by the trial court. However, appellant's position is rebuked the 1978 Constitution for the Dartmouth Fraternity System, which required that "[e]ach currently recognized Dartmouth fraternity shall, in order to retain such status after March 31, 1978, submit to the Dean of the College by that date a statement . . . in which such fraternity accepts this Constitution and agrees to operate as a Dartmouth fraternity in accordance with its terms." SAE submitted such a statement.

It is clear, then, that SAE was operating in conjunction with the College in 1971 and 1978. SAE has presented no evidence that between those dates there were any changes to the operation of SAE which would support a conclusion that it was not operating in conjunction with the College in 1976 when that requirement was enacted. Thus, in 1976, "when the amended zoning ordinance was enacted, [SAE]'s use of its property as a student residence was <u>conforming</u> with respect to the requirement that the residence be operated in conjunction with the College." <u>Dartmouth Corporation of Alpha Delta</u>, 169 N.H. at 751.

Appellant's final argument is that the zoning board of adjustment deprived it of its procedural due process rights when Board Member Waugh participated in the original vote on its appeal, because, they allege, he later demonstrated bias in favor of Dartmouth College However, as the trial court held, "any bias on the part of Waugh was immaterial because he did not participate in the rehearing." Even if Mr. Waugh's comments did reflect bias against appellant or in favor of Dartmouth College, the remedy to which appellant would be entitled would be that the zoning board would be required to hold a new hearing in which Member Waugh did not participate. ***Appellant***

has already obtained this relief, because Member Waugh did not participate in the rehearing, nor did he participate in the board's decision on appellant's motion for rehearing. As the trial court found, any alleged error was therefore harmless, and this Court should affirm that finding.

ARGUMENT

I. STANDARD OF REVIEW

The superior court's review in zoning cases is limited. See, e.g., Garrison v. Town of Henniker, 154 N.H. 26, 29 (2006). Factual findings of the zoning board are deemed prima facie lawful and reasonable and will not be set aside by the superior court absent errors of law, unless the court is persuaded by a balance of probabilities on the evidence before it that the zoning board decision is unreasonable. Id. The party seeking to overturn a decision of a ZBA bears the burden of establishing that the board's decision was unlawful or unreasonable, and the findings of fact made by a ZBA are deemed prima facie lawful and reasonable. See, e.g., Kelsey v. Town of Hanover, 157 N.H. 632, 634 (2008)(citing Greene v. Town of Deering, 151 N.H. 795, 797 (2005), and Harrington v. Town of Warner, 152 N.H. 74, 77 (2005)); see also RSA 677:6. A party alleging that a use is a preexisting non-conforming use bears the burden of demonstrating that the use legally existed prior to the adoption of a zoning provision prohibiting the use. See, e.g., Peabody v. Town of Windham, 142 N.H. 488, 493 (1997)(citing New London Land Use Assoc. v. New London Zoning Board, 130 N.H. 510, 516 (1988)).

This Court will uphold the superior court's decision unless it is not supported by the evidence or is legally erroneous. See, e.g., Harrington v. Town of Warner, 152 N.H. 74, 77 (2005). The inquiry is not whether this Court would find as the trial court found, but rather whether the evidence before the court reasonably supports its findings. See, e.g., Bacon v. Town of Enfield, 150 N.H. 468, 471 (2004). However, interpretation of a zoning ordinance is a question of law which this Court reviews *de novo*. See Anderson

v. Motorsports Holdings, LLC, 155 N.H. 491, 494 (2007)(citing Harrington v. Town of Warner, 152 N.H. 74, 79 (2005)).

II. THE HANOVER ZONING ORDINANCE IS NOT AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY[3]

Appellant and *amici curiae* argue for the first time on appeal that the Hanover Zoning Ordinance's requirement that student residences be operated "in conjunction with" another institutional use is an unlawful, standardless delegation of the town's zoning authority to Dartmouth College which, it alleges, could arbitrarily or even maliciously, revoke recognition and therefore deprive appellant and other fraternities of their right to exist. This is not what the ordinance does.

Hanover's zoning requirement that a student residence be operated in conjunction with another institution is materially different from the delegations found to be improper in the 30 and 50 year old cases cited by the appellant and *amici curiae*–Guillou v. State Division of Motor Vehicles, 127 N.H. 579 (1986) and Fernald v. Bassett, 107 N.H. 282 (1966). In those cases, the ability to permit or prohibit specific activities was conferred upon entities without any standards to be applied by those entities. For example, in Fernald, the Town of Nottingham had conditioned the grant of a special exception upon the approval of a lake association, the Board of Selectmen, and the Zoning Board of Adjustment after a hearing. This Court found the ordinance was defective because it failed to include any standards for zoning board to apply when

[3]This issue was not properly raised below and is therefore properly before this Court. On or about May 23, 2018, undersigned counsel filed a motion seeking a ruling on this issue prior to any oral argument which may be held in this matter. Because this jurisdictional issue could not be resolved before the appellees' brief was due, this argument is addressed in full, as if it is properly before this Court. This is done without waiving any objection to the jurisdiction of the Court to hear it.

considering the request of the special exception.[4] Likewise, in Guillou, this Court found that a statute which gave the director of motor vehicles the authority to suspend or revoke a license after a hearing "for any cause," to be defective because it failed to provide any standards for the director to follow in taking administrative action.

To the contrary, Hanover's ordinance sets forth the specific standards required for the grant of a special exception and does not delegate standardless authority to any one body, nor does it require the approval of any other body. Instead, it merely requires that student residences be operated in conjunction with another Institution. As this Court held in Dartmouth Corporation of Alpha Delta v. Town of Hanover, 169 N.H. 743, 754 (2017), in order to demonstrate the requisite "conjunction," appellant must demonstrate that it has some "union, association or combination with the College." While recognition by the College might be the easiest way to demonstrate this conjunction, it is not the only way. The burden on appellant was to show that after de-recognition, it still operated "in conjunction with" the College (or any other Institution), such that "necessary safeguards are incorporated . . . [including] health and safety oversight" by another Institution. App. at 1140 (citation omitted). However, like Alpha Delta before it, appellant produced no evidence of any association or relationship with the College after its de-recognition. It therefore may not lawfully continue to operate as a student residence.

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[4]This Court also found that the delegation to the association and the selectmen was a violation of RSA 674:33, which gives that authority to grant special exceptions only to the zoning board of adjustment.

III. THE TOWN OF HANOVER HAS NOT ENGAGED IN A TAKING BY THE ZONING BOARD'S FINDING THAT THE USE OF THE PROPERTY AS A STUDENT RESIDENCE IS NO LONGER PERMITTED BECAUSE THE PROPERTY IS NO LONGER USED IN CONJUNCTION WITH DARTMOUTH COLLEGE

The trial court did not err in finding that the prohibition on the use of the property as a student residence did not substantially destroy the value of its property, and thus did not effectuate a taking. Although appellant alleges that the primary use of the property is a fraternity, and the residential use is accessory to that use, there is no "fraternity" use category in the zoning ordinance. Instead, a fraternity falls within the definition of "student residence," and such a use requires a conjunction with Dartmouth College.

As this Court held in Dartmouth Corp. of Alpha Delta v. Town of Hanover, 115 N.H. 26, 29 (1975), "[a]lthough fraternities may be somewhat unique in theory, the buildings they own and occupy are not dissimilar from modern college dormitories which typically have large rooms for social functions as well as facilities for living." (internal citations omitted). Moreover, this Court in Dartmouth Corp. of Alpha Delta v. Town of Hanover, 169 N.H. 743, 751 (2017) dismissed appellant's argument that there is a difference between a "fraternity" and a "student residence." As a matter of law, then, appellant's property is a student residence as that term is defined in the zoning ordinance.[5]

As a student residence, appellant was required to conform with the requirement that it be utilized "in conjunction with" another institutional use. Once that requirement was no longer met, the student residence use was no longer permitted. This finding

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[5]By way of background, prior to 1976, "fraternities" were permitted uses in Hanover. As of 1976, that specific permitted use was removed, and instead fraternities were thereafter included in the definition of student residences." See App. at 969.

does not constitute a taking of appellant's property. As both the trial court and the zoning board noted, appellant's property may be utilized for any number of uses permitted as of right or by special exception. See Order at 10. Though appellant alleges that the "gathering hall/fraternity" is not financially feasible without the residential use, there is no evidence in the record to this effect.

Section 902 of the Hanover Zoning Ordinance has a reasonable tendency to promote the public welfare and gives due regard to appellant's property rights. See Sanderson v. Town of Candia, 146 N.H. 598, 599 (2001). It is therefore not confiscatory, see id., and this Court should affirm the trial court's holding on this issue.

IV. APPELLANT IS NOT AN INSTITUTION AS THAT TERM IS DEFINED IN THE ZONING ORDINANCE

Appellant argues that it is an "Institution" as that term is defined in the Hanover Zoning Ordinance because it allegedly provides educational public services, and therefore, it is the only Institution with which the student residence needs to operate in conjunction.

Appellant is a trust, whose trust documents have not been provided to the town, the trial court, or this Court. The appendix does include a reference to the trust's predecessor at the New Hampshire Secretary of State's Office. See App. at 670. It appears that that organization (which is still in good standing with the state) was formed as a "fraternity for social, educational, and personal growth." The exact educational purposes are not identified, though appellant claims it holds classes on its property in conjunction with ExL University.[6] Contrary to the assertion in appellant's brief, the town

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[6]ExL University is a "local not-for-profit educational institution based in Hanover." See Verified Petition at ¶17. It was a leadership and entrepreneurship organization created by students and alumni which brought entrepreneurs connected to Dartmouth

has never "admitted that ExL University is an Institution as that term is defined in the Hanover Zoning Ordinance;" and even, if it were, there is no evidence that the appellant's student residence operates in conjunction with that apparently defunct organization, or that ExL University provides the type of oversight contemplated by the Ordinance. Moreover, while there may be educational activities on the property, that does not render the trust itself an educational institution.

In fact, as appellant noted to the zoning board and to this Court, the trust is "in the business of leasing the Property as a fraternity and derives its income from the payment of rent from both Dartmouth College Students and alumni of the Fraternity." App. at 668; see also Brief of Appellant at 22. The purpose of the trust, then, is an alumni association and a title holding entity, neither of which would make it an educational institution. Consistent with these facts, the zoning board properly found:

> [I]t is doubtful that those who enacted the 1976 Zoning Ordinance contemplated that a single trust with a limited purpose (owning, it appears, this piece of land and providing some financial support for the fraternity members whose fraternity used the residence) would qualify under the definition of "Institution." In explaining the "I District" the 1976 Zoning Ordinance noted that "Hanover is unusual in having several *major institutions* within its boundaries. To meet the special needs of these institutions for the use of land and buildings and to protect the residents of adjoining district, a special Institutional District has been created by the revised zoning ordinance." The recitation of named institutions gives a sense of what "Institution" was intended to encompass: Dartmouth College, Mary Hitchcock Hospital, CRREL and the Hanover and Dresden Schools. Each of these institutions has a multi-faceted land use profile, including elements that in other contexts are typically disassociated (parking, research, educational, residential, commercial, food service, and so on, all on one or more related pieces of property). By contrast, the appellant in this instance is a trust with a limited private purpose, that is (a) owning a property that houses a private fraternal organization and (b) providing financial support to the local fraternity members' educational goals–arguably an exclusive, not public purpose. . . . Common sense dictates that the Institutional District was crafted to include the fraternities because fraternities were inextricably linked to the College itself."

College to campus to speak on their experiences with business and investments. These presentations were held at Dartmouth fraternity and sorority houses. ExL University does not appear to have engaged in any such activities since 2015.

App. at 1142-43.

Appellant is simply not an Institution as that term is defined by the Ordinance and this Court should so find.

V. THE TRIAL COURT PROPERLY RULED THAT APPELLANT'S EQUAL PROTECTION RIGHTS WERE NOT VIOLATED

Appellant argues that the trial court erred in failing to adopt its claim that the town created different classifications of institutions which treated it differently. It alleges that the town created two different classifications of institutions: one between "major" and "minor" institutions; and one between "pre-2015" fraternities and "post-2015" fraternities.

Taking the second argument first, as the trial court held, this is nothing more than petitioner's selective enforcement claim wrapped in different verbiage. See Order at 7. Essentially, appellant argues that the cases it has cited demonstrate that the town has not enforced the "in conjunction with" requirement when other fraternities became unassociated with the College, either through de-recognition or voluntary disassociation.

This Court addressed this issue in Dartmouth Corp. of Alpha Delta, 169 N.H. at 753:

> We are . . . not persuaded by the other zoning board decisions cited by Alpha Delta in support of its argument that the ZBA should be "estopped" from determining that the zoning ordinance requires that Alpha Delta "operate a Student Residence in conjunction with the College to allow the continued use of its Property." None of these decisions address the "in conjunction with" language and, therefore, are not relevant to the issue before us. To the extent that Alpha Delta is arguing that these zoning decisions are proof of selective enforcement by the Town of its zoning ordinance, we agree with the ZBA that "[t]he mere fact that a Town may have been lax in its enforcement in the past does not prohibit enforcement in the present." *See Anderson v. Motorsports Holdings*, 155 N.H. 491, 499 (2007).

Appellant's counsel has identified no evidence presented in this case that differs from the cases she presented in connection with the Dartmouth Corp. of Alpha Delta case. There is therefore no reason why this Court should reach a different conclusion on this issue. Appellant has not demonstrated that it is "similarly situated" to these other fraternities, and therefore, it cannot sustain an equal protection claim.

Appellant's other argument is that the zoning board's decision illegally creates a distinction between "major" institutions, such as Dartmouth College, and "minor" institutions, such as appellant, which the voters never intended to create in adopting Section 902 of the Hanover Zoning Ordinance. This is not what the zoning board did.

What the zoning board did was to quote language from the 1976 Ordinance as follows:

> Hanover is unusual in having several major institutions within its boundaries. . . . Land owned by Dartmouth College and the Mary Hitchcock Medical Hospital . . . has been placed in the newly named Institutional (I) zone, along with area that include CRREL and the Hanover and Dresden schools.

App. at 710. The zoning board then concluded that appellant, "a trust with a limited private purpose, that is (a) owning a property that houses a private fraternal organization and (b) providing financial support to the local fraternity members' educational goals–arguably an exclusive, not public purpose," App. at 1143, is not an Institution as that term was defined or intended by the voters of Hanover.

Despite appellant's attempts to craft another equal protection claim, this application of the zoning ordinance does not create different categories of institutions–rather it simply finds that appellant is not an institution as that term is

defined.[7] There is no error in that finding and there is no equal protection claim to be analyzed.

VI. THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLANT'S PROPERTY WAS USED IN CONJUNCTION WITH THE COLLEGE IN 1976, WHEN THE APPLICABLE ZONING PROVISION WAS AMENDED TO REQUIRE SUCH A CONNECTION

In its decision, the ZBA found that the property was operated in conjunction with the College prior to the adoption of that requirement in the Ordinance. See App. at 1137. This was a factual finding, which is deemed prima facie lawful. See RSA 677:6. The trial court therefore could not set aside this factual finding absent errors of law, unless the court was persuaded by a balance of probabilities on the evidence before it that the zoning board decision was unreasonable. To the contrary, the trial court specifically found:

> that there was sufficient evidence for the ZBA to reasonably conclude that SAE operated "in conjunction with" the College prior to the amendment to the Town's zoning ordinance in 1976. Notably, the ZBA found that the College provided fire safety services to SAE for a significant period of time, established a fraternity advisory board in 1971, and appointed a fraternity business manager in 1972. Although SAE presented contradictory evidence, it is not for the court to gainsay the ZBA's determination that SAE's evidence was unpersuasive. Accordingly, the court finds that the ZBA's decision on this issue was neither unreasonable nor unlawful.

Order at 7.

This Court reviews the trial court's decision not to determine whether it would have found as the trial court did, but rather to determine whether the evidence reasonably supports the trial court's finding. See, e.g., Mountain Valley Mall Associates v. Municipality of Conway, 144 N.H. 642, 647 (2000)(quotations omitted). Here, the

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[7]Contrary to the repeated assertions in Appellant's Brief, there is no evidence that the Town has ever treated any fraternity as an "Institution" under the Ordinance.

evidence does, in fact, support the factual findings of both the board and the trial court. Specifically, the record before the Court demonstrates:

*1902 vote by Dartmouth College to limit the number of residents in fraternity houses to 14, except for Tri Kappa Fraternity, which was permitted to have 17 residents "as its investment was made before the policy of the College in regard to fraternity houses was adopted." App. at 475

*1920 vote of Dartmouth College that "the plans and location of proposed new fraternity houses shall require approval of the Trustees." App. at 476

*1925 vote of Dartmouth College to reaffirm the "longstanding limitation of the number of students permitted to room in a house to sixteen," to limit the total size of fraternity houses to 95,000 cubic feet, and to require approval for any require material enlargements of existing fraternity houses. App. at 476

*1949 letter from the Dartmouth College President reporting "permission for house parties this spring and hereafter will be dependent upon the houses complying with pertinent fire regulations." App. at 478

*1949 Memorandum informing the fraternities and their faculty advisors that "[e]ffective September 1, 1949, fraternity houses at Dartmouth will be approved for student residence only if and insofar as the houses have complied with all pertinent laws and regulations pertaining to the protection of life from fire," and that "permission will be granted for the housing of guests in fraternity houses at houseparty times only on the basis that such guests will not be housed in the house in numbers or in manner contrary to the provisions of the law and regulations governing occupancy of the house for such purposes." App. at 479

*Dartmouth College inspections of fraternities in the 1960s and 1970s. See, e.g., App. at 498, 509.

*1964 vote of Dartmouth College "to require that each fraternity, as a condition of *continued recognition* of its house as a suitable residence for Dartmouth College students, have in operation a fire alarm system approved by Dartmouth College." App. at 508 (emphasis added)

*1971 establishment of the Fraternity Governing Board by Dartmouth College, which Board included College officials. App. at 522, 748.

Petitioner argues that these acts all occurred prior to 1976 and therefore should not have been considered by the trial court. However, appellant's position is thoroughly rebuked by the College's *Response to Appellant's Memorandum of Law*. App. at 1006-1024. Specifically, that *Response* points to the 1978 Constitution for the Dartmouth Fraternity System. See App. at 523. That Constitution required that "[e]ach currently recognized Dartmouth fraternity shall, in order to retain such status after March 31, 1978, submit to the Dean of the College by that date a statement . . . in which such fraternity accepts this Constitution and agrees to operate as a Dartmouth fraternity in accordance with its terms." App. at 531. SAE submitted such a statement. See App. at 533.

It is clear, then, that SAE was operating in conjunction with the College in 1971 and 1978. SAE has presented no evidence that between those dates there were any changes to the operation of SAE which would support a conclusion that it was not operating in conjunction with the College in 1976 when that requirement was enacted. Thus, in 1976, "when the amended zoning ordinance was enacted, [SAE]'s use of its

property as a student residence was conforming with respect to the requirement that the residence be operated in conjunction with the College." Dartmouth Corporation of Alpha Delta, 169 N.H. at 751.

This Court should therefore affirm the finding of the trial court that appellant's property was operated in conjunction with Dartmouth College in 1976, and that its failure to continue to do so constitutes a violation of the zoning ordinance.

VII. THE TOWN DID NOT DENY APPELLANT OF ITS PROCEDURAL DUE PROCESS RIGHTS

Appellant's final argument is that the zoning board of adjustment deprived it of its procedural due process rights when Board Member Waugh participated in the original vote on its appeal, because, they allege, he later demonstrated bias in favor of Dartmouth College by contacting Dartmouth's counsel.

As an initial matter, this factual allegation is simply false. As the evidence demonstrates and as the trial court held, Mr. Waugh sent an e-mail to the town's zoning administrator suggesting that she send a copy of the board's decision to Dartmouth. See App. at 1048; Order at 12. There is no evidence that Mr. Waugh contacted Dartmouth College's counsel directly. Moreover, as the trial court further held:

> It is unclear from the record when–if ever–the Town sent notice of its April 18, 2016 decision to the College. It is also the ZBA's standard procedure to send notice of its rulings to all interested parties. (*See* CR at 1141). Furthermore, any bias on the part of Waugh was immaterial *because he did not participate in the rehearing.*

Id. (emphasis added).

Winslow v. Town of Holderness, 125 N.H. 262 (1984) does stand for the proposition that participation by a board member whose actions or remarks prior to his participation in the review of an application indicate that he has prejudged the case may

not sit on the application, and if he does, that that decision is voidable. However, these are not the facts here. Mr. Waugh's statements which appellant alleges demonstrate his bias (an allegation with which the trial court disagreed, see Order at 12), were made during the course of drafting the first decision in this matter, and after the decision had been rendered. It has long been held that judgments made by board members during the course of reviewing an application are not grounds for disqualification. See, e.g., Webster v. Town of Candia, 146 N.H. 430, 441-42 (2001)("Administrative officials who serve in an adjudicatory capacity are presumed to be of conscience and capable of reaching a just and fair result. The burden is upon the party alleging bias to present sufficient evidence to rebut this presumption." A motion for recusal should be supported by a sufficient affidavit of personal bias or other disqualification. Moreover, "[r]easons for disqualification do not include ... knowledge of the facts involved gained in the performance of the member's official duties." RSA 673:14, I.)((citations omitted).

Even if Mr. Waugh's comments did reflect bias against appellant or in favor of Dartmouth College, the remedy to which appellant would be entitled would be that the zoning board would be required to hold a new hearing in which Member Waugh did not participate. ***Appellant has already obtained this relief***, because Member Waugh did not participate in the rehearing, nor did he participate in the board's decision on appellant's motion for rehearing. As the trial court found, any alleged error was therefore harmless, see Order at 12, and this Court should affirm that finding.

CONCLUSION

Appellant has not met its burden of demonstrating on appeal that the superior court's decision is not supported by the evidence or is legally erroneous. To the contrary, the evidence before the trial court reasonably supported its findings. Appellant's property was operated in conjunction with Dartmouth College, which satisfies the definition of Institution in the zoning ordinance, until it was de-recognized. It has not demonstrated that it was operated in conjunction with another institution after that time, Appellant not satisfying the definition of Institution in the zoning ordinance. Because of this change in use, the property may no longer be operated as a student residence. There is no constitutional infirmary in the ordinance, there is no taking by its application to appellant's property, and there is no violation of equal protection or procedural due process, and this Court should so affirm.

REQUEST FOR ORAL ARGUMENT

The Town of Hanover and the Town of Hanover Zoning Board of Adjustment do not believe oral argument is necessary to resolve the issues before the Court; however, should the Court determine that such argument would be helpful, the Town of Hanover and the Town of Hanover Zoning Board of Adjustment request oral argument not to exceed 15 minutes, to be presented by Laura Spector-Morgan, Esquire.

CERTIFICATION

I have forwarded, by first class mail, two copies of the foregoing brief to Carolyn Cole, Esquire, Howard Myers, Esquire; Sean Callan, Esquire; and Patrick Hogan, Esquire.

Respectfully submitted,

TOWN OF HANOVER AND TOWN OF HANOVER ZONING BOARD OF ADJUSTMENT

By Their Attorneys
MITCHELL MUNICIPAL GROUP P.A.

Date: May 31, 2018　　By: [signature]

Laura Spector-Morgan, Bar No. 13790
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STATE OF NEW HAMPSHIRE

GRAFTON COUNTY SUPERIOR COURT

NEW HAMPSHIRE ALPHA OF SAE TRUST,	)	Supreme Court Case No. 2017-0634
Plaintiff,	)	Superior Court Case No. 215-2016-CV-00283
vs.	)	
TOWN OF HANOVER,	)	North Haverhill, New Hampshire April 5, 2017 1:43 p.m.
Defendant.	)	

FINAL HEARING ON THE MERITS
BEFORE THE HONORABLE LAWRENCE A. MACLEOD, JR.
JUDGE OF THE SUPERIOR COURT

APPEARANCES:

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Proceedings recorded by electronic sound recording; transcript produced by court-approved transcription service.

1 (Proceedings commence at 1:43 p.m.)

2 THE COURT: So before the Court is docket number

3 16-CV-283, Alpha SEA Trust v. The Town of Hanover. This is a

4 zoning appeal. Could everyone just identify themselves for the

5 record before we begin?

6 MS. COLE: Good afternoon. Carolyn Cole for the

7 Petitioner.

8 THE COURT: Good afternoon.

9 MS. SPECTOR-MORGAN: Good afternoon, Your Honor.

10 Laura Spector-Morgan on behalf of the Town of Hanover and the

11 Hanover Zoning Board of Adjustment. With me today is Judy

12 Brotman who is the town zoning administrator.

13 THE COURT: Good afternoon. And you are, sir?

14 MS. COLE: I'm sorry. This is Jeremy Katz, he's the

15 trustee of the New Hampshire SAE Trust.

16 THE COURT: Okay. Great. Thank you.

17 So Lawyer Cole, it's your motion so go ahead.

18 MS. COLE: Thank you, Your Honor. And let me ask,

19 Your Honor, is this -- this is a microphone; is that right?

20 THE COURT: Yes.

21 MS. COLE: So you don't need me to pull that forward?

22 THE COURT: No. You're all set.

23 MS. COLE: I think we'll push this out here.

24 THE COURT: Go ahead.

25 MS. COLE: Your Honor, I appreciate the opportunity

1 to present our case today. A substantial brief has been sent
2 to the Court, and I'm going to guess, at this juncture, you
3 probably haven't had a chance to review the entire package.
4 THE COURT: I have not.
5 MS. COLE: And --
6 THE COURT: I've read the pleadings other than this.
7 I've perused your brief, but I haven't had a --
8 MS. COLE: Okay. So my presentation will be briefly
9 a roadmap or overview to that substantive brief.
10 THE COURT: Okay.
11 MS. COLE: But given the nature of -- and density of
12 the issues involved, I am greatly appreciative of your patience
13 because I anticipate that my presentation will take about a
14 half an hour. But good note, I will keep you spellbound and
15 riveted the entire time.
16 THE COURT: Can't wait. Go ahead.
17 I will say, ladies, I haven't had the chance to look
18 at the record either. So feel free to point out anything you
19 think is of particular significance -- all right -- and I'll
20 make note of it.
21 MS. COLE: What I will tell you is rather than give
22 you exact citations to the record because there are so, so many
23 of them, I'm going to tell you what's in the record. And when
24 you look at the brief, it's going to be specifically annotated
25 and will point you directly to the record.

1 THE COURT: Okay. Good.
2 MS. COLE: Just because I think, you know, for you to
3 try to paw through three volumes at this point, would be maybe
4 counterproductive at this point.
5 THE COURT: It took me two trips to bring it out
6 here, so go ahead.
7 MS. COLE: Your Honor, the Petitioner is the
8 Successor Institution to the New Hampshire Alpha Association of
9 Sigma Alpha Epsilon. The Petitioner and its predecessor
10 institution have, at all times, since the 1910s owned the real
11 property in the Town of Hanover known as 38 College Street.
12 The property is adjacent to Dartmouth College, but does not
13 exist on the Dartmouth campus.
14 The property was built between 1928 and 1931 to
15 accommodate the Sigma Alpha Epsilon fraternity, and was
16 explicitly designed to be a place of congregation. It is a
17 gathering hall for up to 250 people, used for fraternity
18 meetings, events, and alumni functions, and academic study
19 space for members of the fraternity and their invited guests,
20 as a venue for alumni reunions and functions, and as a venue
21 for guest speakers and visitors.
22 The property is used for political speech,
23 petitioning of elected officials and executive officials;
24 religious speech and ceremony; scholastic expression and
25 advancement; and public community service. Both the structure

1 and the use of the property lawfully preexisted the first
2 Hanover zoning ordinance enacted in 1931.
3 As an adjunct to the fraternal use, the Petitioner
4 leases the property to the SAE fraternity and derives operating
5 income from the payment of rent from members of the fraternity,
6 some of whom are students, and many of whom are not. For
7 almost a century, the property has been leased for this purpose
8 with no substantial changes to or expansions of that fraternal
9 use.
10 Residential facilities located on the upper floors of
11 the structure are incidental to the building's primary and
12 designated use as a meeting house. In 1976, Hanover amended
13 its zoning ordinance by creating a new I-institutional zone.
14 The 1976 amended zoning ordinance was established to permit
15 institutions in this zone to use their land in a manner that
16 met the specialized needs of that institution.
17 Fraternities were no longer a permitted use in 1976,
18 and the special exception became -- I'm sorry -- the student
19 residence became a conditional use available only upon the
20 application and receipt of a special exception. Student
21 residences granted a special exception, were obliged to comply
22 with the requirement to "operate in conjunction with another
23 institutional use."
24 The Petitioner has never applied for/received a
25 special exception to operate as a "student residence." The

1 Petitioner has never had any legal or contractual relationship
2 Dartmouth College. At times, the Petitioner's tenant has
3 engaged in contractual relations with Dartmouth, and at other
4 times, engaged in no contractual relations.
5 For instance, in 1976, there was no contractual
6 relationship between the Petitioner's tenant and the college.
7 In the late 1980s, Petitioner's tenant established a
8 contractual relationship, but in the early 1990s that
9 relationship was severed. In the mid-1990s, the relationship
10 was reestablished, and in 2016, it was again severed.
11 There is no dispute between the parties that at all
12 times, since 1976, the use of the property was lawfully
13 nonconforming, as has been admitted in Hanover's answer at
14 section -- at paragraph 102. At no times prior to 2016 has the
15 Petitioner ever been accused of violating Section 902, even
16 though its tenant did not operate in conjunction with Dartmouth
17 College in the 1970s and the 1990s. At no time prior to 2016,
18 was the Petitioner required to comply with the present-day
19 zoning ordinance.
20 On February 5th, 2016, Dartmouth derecognized the
21 Petitioner's tenant for no reason and with no hearing and no
22 notice. Dartmouth has defended this action as their exclusive
23 right to do as a private institution. Dartmouth then
24 immediately notified the town of its derecognition and days
25 later, the town zoning administrator served Petitioner with a

1 zoning violation notice dated February 12th, 2016. Issued
2 without any personal investigation, advising the Petitioner
3 that it was in violation of Section 902 of the 2015 zoning
4 ordinance because SAE has been derecognized by Dartmouth
5 College, the SAE facility is no longer being operated in
6 conjunction with another institutional use. Therefore, the
7 continued use of the property as a residence is a violation of
8 the zoning ordinance.

9 The Petitioner appealed, and in its original appeal,
10 won a 5:0 decision. Shortly thereafter, Dartmouth who, as an
11 abutter, was notified of the proceeding, but elected not to
12 participate in the original appeal, asked for and was granted a
13 rehearing in a process that denied Petitioner's right to
14 respond and speak in its defense. Dartmouth, in being granted
15 a rehearing, was provided a different and lower burden of proof
16 than others in such a request, and that is briefed extensively
17 in our memo.

18 After the second appeal, the ZBA denied Petitioner's
19 appeal and issued a new decision. The ZBA upheld the zoning
20 administrator's decision. It is this decision, in conjunction
21 with the zoning administrator's violation notice that
22 Petitioner is appealing pursuant to its statutory rights on the
23 basis that the decision is legally erroneous, unconstitutional,
24 statutorily defective, not supported by the vast preponderance
25 of evidence in the certified record, and represents a taking of

1 Petitioner's vested fundamental and inalienable rights to
2 possess, utilize, and enjoy its property.
3 Now, last year a case became -- a case came before
4 this Court which involved a different fraternity, Alpha Delta,
5 in which Your Honor ruled to uphold the ZBA decision that Alpha
6 Delta was in violation of the 2015 ordinance. That case is
7 presently on appeal at the New Hampshire Supreme Court and
8 pending a decision. But more importantly, the case before Your
9 Honor today is fundamentally different than that of Alpha
10 Delta's for two reasons.
11 First, the Petitioner's claims, both factual and
12 legal, are different than those of Alpha Delta, and they have
13 been comprehensibly identified in the certified record and
14 briefed for this Court. Second, this Court ruled against Alpha
15 Delta on the basis that it failed to build an adequate record
16 and to identify the critical elements of its claims. But in a
17 multi-thousand-page certified record, we are very confident
18 that neither of those deficiencies exist in this case.
19 We further believe that had this Court been aware of
20 the facts in this present certified record, it is entirely
21 possible that Your Honor would have provided a different ruling
22 in the Alpha Delta case. As I said, a substantial memorandum
23 was provided in advance of this hearing that includes
24 references in the certified record, along with substantial
25 argument and case law.

1 So to avoid unnecessary replication, I will provide a
2 brief summation of the primary claims alleged. The first
3 reversible error can be found between pages 11 and 32 of the
4 trial memorandum. It can be clearly summarized as follows:
5 The ZB erred by finding Petitioner in violation of 2015
6 ordinance because lawfully, nonconforming uses need not comply
7 with zoning restrictions applicable only to lawfully conforming
8 uses.
9 The right to continue a previously lawful use of
10 one's property after the enactment of the zoning ordinance that
11 prohibits such use is a vested right recognized by the New
12 Hampshire Constitution Articles 2, 12, and 23, and RSA 674:19.
13 In Hanover, grandfathered rights are safeguarded by Section 801
14 of the amended zoning ordinance which state:
15 "Any structure or use in existence and lawful at the
16 time of the adoption of this ordinance may be
17 continued although such structure or use does not
18 comply with the ordinance."
19 Petitioner's preexisting nonconforming use as a
20 fraternity meetinghouse is a vested right that predates the
21 amended zoning ordinance. The cases of Bruced (phonetic) and
22 New London Land Use Association instruct us that once a right
23 to use is acquired, any zoning ordinance enacted subsequently
24 which would prevent that use, is inapplicable to the party
25 having the right to use.

1 Now, lawful, nonconforming uses are relinquished in
2 three ways; abandonment of the use; willful relinquishment
3 through, for instance, the knowing conversion into a special
4 exception; or the substantial change in use. The town's notice
5 of violation did not allege any of these instances. The
6 violation notice exclusively alleged that Petitioner is in
7 violation of the 2015 zoning ordinance because Petitioner's
8 tenant is no longer constitutes a student residence as defined
9 under Section 902.
10 The zoning administrator never alleged that
11 derecognition caused a substantial change to the lawful
12 nonconforming use, such that Petitioner's grandfathered rights
13 were terminated under RSA 674:19. Nor was this claim litigated
14 in the original case, and the town is precluded from arguing it
15 now. Had the town alleged that derecognition constitutes a
16 substantial change of use, we would have defended that claim,
17 and we would have won. But the New Hampshire Constitution
18 Article 15 guarantees our right to clearly know what we are
19 being accused of.
20 So the exclusive gravamen before us today is whether
21 a lawfully nonconforming use must nonetheless comply with a
22 later adopted restriction. Now, the town relies on the case
23 Wickson v. Salem for the proposition that we need to determine
24 what the nonconforming use was in order to determine whether or
25 not it can still continue. But that case is an apposite.

1 Wickson, in that case, was accused by the Town of Salem of
2 abandoning a primary nonconforming use for a period of decades,
3 and then attempting to restart a new use that was radically
4 different.
5 In that case, abandonment and substantial change were
6 alleged. This case -- that case has no relevance to this case
7 where none of those allegations were brought forth. The town
8 has admitted in its answer that since at least 1976, the
9 present use of the property is lawfully nonconforming. The
10 town also admits that Petitioner never sought or received a
11 special exception to operate as a student residence, as that
12 term is defined in Section 902.
13 The town wants you to believe that if a nonconforming
14 use, which has no obligation to comply with the later-enacted
15 restriction, but which incidentally and unknowingly complies
16 with a later-acted restriction, then the later-acted ordinance
17 must apply to the nonconforming landowner. A lawfully,
18 nonconforming landowner intent on peacefully continuing its
19 preexisting use without abandonment or substantial change,
20 should never need to know what later restrictions relative to
21 conforming uses has been enacted.
22 Hanover's assertion that somehow a lawfully
23 nonconforming landowner must regularly keep abreast of the
24 changes in the ordinance and constantly look over their
25 shoulder in order to continue their vested use, is in complete

1 contravention with the plain language of the constitution, RSA
2 674:19, and Hanover's own zoning ordinance 801. All -- all of
3 which state that Petitioner has no obligation to comply with
4 any aspect of the subsequently enacted ordinance, whether the
5 use complies, whether the use doesn't comply, it doesn't
6 matter. The argument is foreclosed.
7 The ZBA failed by finding that the notice of
8 violation was defective as a matter of law. The ZBA unlawfully
9 found that Petitioner's property no longer constitutes a
10 student residence as that term is defined in Section 902. But
11 as a matter of law, the Petitioner's property is not, and has
12 never been a student residence as that term is defined because
13 a student residence, under 902 is a use permitted only by the
14 grant of a special exception.
15 A use allowed by special exception is a use which has
16 come into existence via the actual issuance of a special
17 exception. A landowner cannot be deemed to have been granted a
18 special exception, and a landowner cannot use its land as a use
19 only permitted by a special exception unless it's been granted
20 one. Section 207 of Hanover's own zoning ordinance states:
21 "A use of land and structure so designated in Article
22 4, may be allowed as a special exception only on the
23 approval of the Zoning Board of Adjustment. Thus,
24 the process of obtaining a special exception is
25 mandatory and nondiscretionary."

1 The Petitioner's use of its property as a lawful,
2 nonconforming use, and Petitioner has never sought nor obtained
3 a special exception to operate as a student residence under
4 Section 902. Now, this idea is not a new concept for the town.
5 In 2004, the ZBA heard a case regarding fraternity called Kappa
6 Kappa Kappa, which I will call Tri-Kap. In that case, the ZBA
7 correctly and conclusively ruled that fraternities that predate
8 all zoning ordinances, and which have not applied for and
9 received a special exception by the ZBA, are lawfully
10 nonconforming with respect to the zoning ordinance; therefore,
11 the ZBA is bound by the doctrine of stare decisis, and its
12 deviation without any explanation or justification is arbitrary
13 and capricious.
14 In the Tri-Kap case, the fraternity sought to expand
15 its building and claimed that the proposed expansion only
16 required a building permit and not a special exception because
17 in Tri-Kap's thinking -- and, by the way, Tri-Kap was a
18 recognized Dartmouth fraternity, and it claimed that it met the
19 definition of 902 because it had a building designed for and
20 built for students as a recognized institution -- it claimed
21 that it was clearly a student residence under Section 902, and
22 it was entitled to the rights of expansion, and that it didn't
23 need to get a special exception.
24 Tri-Kap insisted that it was lawfully conforming and
25 not grandfathered, but the ZBA -- the same ZBA, by the way that

1 is -- that has heard this particular case, rejected the Tri-Kap
2 claim because since the process to obtain a special exception
3 is nondiscretionary and mandatory, Tri-Kap could not be deemed
4 or applied to have received a special exception to operate as a
5 student residence.
6 Without a special exception, Tri-Kap was lawfully
7 nonconforming because only the application for and grant of a
8 special exception would render the property conforming in every
9 respect. Now, it bears repeating that the "in-conjunction
10 with" language only applies to those property owners who have
11 been granted a special exception to operate as a student
12 residence. It does not apply to lawfully nonconforming land
13 users. Why? Because RSA 674:19 says so.
14 No later acted in ordinance shall apply to lawfully
15 nonconforming uses. Now, my opponent will tell you that
16 Petitioner was merely grandfathered from having to get the
17 special exception, but it wasn't grandfathered from the
18 restrictions of that special exception. If you think about how
19 that makes sense, but let's go with it. It's incorrect.
20 Petitioner is not grandfathered from a requirement in the
21 ordinance. Petitioner is grandfathered from adhering from the
22 ordinance in its entirety, and that would include all
23 requirements and subsections within it.
24 The ZBA has erroneously conflated the idea that a
25 quote, capital S, capital R, student residence, as defined in

1 902 is simply a facility in which students reside. But as the
2 ZBA in the Tri-Kap case concluded, it is not enough to be
3 acting like a capital S, capital R student residence to in fact
4 be a student residence. The only way for a preexisting
5 fraternity to "completely conform" that's the language of
6 Tri-Kap, with the more restrictive ordinance, is to apply for
7 and receive a special exception. It does not become conforming
8 by acting like a student residence, including operating in
9 conjunction with another institutional use.
10 The town has engaged in an unconstitutional taking of
11 Petitioner's rights to continue and enjoy the vested
12 nonconforming use of its property. As has been amply
13 demonstrated in the trial memorandum, the zoning administrator
14 and the ZBA have consistently found through the years that any
15 fraternity, both recognized and derecognized that has used its
16 property pre-dating the enactment of the first zoning
17 ordinance, is a lawful, nonconforming use. Thus, it's
18 determination that Petitioner must operate as a student
19 residence under Section 902 is arbitrary and capricious.
20 Now, the failure of the town to adhere to its own
21 precedent is not coincidental, Your Honor. Indeed, as detailed
22 in the brief, there is clear evidence that the town is actively
23 cooperating with the college to deprive the Petitioner of its
24 vested, inalienable property rights. In 2015, the town's
25 consistent affirmative interpretation of fraternities as

1 lawful, nonconforming uses suddenly changed with Dartmouth's
2 well-publicized plan to use the town to help it take over
3 privately-owned fraternity property, repurpose that property
4 for its own use, and destroy the organizations that compete
5 with it. And that has been fully briefed.
6 The second problem with the town's actions is that
7 they have violated my client's rights to equal protection in
8 its substantive due process rights. This can be found on pages
9 33 to 41 of the memorandum. An equal protection challenge to
10 the ordinance is an assertion that the government impermissibly
11 established classifications, and therefore, treated
12 similarly-situated individuals in a different manner.
13 The leading case on this issue is <u>Community Resources</u>
14 <u>for Justice v. The City of Manchester</u>, which held that the
15 right to use and enjoy property is an important substantive
16 right, and therefore, the court will employ the intermediate
17 scrutiny test to review equal protection challenges to zoning
18 ordinances that infringe upon this right.
19 The ZBA violated Petitioner's rights when it created
20 classifications of fraternal institutions as a means of
21 depriving Petitioner of its important substantive right to use
22 its property. As detailed in the memo, the town's ruling in
23 the cases of <u>Beta Delta Chi</u>, 1999; recognized, <u>Zeta Psi</u>, 2003,
24 derecognized; <u>Phi Delta Alpha</u>, 2005, derecognized; <u>Zeta Psi</u>,
25 2008, derecognized; <u>Tri-Kap</u>, 2014, recognized; <u>Tri-Kap</u>, 2015,

1 all demonstrate that for at least 15 years the town has
2 consistently ruled that similarly-situated fraternal
3 institutions that pre-exist all zoning ordinances are lawful,
4 nonconforming use uses, which may remain lawful nonconforming
5 uses in spite of college derecognition.
6 In fact, in response to an inquiry by Gamma Delta Chi
7 in 2011, as to the effect of colleges -- the college's
8 threatened derecognition, what that threatened derecognition
9 would have on its grandfathered rights, the zoning
10 administrator responded to them, "College derecognition does
11 not erase the pre-existing, legal, nonconforming rights of a
12 property, in this case, the use as a fraternity."
13 Further, the town has never required any fraternal
14 institution requesting a special exception to show that it is
15 operating in conjunction with another institutional use.
16 Petitioner was treated differently than other fraternal
17 institutions in the same zone in Hanover. Petitioner was
18 subjected to a different burden of proof of its lawful
19 nonconforming status, and Petitioner was subject to a different
20 level of enforcement, vis-à-vis other recognized and
21 derecognized fraternities.
22 This difference in treatment was knowing and
23 intentional by Hanover as the same zoning administrator was
24 involved in the bulk of these cases, and the Zoning Board of
25 Adjustment has substantially the same constituency as well.

1 Having presented a prima facia case of unequal treatment that
2 is knowing an intentional, where Petitioner has been treated
3 detrimentally, the supreme court instructs that the burden of
4 the challenged action must be shifted to the government.
5 The town in its violation notice and ruling has the
6 burden to show -- had the burden to show that its treatment is
7 substantially related to an important governmental objective
8 and that the objective was clear and stated at the time of the
9 legislation and is not invented post hoc in response to
10 litigation or based on overbroad generalizations. The town has
11 engaged in no effort to carry this burden, and it should
12 summarily fail.
13 The third defect and that is the subject of this
14 appeal is the failure of the Zoning Board to determine that
15 administrator gloss had occurred. This matter is briefed at
16 pages 42 to 47. The Doctrine of Administrative Gloss is a rule
17 of construction under which an administrative gloss is placed
18 upon an ambiguous clause when those responsible for its
19 implementation interpret the clause in a consistent manner and
20 apply it to a similarly-situated petitioner's over a period of
21 years without legislative interference, In Re: Pelar.
22 All parties here have established that Section 902 of
23 the zoning ordinance and the definition of student residence is
24 ambiguous. The town zoning administrator stated under oath in
25 a prior case that she did not know what the phrase "in

1 conjunction with" meant, and that she could not recall ever
2 having enforced the town's current interpretation prior to
3 2015. The Zoning Board itself, which includes highly esteemed
4 land use attorneys, have stated that it is very, very vague
5 what the ordinance means. And this is briefed at a different
6 section.

7 At no time was there legislative interference that
8 changed the ordinance or instructed a different interpretation.
9 Between 1976 and spring of 2015, the ordinance was interpreted
10 consistently in favor of fraternal institutions. Further, the
11 town has affirmatively interpreted the definition of student
12 residence. First, in the 2003, Zeta Psi case. Zeta Psi was a
13 fraternity that was "permanently derecognized" by Dartmouth;
14 however, it continued to operate, as evidenced by the many
15 affidavits in the certified record. When the operational
16 facility applied to use the facility to lease to the Dartmouth
17 review in the fraternity house, the ZBA ruled as followed, and
18 I summarize:

19 1) The property was occupied by at least one member
20 of the Dartmouth review.
21 2) The property meets the definition of Section 902
22 of student residence in all respect, even though
23 it was derecognized at the time this decision was
24 rendered.
25 3) The property owner operated in conjunction with

1 the institution that owned the land -- the
2 fraternal institution landowner.
3 4) The student residence is incidental to the use as
4 a fraternity.
5 5) The property was a lawfully nonconforming use.
6 Second, in 2011, when Gamma Delta Chi sought the
7 town's opinion as to the zoning implications of college
8 derecognition of its fraternity tenant, the zoning
9 administrator again advised that:
10 "College derecognition does not erase the pre-
11 existing legal nonconforming use of a fraternity --
12 of a property, in this case, the use as a fraternity.
13 In the situation you have described, the institution
14 having ownership in the land is the fraternal Greek
15 organization."
16 Now, contrary to the assertions of the town in the Alpha
17 Delta case, the certified record in this case shows very
18 clearly that the zoning administrator's advice regarding
19 derecognition was provided to Gamma Delta Chi for the purposes
20 of reliance, and that, in fact, Gamma Delta Chi relied on this
21 opinion in its decision to make substantial financial
22 investments in the property, which it would not have done had
23 Ms. Brotman told them that derecognition would cause the town
24 to shut down the property entirely as it did with the
25 Petitioner in this case.

1 Third, in 2014, the Tri-Kap case, Kappa Kappa Kappa was a
2 fraternity that was recognized, unlike Zeta Psi. It believed
3 it met, in all respects, the definition of student residence
4 and applied for construction permit. As previously discussed,
5 Tri-Kap was denied this because despite its claims to comply
6 and it's claims that it complied in all respects the ZBA found
7 it to be a lawful, nonconforming use, and sent it back to go
8 get a special exception.
9 So what we have here are both recognized fraternities and
10 derecognized fraternities, both being told two important --
11 three important things. One, that they are lawfully
12 nonconforming uses, grandfathered from the ordinance; and two,
13 that only applying for special exception can they become a
14 student residence as defined by the ordinance; and three, that
15 recognition or derecognition is not a factor in either lawful,
16 nonconforming status, or the receipt for approval of a special
17 exception.
18 Fraternities have relied upon the consistency of town
19 interpretation's, and were entitled to continue this reliance.
20 As such, absent legislative intervention, the town is
21 prohibited from a new regulatory approach. The fourth claim is
22 that the ZBA failed to determine that selective enforcement had
23 occurred, and the Petitioner's equal protection rights were
24 violated when conscious, intentional discrimination existed in
25 the knowing nonenforcement of both the ordinance and the

1 violations of said ordinance. This argument can be found in
2 page 8 -- 48 to 55 of the memorandum. The equal protection
3 clause of the 14th amendment commands that no state shall,
4 "Deny to any person within its jurisdiction" --
5 MS. SPECTOR-MORGAN: Your Honor, if I may, I just
6 want to interject here because the matters that are briefed at
7 pages -- whatever pages Attorney Cole just referenced, were not
8 raised in the motion for rehearing, were not raised in the
9 petition, and therefore, I object to them being raised at this
10 hearing. I do have a brief motion in that respect to hand to
11 you as well, but I just wanted to flag that issue for the
12 Court.
13 THE COURT: Thank you. I'll take it under
14 advisement.
15 MS. COLE: Could you find our brief?
16 I respectfully disagree. We not only raised it in
17 our original hearing brief, we raised it in our rehearing
18 brief. And I will pull the exact pages in a second, if you'd
19 like me to wait it out or continue.
20 THE COURT: No, go ahead. Continue.
21 MS. COLE: Let me start again. The equal protection
22 clause of the 14th amendment commands that no state shall,
23 "Deny to any person within its jurisdiction the equal
24 protection of the laws." Which is, essentially, a direction
25 that all persons similarly situated should be treated alike.

1 As the right to use and enjoy property is an
2 important substantive right, the superior court will use the
3 intermediate scrutiny test to review equal protection
4 challenges to zoning ordinances that infringe upon this right.
5 The burden is upon the town to demonstrate that the zoning
6 ordinance is substantially related to an important governmental
7 objective.
8 Under this test, the challenged zoning ordinance, a
9 decision must be reasonable, not arbitrary, and must rest upon
10 some ground of difference having a fair and substantial
11 relation to the object of the legislation. To meet this
12 demanding burden, the town must demonstrate that its
13 justification is genuine, not hypothesized, and not invented
14 post hoc in response to litigation.
15 Prior 2015, the certified record demonstrates that
16 the town never enforced Section 902 against any landowner whose
17 fraternity tenant had severed ties with Dartmouth college, even
18 where the town was on notice of the change in relationship. As
19 an example, we have found and produced a copy of the Dartmouth
20 College communication to the town from 1991 when Sigma Phi
21 Epsilon's relationship with Dartmouth College was severed.
22 This notice was received by the Hanover town manager and
23 explicitly circulated to zoning police and fire depts. Upon
24 evaluation, no action was taken.
25 Under oath, the town zoning administrator admitted

1 that she could not remember ever having issued a notice of
2 violation to any fraternity that had been derecognized. The
3 Petitioner has shown ten such instances. The nonenforcement
4 against all derecognized fraternities for the past 39 years was
5 not merely historically less, but rather, conscious, and
6 intentional, as can be adduced from the facts as set forth in
7 our brief.
8 To begin with, one ZBA member of the Alpha Delta
9 case, noting that Section 902 had never been applied to any
10 other fraternity which had been derecognized, openly speculated
11 that the college was using the town to do its bidding, and
12 specifically said, "I just don't think the town was lax,
13 though." That's in the brief.
14 The selective enforcement correlates directly with
15 the new college imperative to diminish, devalue, and ultimately
16 seize adjacent properties that are owned by fraternities.
17 College documents demonstrating these intentions are found in
18 the certified records and referenced in the memorandum. Given
19 that both the college's policy of recording derecognitions and
20 the presence of fraternities operating openly and notoriously
21 in the center of town, the town cannot possibly claim that it
22 did not know of these other instances.
23 The town not only did not enforce Section 902 against
24 other landowners whose fraternity tenant was derecognized, but
25 the town zoning and codes office actively granted repeated

1 permits to derecognized and unaffiliated fraternities. In
2 addition to the differential treatment of fraternity landowners
3 by the town, conscious and selective enforcement is further
4 underscored by the town's active determination not to
5 investigate or pursue clear and obvious violations of other
6 landowners in the I-Zone, most notably Dartmouth College
7 itself; to wit, less than 50 feet away from Petitioner's
8 property in the I-Zone, is an illegally installed wireless
9 facility that has been operated upon a Dartmouth building
10 without permission for more than ten years. Petitioner's
11 trustee confirmed with both Hanover building inspector and the
12 Hanover zoning administrator -- thank you -- that the wireless
13 facility never applied for or received the mandatory approvals
14 from the town and was verbally informed that the facility
15 exists in violation of the zoning ordinance.
16 But when the zoning administrator was asked if any
17 enforcement action would be taken, her response that she was,
18 "Very busy, and did not think it was important given all the
19 other things she had to do." Petitioner was very surprised to
20 see towns counsel claim that that facility was only an internal
21 communications facility given the fact that the Petitioner
22 provided the town with the public Dartmouth statements to the
23 contrary, which are now included in the certified record.
24 More telling, the college itself regularly uses its
25 own student residence dormitories for purposes that are not

1 even remotely in conjunction with another institutional use.
2 It has run summer camps for school children during the summer
3 months in which the children as young as 11 reside in
4 dormitories of Dartmouth College. The camp's websites announce
5 that they are expressly, "Not affiliated with Dartmouth
6 College." The college has never applied for or received a
7 special exception to operate these student residences, and does
8 not operate them in conjunction with the college.
9 The zoning administrator has been made of this
10 situation and has not issued a zoning violation to the college.
11 Prior to and during the Alpha Delta hearing, the ZBA and the
12 zoning administrator had no idea what the meaning of "in
13 conjunction with" meant. The ZBA's after-the-fact discovery of
14 this meaning was hypothesized and invented post hoc in response
15 to litigation.
16 The town has never articulated how its new
17 interpretation and application of Section 902 substantially
18 relates to an important governmental objective. Accordingly,
19 the ZBA's decision to Petitioner in violation of Section 902 is
20 unlawful selective enforcement, which violates its equal
21 protection rights.
22 The fifth reversible error is briefed in memorandum
23 page 56 to 75 where the zoning ordinance, both on its face and
24 applied, creates unconstitutional restrictions on speech,
25 association, and assembly, and impose a prior restraint on the

1 clear, constitutional rights of the Petitioner.

2 MS. SPECTOR-MORGAN: And, Your Honor, I apologize,

3 this is actually the part of the memo that I object to.

4 I thought -- it's the prior restraint part, not the

5 prior part. That absolutely was briefed.

6 THE COURT: All right.

7 MS. COLE: I will point to the record in one moment,

8 Your Honor, where we specifically brought this to the ZBA's

9 attention in the rehearing brief.

10 MS. SPECTOR-MORGAN: They did bring up the

11 association, not the speech.

12 THE COURT: All right.

13 MS. SPECTOR-MORGAN: That's my only point.

14 THE COURT: As I said earlier, I'm at a little bit of

15 a disadvantage.

16 MS. SPECTOR-MORGAN: Yes.

17 THE COURT: You two know everything that's going on

18 in this case; I know virtually nothing, so I'm going to take

19 your objection under advisement.

20 MS. SPECTOR-MORGAN: I understand.

21 THE COURT: When I go through all this, I'll rule.

22 MS. SPECTOR-MORGAN: For --

23 THE COURT: If I find you're right, it'll be out. If

24 you're wrong, it'll be in.

25 MS. COLE: For Your Honor's help, during -- in the

1 memorandum, I pointed out in the brief where everything was
2 raised and preserved.
3 THE COURT: Okay.
4 MS. COLE: So that I can drag it out right now, but
5 if you accept the premise that I have brought it to your
6 attention -- brought it to the attention of the Court in the
7 memorandum.
8 THE COURT: That's fine.
9 MS. COLE: Thank you. The ordinance, both on its
10 face and as applied, creates unconstitutional restrictions on
11 speech, association, and assembly, and imposes a prior
12 restraint on clear constitutional rights of the Petitioner.
13 The certified record shows that Petitioner's land is regularly
14 utilized as a meetinghouse where important speech and
15 expression occurs. This speech includes, but is not limited to
16 core political speech, robust debate, and religious observance,
17 and artistic expression.
18 The nature of that speech that occurs is often
19 antithetical or embarrassing to the purported prestige of the
20 college. The first amendment of the United States Constitution
21 and our state constitution provides individuals with the right
22 to free speech as well as peaceable assembly. Political
23 meetings are, "Core political speech," entitled to the highest
24 degree of protection of the first amendment.
25 The town zoning ordinance Section 902 has the

1 potential to be read as requiring a third-party institutional
2 approval for another landowner to operate. The town's
3 application in this case insists that a third-party approval
4 from Dartmouth is required for Petitioner to operate its
5 property. Dartmouth testified that its approval can be
6 provided or withdrawn for any reason at any time.
7 Dartmouth also testified that, "Its arbitrary actions
8 can trigger land-use issues under the ordinance, and that this
9 should cause private landowners to think before they act of
10 speak," and that's a quote. Dartmouth's derecognitions of
11 fraternities revolves around Dartmouth's disapproval of or
12 disagreements with viewpoints, expressions, actions, and speech
13 made by these organizations and their members, and Dartmouth
14 has repeatedly punished and derecognized many of the
15 fraternities briefed in our memorandum for their speech.
16 Zeta Psi, in fact, was derecognized for putting out
17 an offensive pamphlet or something of that nature. All of the
18 fraternities, in fact, have been derecognized not for their
19 actions, but for their speech. This particular segment was --
20 you can find in the certified record at 1186 where it was
21 preserved.
22 Fraternities such as Petitioner's tenant compete with
23 Dartmouth College for income, dues, tenants, speakers,
24 viewpoints, mindshare, and many other things. And we have no
25 doubt that Dartmouth disapproves of the speech and expression

1 that is conducted at privately-owned fraternities. That might
2 be because the speech is often off-color. It might be because
3 the speech takes a clearly adverse and politically incorrect
4 viewpoint.
5 It also might be because of the discourse that occurs
6 at 38 College Street often includes visits from leading
7 national political figures, where robust debate is encouraged
8 and is -- goes on. Business executives and artists and they
9 offer a different and contrary platform from that of
10 Dartmouth's own. No matter what the premise for the
11 disagreement is, it is clear -- clearly admitted that Dartmouth
12 would prefer to stifle it. And there is reference in the
13 record to what Dartmouth intends to do about the way
14 fraternities express themselves.
15 Dartmouth, in its private contractual relations, may
16 have the right to privately and contractually limit speech.
17 The town, however, does not enjoy the right that Dartmouth has
18 to restrict speech. Put another way, the town may not
19 condition the right to enjoy one's land on what one individual
20 might say, think, or express.
21 Since Dartmouth may condition recognition for those
22 reasons, the town is indirectly suppression speech that is
23 prohibited -- what it would be prohibited from doing directly.
24 Restrictions on speech, expression, assembly, and association
25 endorse strict scrutiny when evaluated for constitutionality.

1 The town's ordinance on its face and as applied here does not
2 survive the strict-scrutiny test.
3 If the town wanted to ensure safety, there are much
4 less restrictive manners to achieve that objective without
5 stifling or endanger core constitutionally protected freedoms.
6 The sixth cause for reversal is based on the town's actions as
7 a taking of he landowner's constitutionally protected rights to
8 enjoy the continued use of its property as a lawfully
9 nonconforming use.
10 The right to use and enjoy one's property is
11 enshrined in both the U.S. and the state constitutions,
12 particularly -- are particularly ours in Articles 2 and 12.
13 The State Supreme Court has repeatedly ruled that a taking
14 occurs when vested property rights have been interfered with.
15 The interference with landowners vested rights to continue use
16 as a lawfully conforming -- nonconforming fraternity, and the
17 revocation of their property rights is a taking.
18 Again, the town cannot meet its burden of showing
19 that the taking is justified or supportable. The economic use
20 of the land is as a fraternity. The town's determination has
21 withdrawn all reasonable use of the land and the structure.
22 There is no economically viable or reasonable alternative uses.
23 The town's actions are furthermore in violation of Article 12-a
24 of the New Hampshire Constitution as the actions are clearly a
25 taking for the benefit of a private party.

1 In this case, the withdrawal of the landowner's
2 rights accrues exclusively to the benefit of a rich,
3 established landowner that is favored by the town. The
4 memorandum details the ongoing and deliberate endeavors of
5 Dartmouth to acquire and condemn Petitioner's property. The
6 2006 addition of Part 12-a of the New Hampshire Constitution
7 was entered specifically to bar activities of this sort within
8 our state.
9 Finally, the supreme court has recognized that the
10 municipal removal of vested nonconforming rights is a taking
11 and the right to continue a nonconforming use once deprived can
12 never be restored, Dugan v. Conway.
13 Claim 7 deals with the ZBA's legal errors in
14 interpreting its own ordinance as a matter of law subject to de
15 novo review. This is briefed at page 80 to 93 of the
16 memorandum. The ZBA's decision that the amended zoning
17 ordinance requires that the property be used in conjunction
18 with Dartmouth College is erroneous since Dartmouth College is
19 not the institution that owns the land.
20 The "Objective section", and I say that in quotes
21 because that's what it's titled, of the 1976 ordinance, defines
22 the I-Institution as follows:
23 "It is the intent of this provision to permit or
24 allow institutions to use their land for uses related
25 to the purpose of the institutions."

1 The clear and unambiguous language of the 1976
2 amended zoning ordinance is to allow institutions to use the
3 land that they own to enhance their missions, which is
4 precisely how the ZBA interpreted the ordinance in the 2003
5 Zeta Psi case, and again in the 2011 advisory email form the
6 town zoning administrator from Gamma Delta Kai. In both cases,
7 the ZBA and the zoning administrator determined that the
8 fraternal landowner was the institution that owned the land.
9 Dartmouth does not own Petitioner's land.
10 Petitioner is an institution that meets the
11 definition of the zoning ordinance of what a institution is,
12 and it's fully briefed. And it uses its land to enhance its
13 mission. Uncontroverted expert testimony was introduced that
14 provides a clear reading of the ordinance's intent and
15 construction. The tenant operates in conjunction with the
16 Petitioner, the landowning institution, and it operates in
17 conjunction with other institutions besides Dartmouth college,
18 such as Excel (phonetic) University, which the town admits is
19 affiliated with the fraternal landowner and is an institution.
20 Any reading that allows Dartmouth to determine the
21 use of land that it does not own is erroneous. Any reading
22 that provides Dartmouth superior status as an institution is
23 erroneous and a violation of equal protection that is subject
24 to the intermediate scrutiny test.
25 The eighth reversible error is that the Board's

1 interpretation that the phrase "in conjunction with" is
2 unconstitutionally vague, speculative, legally erroneous,
3 contrary to the plain language of the ordinance, in
4 contravention with its own multiple interpretations, and is
5 arbitrary and capricious.
6 How the Board now interprets the words "in
7 conjunction with" to mean that the special-exception use of
8 student residence must have the, "Potential for college health
9 and safety oversight." Until recently, the town officials and
10 the zoning board members universally agreed that the words are,
11 in fact, vague and without meaning. During a recent deposition
12 in connection with the Alpha Delta case, the zoning
13 administrator, who had determined that both Alpha Delta and
14 Petitioner were not operating in conjunction with another
15 institutional use, was asked, "To what extent the -- what
16 extent of the necessary relationship between the college and
17 the fraternity was to be considered in conjunction with."
18 You know what she responded? "I don't know. I don't
19 know that I can answer that." During the Alpha Delta
20 deliberations when discussing what the words "in conjunction
21 with" meant, zoning member Bernie Waugh stated, and I quote,
22 "It is very, very vague what in conjunction may or may not
23 mean." During deliberations for rehearing motion for
24 Petitioner, zoning board member, Arthur Gardner said, with
25 other members in agreement:

1 "There is no doubt that this is a damned elliptical
2 phrase in connection with, or whatever it is, I can't
3 remember. That is a doozer."
4 Kate Connolly, a board member in the Alpha Delta
5 case, argued that:
6 "I contend that 'in conjunction' is not --
7 conjunction is not recognition by Dartmouth College.
8 I don't see anywhere where the board is considering
9 the potential for health and safety oversight in
10 those quotes."
11 The town has no evidence that anyone in 1976 knew
12 what it meant. In spite of the fact that neither the town nor
13 the Zoning Board had any idea what the words meant, the Board
14 discovered the meaning only after the Alpha Delta hearing had
15 closed, in order to justify that both Alpha Delta and
16 Petitioner were in violation of the zoning ordinance. If the
17 town is to interpret special exception language for conforming
18 uses, it must interpret ambiguities against itself and in favor
19 of the landowner.
20 The town may not now reinterpret a vague and
21 unknowable phrase for the purposes of depriving a landowner the
22 continued use of its property. No reasonable landowner for the
23 past 40 years would have ever construed that in conjunction
24 with another institutional use meant recognized by Dartmouth
25 College where the potential, but not the actual provision of

1 oversight may or may not exist.

2 Laws are intended to be understood by the populous
3 they bind. Not only is the Petitioner, as a lawfully
4 nonconforming use, entitled to completely ignore laws to which
5 it is not subject in this case because they are reserved for
6 conforming uses, but if they were to be subject, they would
7 have to be understandable. And this ordinance fails as being
8 unconstitutionally vague.

9 And I promise I'm almost done. The ninth reversible
10 error is briefed from pages 101 to 107, and demonstrates that
11 the Board's ruling is not entitled to deference for its factual
12 findings because the preponderance, the overwhelming
13 preponderance of the evidence in the certified record amply
14 shows exactly the opposite of the Board's findings. To wit
15 there is no evidence that in 1976, at the time of the adoption
16 of the ordinance that there was any relationship of oversight
17 that existed between Dartmouth and the Petitioner's tenant.

18 Dartmouth's representatives, its own representatives,
19 admits in the certified record that no information exists from
20 the relative time that demonstrates any relationship of
21 oversight. Dartmouth produced no witnesses or testimony that
22 contradicted or undermined in any way the many, many
23 representatives of the Petitioner of the relationship or the
24 lack thereof that existed in 1976.

25 Dartmouth's actual records, which it suppressed and

1 did not submit, were discovered by the Petitioner, and
2 introduced into the certified record. They show that the
3 fraternities in 1976 were independent, not super biased by
4 Dartmouth, and not inspected or overseen in any way. The Board
5 cannot infer facts that do not exist to contravene facts that
6 were presented by Petitioner's witnesses, either via sworn
7 affidavit, live testimony, or via the use of Dartmouth's own
8 historic records that were in Dartmouth's possession and it
9 chose not to submit.
10 The tenth claim is that the town's actions violate
11 Petitioner's right to engage an expressive association on its
12 property. This was briefed on pages 109 to 112. The certified
13 record contains substantial evidence of the nature and extent
14 of the expressive association that occurs on the property.
15 This includes, but is not limited to, religious observances,
16 community service, and artistic expression. Expressive
17 association is protected by the U.S. Constitution.
18 The town's imposition of its ordinance is solely
19 based on the actions of Dartmouth College. The town may not
20 regulate expressive association. The town may not engage in
21 indirect action to regulate expressive association when it may
22 not do so directly. As a result, the town's actions are
23 unconstitutional.
24 The eleventh claim is that the town violated
25 Petitioner's procedural due process rights, and that is briefed

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1 on pages 113 to 122. As demonstrated in both the takings and
2 the selective enforcement discussion, the town's actions were
3 motivated by a desire to deprive the landowner of the right to
4 continue enjoying its property. By virtue of an overtly biased
5 ZBA, which included, but not limited to ex parte contact
6 between one board member and the college informing the college
7 specifically how to reverse the 5:0 ruling in favor of
8 Petitioner. The Petitioner has been deprived of its ability to
9 receive a clear statement of allegations against it, and to
10 fully defend itself in front of judges as impartial as society
11 would permit.
12 Finally, Your Honor, the town's actions merit
13 reversal in the twelfth claim because the town acts in applying
14 and interpreting its ordinance go far beyond what has been
15 authorized by the State to do. As a result, the determinations
16 are ultra vires, arbitrary, and capricious. The results have
17 not been based -- I'm sorry -- the results have been based on a
18 dislike of the landowner and the use, rather than a proper
19 employment of the zoning to achieve the town's objectives. In
20 evaluation claims of this sort, the supreme court mandates that
21 the town balance the harm to the landowner against the
22 prospective benefit to the community. The town has failed to
23 do this, and with good reason because the damage to the
24 landowner is grievous and permanent, whereby there is no direct
25 benefit identified to the community.

1 I thank you for your patience. I would be happy to
2 answer any questions. Here with me is the trustee for
3 Petitioner who is also happy to answer any questions or to tell
4 you about the nature and interaction between the fraternity and
5 Dartmouth that continues to this day. In fact, to this day,
6 there is going to be, and it is not part of the certified
7 record, and I'm not going to introduce it, but the Ciabatti
8 (phonetic) Dartmouth is holding Passover at the house, part of
9 a religious observance this coming Monday, the 10th. So I'd be
10 happy to answer any questions. If not, I will cede to my
11 opponent. Thank you very much.
12 THE COURT: Attorney Morgan-Spector (sic), you may
13 proceed when you're ready.
14 MS. SPECTOR-MORGAN: I promise you I will not take an
15 hour. I do have for Your --
16 THE COURT: The floor is yours.
17 MS. SPECTOR-MORGAN: -- I'm sorry?
18 THE COURT: The floor is yours.
19 MS. SPECTOR-MORGAN: I do have for you, Your Honor, a
20 page that's missing out of the certified record. One of the
21 affidavits that was presented is missing page 2 because it was
22 double-sided, so when it was copied, it just got messed up.
23 THE COURT: Do you know -- okay. It's got the page
24 number on it.
25 MS. SPECTOR-MORGAN: It does.

1 THE COURT: Okay. Go ahead.

2 MS. SPECTOR-MORGAN: This Court should affirm the
3 decision of the Zoning Board of Adjustment because Petitioner
4 has not and cannot demonstrate that the Zoning Board's decision
5 was illegal or unreasonable for any of the reasons cited in the
6 petition, in the memorandum of law, or here today. As this
7 Court identified in the Alpha Delta case, and the Alpha Delta
8 case here is very relevant because the Zoning Board cited it
9 and relied on it in its decision.

10 The question here is what was the use of the property
11 in 1976? Because everyone agrees 1976 is when this property
12 became nonconforming. And absolutely, this property became
13 nonconforming in 1976. And it gets to continue that
14 nonconforming use for as long as it wants, regardless of what
15 changes are made to the zoning ordinance, but only that use.
16 It cannot change that use.

17 And that is what was done here. That is what they
18 were informed of by the zoning administrator, and that is what
19 we're here to discuss today. The issue is not whether there
20 was a contractual relationship between Petitioner or its tenant
21 and the college. The question is, were they operated in
22 conjunction with each other? And the evidence that the Zoning
23 Board relied on is clear in the record. That from the early
24 1900s, before the fraternity was established and before the
25 house was built, the Dartmouth College and the fraternities

1 operated in conjunction with each other.

2 Specifically, that evidence is found in the certified

3 record in conjunction with Dartmouth's motion for rehearing,

4 I'm going to cite to it. I will give you some certified record

5 page numbers. They will also be in my trial memo.

6 There was a 1902 vote by the Board of Trustees of

7 Dartmouth College to limit residence and fraternity houses to

8 14, except for that Tri-Kap house, which was permitted 17

9 individuals, as their investment was made before the policy of

10 the college in regard to fraternity houses was adopted. That's

11 in the certified record at page 475.

12 There's a 1920 vote by the trustees of Dartmouth

13 College requiring that the plans and location of proposed new

14 fraternity houses shall require approval of the college,

15 certified record at page 476. There's a 1925 vote to reaffirm

16 the longstanding limitation of the number of students permitted

17 to room in a house to 16; to limit the total size of the

18 fraternity houses to 95,000 cubic feet; and to require approval

19 for any material enlargements of existing fraternity houses,

20 certified record at page 476.

21 In 1949, we have a letter from the president of the

22 college reporting that permission for house parties this spring

23 and hereafter, will be dependent upon the houses complying with

24 pertinent fire regulations. Certified record at 478. In 1949,

25 there's also a memorandum to the fraternities and their faculty

1 advisors that effective September 1st, 1949, fraternity houses
2 at Dartmouth will be approved for student residents and parties
3 only if the houses comply with all fire regulations. Certified
4 record at page 479. There are pages and pages of inspections
5 by Dartmouth College of the fraternities. Two examples of
6 those, from the '60s and the '70s can be found at page 498 and
7 509.
8 In 1964, there's a vote of the trustees of Dartmouth
9 College to require that each fraternity, as a condition of
10 continued recognition of its house as a suitable residence of
11 Dartmouth College students, have in operation a fire alarm
12 system approved by Dartmouth College. Certified record at 508.
13 And in 1971, the college established a fraternity governing
14 board, which board included college officials. That board
15 eventually became a nonprofit entity of its own so that it
16 could hire an employee, but it was established by the college
17 and there were college officials designated on that board.
18 Petitioner argues that you should ignore all of this
19 evidence because none of the students who attended Dartmouth in
20 the '70s remember any health of safety oversight by the
21 college. But just because they didn't' see it, doesn't mean it
22 wasn't there. The clear evidence before the board, the clear
23 evidence before this Court is that until the fraternity was
24 derecognized in March of 2016, the college provided significant
25 health and safety oversight, particularly in the area of fire

1 safety. That is what the board found, and that is what this
2 Court will find when it reviews the record.
3 Because it was derecognized in March of 2016, the
4 zoning administrator did inform them that they were no longer
5 being operated in conjunction with a college and that they were
6 now in violation of the zoning ordinance. The magic words,
7 "Substantial change in use," were no in there, but any
8 reasonable person reading that letter would understand that
9 what the town was saying is you have changed your use because
10 you are no longer operating in conjunction with the college,
11 and therefore, your use must cease.
12 The Court's, of course, familiar with the standard of
13 review in this case. Petitioner has the burden of
14 demonstrating that the decision of the Zoning Board was illegal
15 and unreasonable. The findings of fact of the Zoning Board are
16 deemed prima facia, lawful, and reasonable. And Petitioner,
17 because it's alleging their nonconforming use, bears the burden
18 of demonstrating that the use legally existed prior to the
19 adoption of the zoning permission prohibiting the use.
20 The Zoning Board of Adjustment here legally and
21 reasonably concluded that Petitioner's property is no longer a
22 legal, nonconforming use because it is no longer used in
23 conjunction with another institutional use. And in fact, the
24 definition of student residence does require that the student
25 residence be operated in conjunction with another institutional

1 use. But setting that aside, until it's derecognition,
2 Petitioner clearly fell within the definition of student
3 residence. It was designed for and occupied by students,
4 included individual living units and social rooms, and kitchen
5 facilities, and operated in conjunction with Dartmouth College.
6 Petitioner would have you believe that it was exactly
7 the opposite. That it was a meeting house, which happened to
8 house 18 students. But Your Honor, if you look at the tax
9 cards, you'll see that the first floor is this meeting space.
10 And according to what Attorney Cole said today, the upper
11 floors, the second and third floors, were residential space.
12 That's more than half the house that was used for residential
13 space. So I think it's a bit questionable to describe the use
14 of the property as residential as being ancillary to another
15 use.
16 Based on the evidence I've summarized for you, the
17 Zoning Board found that the property was no longer operated in
18 conjunction with the college in light of its derecognition.
19 And in doing so, the Board cited and said clearly it was
20 relying on this Court's decision in the Alpha Delta case. The
21 docket number in that case, in case you care to look it up is
22 15-CV-529.
23 And the Board quoted Your Honor and your decision and
24 where you say that the purpose of the conjunction requirement
25 is to ensure that student residences maintain an association

1 with the college such that the college can provide health and
2 safety oversight to the residences. The Board found that
3 Dartmouth College had engaged in appreciable health and
4 oversight activities prior to 1976, particularly with regard to
5 fire regulations, and the Petitioner failed to present any
6 evidence of association or relationship with the college
7 following derecognition. Therefore, just like Alpha Delta, the
8 Board found that Petitioner is no longer operating in
9 conjunction with Dartmouth College, and could not continue to
10 operate a student residence on its property.
11 Now, Petitioner argues that it's not, in fact,
12 student residences. It's a fraternity. Well, that's belied by
13 the definition of student residence. In 1976 -- prior to 1976,
14 fraternities had been allowed in the general residence district
15 as it was described at the time. In the 1976 ordinance,
16 fraternities were no longer an identified use in and of
17 themselves, but they were included in the definition of student
18 residence.
19 The 1976 definition was, "Student residents shall
20 include any dormitory, including social rooms and limited
21 kitchen facilities, sororities, fraternities, residences for
22 nurses and medical interns operated in conjunction with another
23 institutional use such as for educational purposes or health
24 purposes." So as of 1976, fraternities became student
25 residences by definition. So the argument that it's not a

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1 student residence, it's a fraternity, is simply not based on
2 the language of the zoning ordinance.
3 The next argument that you heard was that they can't
4 possibly be a student residence because they don't have a
5 special exception. And that, of course, conflates two
6 different sections of the ordinance. The first is the
7 definition of student residence. This property clearly fell
8 within that definition. The second is the table of permitted
9 uses, which required a special exception for that defined use
10 in this zone.
11 So the fact that it doesn't have a special exception,
12 in no way bears on the question of whether or not it was a
13 student residence. That decision turned solely on the
14 definition of student residence. As we've discussed, and as
15 Attorney Cole told you, my position is yes, it is grandfathered
16 from the requirement that it get a special exception. That it
17 is not grandfathered from the requirement that it operate in
18 conjunction with the college because it always has and it
19 cannot change that use.
20 This is not a taking of Petitioner's property. The
21 property can be used for any number of permissible uses. In
22 its trial memorandum, Petitioner alleges that can't be done at
23 a reasonable cost. There's no evidence in the record about
24 that. And in its trial memo it argues that by removing the
25 nonconforming use, it's a taking. But in fact what happened

1 here was not that the town took away the nonconforming use, the
2 fact is that Petitioner behaved badly by hazing its pledges.
3 MS. COLE: Objection. Objection. There's
4 absolutely -- that's ad hominem attack. There's no evidence in
5 the record why Dartmouth derecognized the fraternity. There's
6 zero evidence of this, and this is not about how bad somebody
7 behaved as a tenant. And I think that's an ad hominem attack.
8 THE COURT: Similarly, I will rule on your objection
9 after I've had a chance to look at the record.
10 MS. SPECTOR-MORGAN: And I will quote to you from the
11 letter from Dartmouth College:
12 "We are writing to confirm that Dartmouth College has
13 officially notified that Sigma Alpha Epsilon's national has
14 suspended your charter's charter effective immediately." In
15 his later, dated February 4, 2016, SAE's executive director,
16 Blaine Ayers wrote, "Due to violations of the fraternity's
17 health and safety policies, the supreme council has voted to
18 suspend the charter of the New Hampshire Alpha chapter
19 effective immediately. The suspension will be for no less than
20 five years." And if you look at Tab B of the certified record,
21 there are numerous newspaper articles that talk about the
22 hazing that resulted in the revocation of the charter and the
23 derecognition.
24 So again, Your Honor, the town did not take away
25 Petitioner's nonconforming rights. Petitioner lost those

1 rights on its own when it engaged in the behaviors.

2 Moreover, Your Honor, the next thing that Petitioner

3 moves onto is the other cases, it claims, are factually similar

4 and that should have guided the Zoning Board in this case.

5 We've talked about some of these before. We haven't talked

6 about others. But what's fascinating is that the one case

7 that's actually factually similar to Petitioners, the Alpha

8 Delta case, Petitioner says shouldn't apply to them. But it's

9 exactly the Alpha Delta case that should apply to them.

10 As an initial matter, there's great deal in the

11 memorandum of law about stare decisis and how the Zoning Board

12 is bound by stare decisis. The supreme court has never held

13 that the Zoning Board is bound by stare decisis. And in fact,

14 all zoning cases are decided on their own facts. Even if stare

15 decisis did apply, the Tri-Kap decision, the 2014 decision that

16 Petitioner points to, wouldn't affect the decision of the

17 Zoning Board here because, as Attorney Cole noted, Tri-Kap was

18 a recognized fraternity.

19 It appealed decision that a special exception was

20 necessary to expand its building, and the Zoning Board held

21 that because Tri-Kap existed prior to the special exception

22 requirement, it was a nonconforming use and could expand

23 without a special exception because the zoning ordinance allows

24 that. That's exactly what the town's position is here.

25 Nowhere in the Tri-Kap decision does the Zoning Board address

1 the "in conjunction with" requirement, nor did it have to
2 because Tri-Kap was a recognized fraternity, and therefore,
3 completely factually different from this case.
4 Petitioner goes on to cite five other situations
5 involving four different fraternities. Beta Delta Chi, for
6 which there is no zoning board documentation provided; Zeta Psi
7 in 2003 and 2008; Phi Delta Alpha, and Gamma Delta Chi. None
8 of these matters involve an interpretation of the "in
9 conjunction with" requirement. And in fact, three of them,
10 Beta Delta Chi, Zeta Psi 2008, and Phi Delta Alpha, all are
11 basically the same as Tri-Kap. These are fraternities that
12 were nonconforming that wanted to expand their buildings beyond
13 the 20 percent that were permitted, they came in for special
14 exceptions to do so.
15 Now, there's an allegation that in 2008 Zeta Psi was
16 derecognized by the college. But that decision specifically
17 says Zeta Psi is a recognized fraternity. And there's an
18 allegation made here today that Phi Delta Alpha was
19 derecognized at the time it came in, but that decision
20 specifically says that the fraternity is in conformance with
21 all zoning regulations, other than the special exception
22 requirement.
23 So could the facts have been different? Maybe. But
24 the facts as the town knew them at the time, were that these
25 fraternities were all recognized and operating in conjunction

1 with the college; and therefore, they have no bearing on this
2 Court's decision today.
3 Petitioner also cites to the 2003 Zeta Psi Dartmouth
4 review matter, which we discussed in the Alpha Delta case and
5 Ms. Brotman gave substantial testimony on that case. In that
6 case, the fraternity was derecognized. And as far as the town
7 knew, no one was living there. In fact, the town had a letter
8 from the college saying as far as we know nobody's living
9 there. So the focus of the Board in 2003 was not are there
10 people living there. The focus of the Board is can they put in
11 a newspaper office.
12 And despite the representation that was made here
13 today, there's nothing in the decision that says there was a
14 Zeta Psi member living in the house. What the decision says is
15 there was a Zeta Psi member who worked on the paper. So the
16 issue that your grappling with today, Your Honor, simply wasn't
17 addressed in that case. Likewise, the Gamma Delta 2011
18 opinion, as you will recall, was an internal communication of
19 the town, which was preliminary, and based on hypotheticals.
20 Those hypotheticals never happened. Gamma Delta never
21 disassociated from the college.
22 And if you read the affidavit that was referred to
23 earlier about the investment Gamma Delta made in its building
24 in reliance on that representation, it says we made an
25 investment in our building to bring our basement into

1 conformance with regulations, and then we decided not to
2 disassociate. So there's no evidence that Ms. Brotman's
3 decision was a basis for those improvements, which had to be
4 made anyway. And since the derecognition never happened that
5 matter is irrelevant.
6 Moreover, Ms. Brotman specifically said that her
7 opinion was based on facts that she may not know -- was
8 dependent on facts she may not know. And had an actual
9 situation been presented to her, as it was in 2001 regarding
10 Gamma Delta, Ms. Brotman would have issued the same opinion she
11 issued in 2001 about Gamma Delta, which said, "A student
12 residence requires some affiliation with another institution,
13 such as Dartmouth College." Delta Gamma never appealed that
14 decision. And that is the town's final word on Gamma Delta and
15 it's requirement that it be associated with Dartmouth College.
16 As for the Administrative Gloss Doctrine that
17 requires an ambiguous clause, a consistent interpretation, and
18 similar applicants. In this case, despite the fact that board
19 members may have said it seems like a confusing, vague term for
20 us, for this Court's purposes, when a term is not defined in
21 the ordinance, you look at the dictionary. And the dictionary
22 defines "in conjunction with" as being joined.
23 So there's nothing ambiguous about the term. You
24 look and see whether the student residence is joined to another
25 institution. Derecognized fraternities are no longer joined to

1 the college, so they're no longer operated in conjunction with
2 the college. Because there's no vagueness, there's no
3 administrative gloss doctrine. Even if there were, the cases
4 the Petitioner cites regarding other fraternities that were
5 somehow disassociated from the college, and they claim there's
6 ten examples. Really, there's four. It's Chi Heorot, in 1982;
7 six fraternities that declared their independence from the
8 college in 1991; Phi Delta Alpha in 2000; and Zeta Psi in 2001.
9 Those examples are all 15 years old. There's no
10 evidence that that's how the town is operating today. And they
11 certainly don't create a defective policy of nonenforcement
12 with similarly situated applicants. The town is not
13 selectively enforcing or creating two separate categories of
14 fraternities. The examples that are cited are factually
15 different, and don't involve the issues before this Court,
16 which is whether the fraternities were used in conjunction with
17 the college.
18 As this Court properly held in the Alpha Delta case,
19 which made similar selective enforcement allegations,
20 Petitioner did not present any evidence to suggest the Zoning
21 Board's alleged failure to enforce the zoning ordinance in the
22 past was anything more than lax enforcement. That is
23 Petitioner presented no evidence that the Zoning Board's
24 alleged discriminatory enforcement was conscious and
25 intentional. Accordingly, the Court finds that the ZBA was

1 correct in concluding the Petitioner did not prove selective or
2 discriminatory enforcement.
3 Same exact situation here. There are many
4 allegations that the college is acting with animus towards
5 Petitioner, and the college is not here nor is it a party to
6 this matter, so those allegations would seem to be beyond the
7 scope of this hearing, but there's no evidence that the town is
8 acting any discriminatory animus. These conspiracy theories
9 aside that the town is somehow doing the college's bidding
10 because the college wants to require fraternity properties.
11 There's no evidence of that. It's just an allegation that
12 hasn't been supported by the record.
13 Petitioner next contends that it's an institution in
14 and of itself, and so it should be able to operate its property
15 in conjunction with its tenant, the fraternity. But if you
16 look at the definition of institution, Petitioner simply
17 doesn't fall within that definition. Petitioner is a trust.
18 No trust documents have been provided. There's reference in
19 the certified record to its predecessor entity, which appears
20 to still be in good standing at the Secretary of State's Office
21 and was formed for social, educational, and personal growth.
22 But there's no exact educational purposes that are
23 identified. And the definition of institution requires that an
24 organization be organized for some measure of public good such
25 as education, and that is the claim that Petitioner has made

1 that it's an educational institution.

2 And then, the Zoning Board addressed this. Despite
3 the expert legal opinion that was provided to it, there are two
4 experienced land use attorneys on the Zoning Board, and at the
5 end of the day, there is one legal expert that matters and that
6 is you, but what the Zoning Board held was it is doubtful that
7 those who enacted the 1976 zoning ordinance contemplated that a
8 single trust with a limited purpose owning, it appears this
9 piece of land, and providing some financial support for the
10 fraternity members whose fraternity used the residence will
11 qualify under the definition of institution.

12 Appellant in this instance is a trust with a limited
13 private purpose. That is: A, owning a property that houses a
14 private fraternal organization; and B, providing financial
15 support for the local fraternity member's educational goals
16 arguably an exclusive, not public purpose. Common sense
17 dictates that the institutional district was crafted to include
18 the fraternities because fraternities were inextricably linked
19 to the college itself. And that's in the certified record at
20 1142 to 1143.

21 The Zoning Board's decision doesn't create different
22 categories of fraternities or institutions or student
23 residences. It finds that this property owner is not an
24 institution, as that term is defined. That this property is
25 not a student residence as that term is defined, and that this

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1 fraternity cannot operate in this property, which has, at all
2 times, been used as a student residence.
3 Petitioner's remaining claim, which I'm just going to
4 address very briefly, they're addressed in the trial memo, the
5 claim is to expressive association. That's really aimed at the
6 college. There's nothing the town's doing to prevent
7 Petitioner from assembling. They can assemble anywhere that is
8 a legally-permitted place to assemble. Their property doesn't
9 happen to be one of those places, but this has nothing to do
10 with speech or association. This has to do with the health,
11 safety, and welfare of the occupants of that building. That is
12 what the town is concerned about, and that is clearly within
13 its jurisdiction.
14 As for a procedural due process and the alleged
15 preferential treatment to Dartmouth College, it's hard to
16 imagine a case where more process has been afforded to a
17 Petitioner to express its opinion. We have over 1,600 pages of
18 documents, most of which were provided by Petitioner. There
19 can be no claim that it wasn't permitted to express its
20 opinion.
21 As for the rights afforded to Dartmouth College, it
22 was permitted to file a motion for rehearing because it's a
23 person aggrieved. Petitioner was not allowed to comment on
24 that because the Board never takes input on motions for
25 rehearing. Although, Dartmouth College didn't participate

1 below as an aggrieved party, it's still permitted to do that.
2 There's -- yes, the town sent Dartmouth a copy of the decision.
3 Ms. Brotman sent the college a copy of its decision, not a
4 member of the board. And that's standard operating procedure,
5 and that's in the decision that as an interested party, the
6 college always gets copies of these decisions.
7 And there's no evidence the communications with
8 Petitioner's counsel and Dartmouth were different and motivated
9 by animus. I think that the staff person just had different
10 information at different times. So these claims that there was
11 preferential treatment given to Dartmouth simply isn't the
12 case. Dartmouth had every right to intervene, did have a
13 different burden of proof because it wasn't alleging a
14 nonconforming use, and it operated at all times in conformance
15 with the law and that's all the town allowed.
16 Finally, there's nothing ultra vires about the town's
17 decision or the application of this ordinance to that property.
18 There is, in fact, a legitimate public purpose. The
19 requirement that the student residence be operated in
20 conjunction with Dartmouth College is to protect the health and
21 safety of its students. And that's justified when you look at
22 the behavior that these fraternities have been engaging in.
23 It's only because the properties were overseen to a degree by
24 the college that the hazing behavior ended. Without Dartmouth
25 College oversight, such behavior would have continued unabated

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1 endangering Dartmouth Students.

2 And, Your Honor, this case isn't about Dartmouth and

3 alleged violations on its property. But even if it were,

4 Ms. Brotman confirms that the cellular tower is an internal

5 communication facility. And as for the camps that are operated

6 in the college's student residences, those are permitted

7 student residences that are used for a few weeks out of the

8 year by camps, not the other way around. So again, those

9 arguments are just simply red herrings.

10 Petitioner has not shown that the Zoning Board erred

11 in holding that its property was no longer used in conjunction

12 with the college, that the property was not being treated

13 differently than other properties, and that the property is not

14 grandfathered from the requirement that it operate in

15 conjunction with the college. It has not demonstrated it's not

16 a student residence. It has not demonstrated that it is an

17 institution. And it has not demonstrated that there were any

18 constitutional flaws in the board's action or decision. And

19 therefore, the town ask that you find the Zoning Board's

20 decision was legal and reasonable, and affirm it.

21 I have a memorandum of law and also that motion to

22 strike that I mentioned.

23 THE COURT: Thank you.

24 MS. SPECTOR-MORGAN: Thank you.

25 THE COURT: Anything further?

1 MS. COLE: I have just a couple points, Your Honor,
2 but I'll be brief. The most striking part of my opponents
3 presentation was the admission. We've been through this for
4 quite some time now, about a year. This is the first time I've
5 heard my opponent say yes, we realize, we recognize that
6 Ms. Brotman's zoning notice violation, which was -- where did I
7 put it? It's right here. May I approach the Court?
8 We acknowledge, Your Honor, that okay, maybe
9 Ms. Brotman's zoning violation didn't allege a substantial
10 change of use, but everybody knew. Of course, we knew. Any
11 reasonable person would infer from the fact that we're telling
12 you you're in violation of a present ordinance should be
13 interpreted as you are about to lose your lawful, nonconforming
14 rights, pursuant to 674:19 because you have substantially
15 changed the use. Hey, if that had been the allegation, we
16 would be having a very different discussion.
17 We would have come in with very different evidence.
18 We would have come in with very different witnesses and very
19 different case law. But it wasn't alleged. And the
20 constitution, Article 15, guarantees we have a right to know
21 what, in clear, plain language, we're being accused of. This
22 isn't bait and switch. It's not the shell game. She can't
23 come into this court and say I know we meant to say it. We
24 meant it's a substantial change of use, and we really want you,
25 Your Honor, to kind of read that zoning notice to actually make

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1 that claim.

2 It's not in there. And that is not right for this
3 discussion here. However, it is an admission that while we
4 have been arguing for one year as to whether a lawful,
5 nonconforming use, which apparently, we all agree we are, must
6 conform to a 2015 ordinance. All of a sudden, it's a bait and
7 switch. No. You've changed your use. That wasn't alleged.
8 And we have every right to strike this because that was never a
9 claim, as Your Honor can wee, before you.

10 Let me address some of the very brief things --
11 briefly, some of the things that were said. About this
12 clearly, we have all these records from 1902 and 1914 and gosh,
13 we have so many records going way, way back. What we do have
14 because I pulled it, what Your Honor will be very, very
15 interested in seeing is that the only time that matters, for
16 the purposes of determining whether or not the college provided
17 health and safety oversight, is not 1902 or '14 or '27 or any
18 of those other dates.

19 It's in or around 1976. And the documents that we
20 were able to compile between 1970 and 1977 tell a very, very
21 different picture. And it's a really very interesting story if
22 you care to read it. The story is the fraternities in the '70s
23 were reacting to governmental pressures, and they were
24 reactionary. And they wanted nothing to do with the college.
25 And guess what?

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1 The college wanted nothing to do with the
2 fraternities. And there was a lot of internal fighting about
3 gosh, you know those fraternities, they do provide nice housing
4 that we lack. We need that housing, but we don't want to pay
5 for them, and we don't want to oversee them. We want them to
6 be independent, but we want them, also, to bring up their brand
7 a little bit because they look like fraternities.
8 And we'd really like parents coming in and showing
9 their kids some of the niceties of Dartmouth. Maybe could we
10 just put a coat of paint on those walls, please and get rid of
11 the beer pong table? That's what the college was concerned
12 about. So much, Your Honor, that it culminated in guess what
13 year? 1976. The vice-president of the college wrote to --
14 it's a memo. I forget who he wrote to. And it's out there.
15 And you know what he said? At this point in time, we are
16 providing no health and safety oversight over the fraternities.
17 That's a long way from oh, they were providing health and
18 safety oversight in 1976.
19 Dartmouth College's own representatives said they
20 have no witnesses and no documents to confirm that any health
21 and safety oversight was provided in the 1970s or anytime
22 thereafter. In fact, the six renegade fraternities, including
23 SAE in the 1990s, were providing zilch. When I say zilch, I
24 mean nothing. No bartering services, no vendor services, no
25 internet hookup, all the things that recognition came with.

1 THE COURT: I don't think it was the internet in
2 1976.
3 MS. COLE: I beg your pardon?
4 THE COURT: I don't think it was the internet in
5 1976.
6 MS. COLE: Was it the internet?
7 UNIDENTIFIED SPEAKER: 1991.
8 MS. COLE: 1991.
9 UNIDENTIFIED SPEAKER: 1991.
10 MS. COLE: He was there.
11 THE COURT: I remember 1976. There was no internet.
12 MS. COLE: No, no, I'm so sorry, I'm saying in 19 --
13 THE COURT: I'm just teasing.
14 MS. COLE: -- 91 to '93 when all these colleges (sic)
15 disaffiliated with the college all went away. So we know that
16 there was no services provided then. The steering committee
17 report, which I think Your Honor will find very interesting,
18 this is where the college announces its intention to take over
19 fraternities. It announces its intentions to use the town to
20 take over facilities, use the zoning to have the town apply the
21 rules differently now to make sure that those derecognized
22 fraternities are going to get out and we're going to come in
23 and get them. And we're going to quote what repurpose them for
24 our own residential facilities.
25 And they've been trying to do it for years. It's

1 very well-briefed. Mr. Katz himself was approached by the
2 college when he was the president of his fraternity and SAE in
3 the '90s. And they tried and tried and tried and tried to buy
4 the fraternity. You know what's happened in the wake of the
5 Alpha Delta recognition? Three times the provost has
6 approached Alpha Delta to buy their fraternity. Now, that
7 seems to be a little bit suspect.

8 MS. SPECTOR-MORGAN: Your Honor, what's happening
9 right now with regard to buying the property really has nothing
10 to do with what was going on in 1976.

11 THE COURT: That is true.

12 MS. COLE: That is true. But it does have something
13 to do with the motives of why now is it being applied
14 differently? What has happened? No, my opponent has told you
15 about all these different fraternities, but she says that
16 doesn't make a policy. I know we've got eight or ten or
17 whatever out there, but that doesn't make a policy. That was
18 15 years ago. Well, it wasn't 15 years ago. 2011 was just a
19 few years ago.

20 What's changed? What's changed is Dartmouth
21 College's policy of wanting to take over and actively doing it
22 by publicly saying we're going to use the town to do this.
23 That's what's changed.

24 Okay. Let me move on. By the way, in that very same
25 steering committee report, and it is briefed in there, the

1 college actually says, we aren't really even providing any
2 supervision of the fraternities. Wait a minute, I thought we
3 were here because of the potential to provide -- if college
4 isn't even providing any, and hasn't been, and by the way,
5 there is nothing Your Honor will find in the record that
6 supports her contention that Dartmouth has been providing these
7 great health and safety oversight all these years. Not one
8 shred of evidence. And in fact, Dartmouth's own spokesperson
9 said we have nothing. So that's factually inaccurate.
10 Number 2, the idea that Ms. Brotman's memo was just
11 an internal memorandum, is only for her, I guess for her staff
12 for anything else. There's a couple problems with that.
13 Number 1, the Gamma Delpha Kai email chain is on her email.
14 Now, we wonder how is it that Gamma Delta Kai got this email
15 back? It's be the town sent it to them and said, here's what
16 Mrs. -- Ms. Brotman recommended and this is what you do. And
17 as for reliance, it is so well-supported by both Professor
18 Fairbrothers (phonetic) and John Turner (phonetic) in our brief
19 of we were up against a wall.
20 We had 100,000 -- this code enforcement she was
21 talking about. They were going to upgrade their basement. It
22 was fire code. Fire code applies to every single building. It
23 has nothing to do with the college. They were competing with
24 the college saying we want you to build an elevator or
25 something like that, or we're going to derecognize. And the

1 town fire warden saying we need you to create some egress. And
2 it was going to cost $100,000. And they had to make a very big
3 decision. Like the college is saying we're going to
4 derecognize you, so why are we going to put $100,000 into a
5 building if we're going to be kicked out of it in five days?
6 It was her recommendation that ultimately made them decide to
7 spend the $100,000 for the fire code. Okay.
8 Now, when my opponent said, well, the national
9 derecognized the chapter women and the college de -- I mean,
10 how many -- we're not here because the tenant may or may not
11 have engaged in something because there's been no hearing and
12 no trial, no nothing, or them. Dartmouth gave them a letter
13 that said you're national derecognized you, so we're going to.
14 That's actually, against their contractual relationship with
15 the tenant, by the way. They have a contractual
16 relationship -- a contractual obligation to provide them notice
17 in a hearing before derecognizing, but that didn't happen.
18 But what my opponent said was it's because of the
19 Petitioner's bad behavior that this all happened. The
20 Petitioner is the landowner, Your Honor, not the tenant. The
21 Petitioner is this institution that goes along its business and
22 pays its bills and runs its thing. It had nothing to do with
23 any of these associated -- these alleged activities had nothing
24 to do with that. So let's just be clear about that.
25 Let's move on to Tri-Kap very quickly.

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1 THE COURT: Very quickly.
2 MS. COLE: My opponent says --
3 THE COURT: Very quickly.
4 MS. COLE: -- very quickly. Tri-Kap she says is
5 completely different because, I mean, Tri-Kap was recognized.
6 You know what? I think I want to hire my opponent to come
7 stand in my stead right now because she argued my case for me.
8 The fact of Tri-Kap is this: Even a recognized fraternity,
9 theoretically in conjunction with Dartmouth College, can't be a
10 student residence unless it gets a special exception. And now,
11 my opponent says, but you are a student residence. You must be
12 a student residence. It says so in the definition of the
13 ordinance.
14 We're a lawful nonconforming use, why the hell does
15 the ordinance even apply to us? It doesn't. I don't care what
16 the definition says. I don't care what anything says. If the
17 ordinance doesn't apply, the definitions don't apply. This was
18 a fraternity and it remains a fraternity. And by the way, when
19 my opponent says, ha, what do you mean she just -- that it's
20 incidental -- the student residence, that's ridiculous. Of
21 course it's a student residence.
22 Well, let's go back to the 2000 Zeta Psi. The ZBA
23 found that a student residence is incidental to the use as a
24 fraternity, and that was a derecognized fraternity. And it
25 matters. And the facts of those different cases don't matters,

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1 it matters how the ZBA and the zoning administrator look at the
2 global idea of we've got these pre-existing fraternities. How
3 do they fit into the zoning ordinance? And whether it's about
4 the Dartmouth review that's not relevant.
5 It's about is this fraternal landowner an institution
6 that owns the land? Yes. Did Ms. Brotman think that the Greek
7 fraternal institution was the institution that owned the land
8 in 2011? Yes. Did the Zoning Board determine that the SAE
9 Trust is not an institution? No. It determined that it was
10 not major enough institution. It determined that it ought to
11 be a bigger institution. It's not about whether it's a public
12 institution or a private institution. It meets the definition,
13 and we have supplied copious material, which will blind you
14 with how much institutional function and mission the Petitioner
15 has set up.
16 Now, that might not have been the case for other
17 fraternities. Maybe it wasn't the case for Alpha Delta. I
18 don't know. I wasn't here. I can say for this particular
19 Petitioner, and we are not looking at Alpha Delta. We are
20 looking at this Petitioner. It has provided ample documentary
21 evidence and testimony that its mission and purpose fits the
22 definition of an institution. It is the institution that owns
23 the land. And that has been consistently interpreted by the
24 town as the landowning institution, using its land for its own
25 purpose.

1 And I think I can be done at that point.
2 THE COURT: Thank you.
3 MS. COLE: Thank you.
4 THE COURT: Anything further, counsel?
5 MS. SPECTOR-MORGAN: Oh, I could go on and on and on,
6 but I won't. Clearly, I disagree with Attorney Cole's
7 characterization of my comments and the record. And
8 unfortunately, Your Honor, I think you, or for your sake, I
9 hope your clerk, is going to have to read these 1,600 pages and
10 realize that they simply don't say what Attorney Cole thinks
11 they say.
12 THE COURT: Okay. Thank you very much, ladies.
13 MS. SPECTOR-MORGAN: Thank you.
14 THE COURT: I'll take the matter under advisement.
15 Have a good afternoon.
16 (Hearing concluded at 3:26 p.m.)
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CERTIFICATE

I, Erin Perkins, a court-approved proofreader, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

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ERIN PERKINS, CET-601 February 10, 2018