THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2018 TERM

DOCKET NO. 2017-0634

NH Alpha of SAE Trust

v.

Town of Hanover and the Town of Hanover Zoning Board of Adjustment

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RULE 7 MANDATORY APPEAL

BRIEF OF APPELLANT, NH ALPHA OF SAE TRUST

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Oral Argument to be presented by:

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No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

All men are born equally free and independent; Therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

All men have certain natural, essential, and inherent rights among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.

Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.

N.H. Constitution, Part I, Art. 12-a 20, 23

No part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property.

N.H. Constitution, Part I, Art. 14 35

Every subject of this State is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

N.H. Constitution, Part I, Art. 15 35

No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; **to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel**. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

N.H. Constitution, Part I, Art. 23 33

Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.

N.H. Constitution, Part I, Art. 29 16

The power of suspending the laws, or the execution of them, **ought never to be exercised but by the Legislature**, or by authority derived therefrom, to be exercised in such particular cases only as the Legislature shall expressly provide for.

N.H. Constitution, Part I, Art. 35 .....33, 35

It is essential to the preservation of the rights of every individual, his life, liberty,

property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, that the Judges of the Supreme Judicial Court should hold their offices so long as they behave well; subject, however, to such limitations, on account of age, as may be provided by the Constitution of the State; and that they should have honorable salaries, ascertained and established by standing laws.

N.H. Constitution, Part I, Art. 37 15

In the government of this State, the three essential powers thereof, to wit, the Legislative, Executive, and Judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of union and amity.

N.H. Constitution, Part II, Art. 5 19

And farther, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, **so as the same be not repugnant or contrary to this constitution**, as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defense of the government thereof, and to name and settle biennially, or provide by fixed laws for the naming and settling, all civil officers within this state, such officers excepted, the election and appointment of whom are hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this state, and the forms of such oaths or affirmations as shall be respectively administered unto them, for the execution of their several offices and places, so as the same be not repugnant or contrary to this constitution; and also to impose fines, mulcts, imprisonments, and other punishments, and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state; and upon all estates within the same; to be issued and disposed of by warrant, under the hand of the governor of this state for the time being, with the advice and consent of the council, for the public service, in the necessary defense and support of the government of this state, and the protection and preservation of the subjects thereof, according to such acts as are, or shall be, in force within the same; provided that the general court shall not authorize any town to loan or give its money or credit directly or indirectly for the benefit of any corporation having for its object a dividend of profits or in any way aid the same by taking its stocks or bonds. For the purpose of encouraging conservation of the forest resources of the state, the general court may provide for special assessments, rates and taxes on growing wood and timber.

RSA 674:16.....14, 15

674:16 Grant of Power. –

I. For the purpose of promoting the health, safety, or the general welfare of the community, the local legislative body of any city, town, or county in which there are located unincorporated towns or unorganized places is authorized to adopt or amend a zoning ordinance under the ordinance enactment procedures of RSA 675:2-5. The zoning ordinance shall be designed to regulate and restrict:

(a) The height, number of stories and size of buildings and other structures;

(b) Lot sizes, the percentage of a lot that may be occupied, and the size of yards, courts and other open spaces;

(c) The density of population in the municipality; and

(d) The location and use of buildings, structures and land used for business, industrial, residential, or other purposes.

II. The power to adopt a zoning ordinance under this subdivision expressly includes the power to adopt innovative land use controls which may include, but which are not limited to, the methods contained in RSA 674:21.

III. In its exercise of the powers granted under this subdivision, the local legislative body of a city, town, or county in which there are located unincorporated towns or unorganized places may regulate and control the timing of development as provided in RSA 674:22.

IV. Except as provided in RSA 424:5 or RSA 422-B or in any other provision of Title XXXIX, no city, town, or county in which there are located unincorporated towns or unorganized places shall adopt or amend a zoning ordinance or regulation with respect to antennas used exclusively in the amateur radio services that fails to conform to the limited federal preemption entitled Amateur Radio Preemption, 101 FCC 2nd 952 (1985) issued by the Federal Communications Commission.

V. In its exercise of the powers granted under this subdivision, the local legislative body of a city, town, or county in which there are located unincorporated towns or unorganized places may regulate and control accessory uses on private land. Unless specifically proscribed by local land use regulation, aircraft take offs and landings on private land by the owner of such land or by a person who resides on such land shall be considered a valid and permitted accessory use.

RSA 674:19.....12, 14, 15, 19, 33

674:19 Applicability of Zoning Ordinance. –

A zoning ordinance adopted under RSA 674:16 shall not apply to existing structures or to the existing use of any building. It shall apply to any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration.

In order to accomplish any or all of the purposes of a zoning ordinance enumerated under RSA 674:17, the local legislative body may divide the municipality into districts of a number, shape and area as may be deemed best suited to carry out the purposes of RSA 674:17. The local legislative body may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land within each district which it creates. **All regulations shall be uniform for each class or kind of buildings throughout each district**, but the regulations in one district may differ from those in other districts.

TABLE AND TEXT OF HANOVER ORDINANCES

Section 206 Special Exceptions

Certain uses of land and Buildings may be allowed as a Special Exception only by approval of the Board of Adjustment, if general and specific standards contained in this ordinance are complied with. Before allowing such Special Exception, the Board of Adjustment shall first determine that the proposed use will conform to such standards including:

206.1 Such proposed Special Exception use shall not adversely affect:

A. The character of the area in which the proposed use will be located;
B. The highways and sidewalks and use thereof located in the area;
C. Town services and facilities.

Article IX, Section 902 of the Ordinance, defines a Student Residence:

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. This definition shall apply only to those student residences located within the "I" Institution zoning district

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Superior Court erred by failing to rule that the Hanover Zoning Ordinance, facially and as-applied in the instant case, constitutes unlawful delegation in violation of the New Hampshire and U.S. Constitutions and relevant statutes, was arbitrary, capricious, and *ultra vires*. App. 1711-1712, 1721, 1722, 1725, 1798-1801, 1851, 1854, 1937-1941.

2. Whether the Superior court failed to find The Town has engaged in an unlawful taking by restricting the accessory use from the principal use as a lawful nonconforming fraternity App. 1805-1807, 1941-1944.

3. Whether the Superior Court erred by failing to adjudicate Appellant's claim that the ZBA ignored the clear language of the 1976 Zoning Ordinance which mandates that the Institution that owns the land may use its land for uses related to the purposes of that institution and that the Appellant is an "Institution" as defined under the Amended Zoning Ordinance and, therefore, Appellant is and has always been "operating in conjunction with" the Fraternal Institution that owns the land. App. 1808-1823, 1944.

4. Whether the Superior Court erred by failing to rule that Appellant's rights to equal protection of substantive due process were violated when the Town impermissibly created classifications that discriminated between similarly situated fraternal land owners, between institutions, and between land owners within the applicable zone, where the Town failed to show that its Application of Section 902 of its Amended Zoning Ordinance is substantially related to an important governmental objective and where its justification for such discrimination was hypothesized or invented post-hoc in response to litigation. App. 1761-1769, 1815-1821, 1944.

5. Whether the Superior Court erred as a matter of law by failing to apply the correct legal timeframe of reference for nonconforming uses and thereby erred by failing to rule that the Appellant had carried its burden of proof based on the balance of probabilities and clear preponderance of the facts in the ZBA case where the *only* evidence adduced at the relevant time of the Ordinance's adoption in 1976 supported Appellant's claims. App. 1829-1836.

6. Whether the Superior Court erred in denying Appellant's claims of violation of procedural due process where, *inter alia*, different burdens of proof were required of landowners, Appellant presented evidence of coordination between the Town and Dartmouth College in achieving a result that favored Dartmouth College, and the Superior Court failed to apply the "Juror Standard" to Appellant's claims of bias of the Town and ZBA members. App. 1841-1850.

STATEMENT OF THE CASE

At all times since 1928, the property at 38 College Street has been utilized as a fraternal meeting house, with an accessory residential use that provided rental income to support the activities and upkeep of the organization. The use has been consistent and uninterrupted. The Town of Hanover implemented a Zoning Ordinance in 1931, after the property's use was established. That Ordinance was modified repeatedly and most notably in 1976, when fraternal uses were abolished, and new student residences were required to operate "in conjunction with another institutional use." For nearly four decades after 1976, the property continued to operate without any interference from the Town. Then, in 2015, Dartmouth College announced that neighboring privately-owned fraternities no longer conform to the "values" of the College, and that it would seek to use the 1976 Ordinance to condemn, acquire, and repurpose these privately held institutions. In February 2016, Dartmouth "derecognized" the fraternal tenant at 38 College Street without notice or hearing. Promptly thereafter, the Hanover Zoning Administrator cited the tenant's derecognition as causing the property to be "no longer operated in conjunction with another institutional use." Appellant appealed the Administrator's decision and won the appeal in a 5-0 decision, confirming its status as a lawful nonconforming use. Dartmouth, a duly noticed but non-appearing abutter, filed a motion for rehearing, which the Town granted. On reconsideration, despite no evidence being presented from the relevant timeframe to support a finding of "substantial oversight" in 1976, the ZBA ruled against Appellant. Appellant appealed this matter to the Superior Court, which affirmed the ZBA and ruled that, although the fraternal meeting use could continue, the accessory residential use could not. For the reasons set forth in this brief, the Superior Court's decision, along with the ZBA and Zoning Administrator's determinations, are improper, illegal, unsustainable, and unconstitutional.

STATEMENT OF THE FACTS

The Appellant is the institution that owns the real property located at 38 College Street in Hanover ("Property" or "Fraternity House").[1] The Fraternity House was built in 1928 and leased to the SAE Fraternity ("tenant") to be primarily used as a gathering hall for Fraternity and alumni functions, as an academic study space for members, for political speech, petitioning of elected and executive officials, religious speech and ceremony, [2] scholastic expression and advancement, and public community service[3] (collectively the "Fraternity Use").[4] As an accessory to the Fraternal Use, the SAE Fraternity rents rooms to some of its members.[5] Although a maximum of 18 individuals may reside full-time in the Property, the building is designed to be used as a place of congregation and is certified by the Town for occupancy up to 250 people.[6]

Appellant (also the "Fraternal Institution") promotes education, scholarship, and leadership in the interest of its more than 1,300 fraternal beneficiaries, a small minority of whom are college students.[7] Two closely aligned sidecar not-for-profit charitable trusts are dedicated to political and artistic speaker series, academic events, community service and lectures.[8] Several years ago, the tenant affiliated itself with ExL University (an educational institution based in Hanover) and started hosting its approved curriculum there.[9] Major United States elected officials have visited the Property to engage the fraternal organization in political speech.[10]

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[1] *See*, Letter of Clark Griffiths, 1953-57 SAE Member, APP. at 662-63 ("*Griffiths Letter*").
[2] *See* Letter of Mayer Schein, APP. 1469.
[3] *See* Signet articles, APP. at 1251 *et seq.*
[4] *Id. See, also* Letter of Ken Holmes, APP. at 666, ¶ 18 ("*Holmes Letter*"); APP. at 1251 *et seq.*
[5] APP. at 668, ¶¶ 20, 22.
[6] *See* Certificate from Town of Hanover Fire Department, Office of Fire Prevention, APP. 1467.
[7] *Holmes Letter,* APP. at 667-68, ¶ 22.
[8] *Id.*
[9] *Id.*
[10] *See* various articles of political events held at the Fraternity House, APP. 1471 *et seq.*

At the time of its inception, and then for the next 70+ years, Appellant and the SAE Fraternity existed independent from the College.[11] The College's relationship with the fraternities in the 1970s was negligible and it did not provide services to the Fraternity House.[12] The concept of "College recognition" did not exist in 1976.[13]

Both the structure and the use of the Property pre-exist the Town's first zoning ordinance enacted in 1931. In 1976, Hanover amended its Zoning Ordinance by creating a new "I" Institutional zone to permit institutions to use *their own land* in a manner that meets the specialized needs of that institution.[14] Section 902 of the 1976 Zoning Ordinance defines "Institution" thus:

> "Institution: Facilities primarily engaged in **public services** including, **but not limited to**, *education*, research, health, and public worship."[15]

The amendment established a new use allowed only by Special Exception called "Student Residence," which required that it be "operated in conjunction with another institutional use."[16] Appellant has never sought nor received a Special Exception to operate as a "Student Residence."[17] The Town admits that, at the time the Town amended the Zoning Ordinance in 1976, and at all times preceding the 2016 notice of violation, Appellant's Property was a lawful nonconforming use.[18]

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[11] *See Griffiths Letter*, APP. at 662; Affidavit of 1975 SAE President, Dan Forsyth, APP. at 720-723 ("*Forsyth Aff.*"); Affidavit of SAE President, John Evans, APP. at 725-26 ("*Evans Letter*"); Letter of James Morgan, APP. at 728 ("*Morgan Letter*"); Holmes Letter; Letter from Blake Beckstrom, 1979-80 SAE President, APP. at 730-731 ("*Beckstrom Letter*").
[12] *Id.*
[13] *Forsyth Aff.*, APP. at 722, ¶ 8(d).
[14] *See* Order at 2 attached hereto; APP 200; *see* relevant portions of 2015 Ordinance attached hereto.
[15] *See* Ordinance "Definitions" attached hereto.
[16] *See* Order at 2 attached hereto; *see* relevant portions of 2015 Ordinance attached hereto.
[17] *See* Hanover Answer at ¶61.
[18] *See* Hanover Answer at ¶102.

During the 1980s, the College created a "recognition" system of affiliation with Greek Letter Organizations.[19] Since then, the College has de-recognized some fraternities, and other fraternities have de-recognized the College. In addition, the College and fraternities – including SAE -- have had periods of mutual de-recognition followed by periods of re-recognition. At all times, the system was voluntary and never affected the rights of private land owners. In 1982, the College de-recognized Chi Heorot fraternity.[20] In the early 1990s, SAE, Alpha Delta, Bones Gate, Sigma Phi Epsilon, and Sigma Nu fraternities de-recognized the College and operated independently between 1991 and 1993.[21] It was standard practice for the College to inform the Town of recognitions and derecognitions. For instance, on October 9, 1991 Dartmouth College informed the Town that Sigma Phi Epsilon was no longer affiliated with the College.[22] Hanover's Town Manager distributed this notice to multiple departments, including the Zoning Administrator, notifying all parties of the change of status. The Town took no action against the landowners in spite of these derecognitions.[23]

This practice continued throughout the period 2000 to 2014 as Phi Delta Alpha[24] and Zeta Psi[25] were derecognized and continued to enjoy unfettered use of their properties. The Town knew that these properties continued to be occupied while de-recognized.[26]

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[19] *Holmes Letter*, APP. at 666; Letter of Brandon Hudgeons, SAE member 1990-1994, APP. at 773-74 ("*Hudgeons Letter*"); Affidavit of Jeremy Katz, APP. at 737, ¶ 12 (*Katz Aff.*).
[20] *See* Letter of Michael Davidson, APP. at 776, 778, ¶ 16 ("*Davidson Letter*").
[21] *See Katz Aff.*, APP. at 737, ¶ 9; Mitchell Letter, APP. at 734; Signet articles, APP. at 1272-73;
[22] *See* Letters from Dartmouth College notifying Town of de-recognition in 1991, APP. 1282-83. These letters were generally issued as a matter of practice from Dartmouth to Hanover.
[23] *Katz Aff.*, APP. at 737-39; *Hudgeons Letter*, APP. at 773-74.
[24] *Davidson Letter*, APP. at 776, 777, ¶ 8.
[25] *See* Letter of Patrick McCarthy, APP. at 781 ("*McCarthy Letter*").
[26] *See* email from Patrick O'Neill of the Hanover Police notifying Town that students are parking on the lawn of a derecognized fraternity dated November 12, 2003, APP. 257. *See also*, February 8, 2008, Case No. 33028-Z2008-03 Zeta Psi application for Special Exception: "The fraternity house was constructed more than 80 years ago, long before the first Adopted Zoning Ordinance was enacted, has **since that time** provided housing for up to 16 students." *See also* 2003 ZBA Ruling, quoting at least one member of the Dartmouth Review presently resides in the House. APP. at 792, ¶ 3.

In 2011 the Gamma Delta Chi Corporation sought the Town's position on zoning implications of its putative derecognition to its pre-existing, legal, non-conforming use of the property.[27] The Zoning Administrator, Judy Brotman ("Brotman"), responded:

> "***College de-recognition does not erase the pre-existing, legal, non-conforming use of a property (in this case the use as a fraternity)***. In the situation you have described, ***the institution having ownership in the land is the fraternal/Greek organization***."[28]

For almost 40 years, College recognition never affected zoning and the Town took no sides in the politics between neighboring landowners in the zone.[29] In 2015 the Town's position changed after Dartmouth determined that the Greek system did not match the College's "values."[30] In its 2015 Steering Committee Report, Dartmouth announced its goal to "acquire and re-purpose" privately-owned fraternity houses using the Town's police powers. Dartmouth would "derecognize" a fraternity, and thereafter the Town would "find"[31] a zoning violation to strip the property owner of its lawful nonconforming zoning rights, forcing its sale:

> "While **Greek organizations** make some positive contributions, they also cause fractures in the social and residential environment which **may promote values that run counter to those of the College**. [ ]
>
> * * *
>
> **[W]ith respect to any organizations in privately-owned residences that are derecognized, the College should be prepared to (1) report the derecognized House to the Town of Hanover, to ensure compliance with any applicable zoning or other laws and (2) acquire their facilities and repurpose them for the College's residential, social and academic purposes.[32] [Emphasis added.]**

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[27] *See* Letter of Greg Fairbrothers, Alumni Advisor of Gamma Delta Chi, together with Exhibit of J.Brotman email of October 21, 2011, APP. at 811 ("*Fairbrothers Letter*"); *Turner Letter*, APP. at 805, ¶ 7.

[28] *See* email chain to/from Judith Brotman dated October 21, 2011, APP. at 814.

[29] The Zoning Administrator remarked: "An additional consideration for the fraternity is what the College may do to the students . . .if they [sic] fraternity disassociates from the school...Thankfully that's a concern for the students and fraternity – not zoning!" APP. At 814.

[30] *See*, Report of the Presidential Steering Committee for Moving Dartmouth Forward, APP. at 816, 856.

[31] *See* Letter from Dartmouth College to Alpha Delta Fraternity dated April 13, 201, APP. at 1491, 1492: "As the [fraternity] will no longer be recognized by the College as a student organization as of Monday, April 20, **the Town of Hanover zoning requirements are likely to apply differently**."

[32] *See*, Report of the Presidential Steering Committee for Moving Dartmouth Forward, APP. 862.

Dartmouth legal counsel, Kevin O'Leary, testified that Dartmouth reserves the right to use *any* process it wants to recognize or de-recognize any organization, for any reason:

> "...we are entitled through ***whatever process we want*** to decide whether we are going to continue to have a relationship with an organization or not. That's a right we have."[33]

On February 5, 2016, Dartmouth derecognized SAE[34] without notice or hearing. Zoning Administrator Brotman then served Appellant with a "Zoning Violation Notice" advising that it had violated Section 902 "[b]ecause [SAE] has been derecognized by Dartmouth College, the SAE facility is no longer being operated in conjunction with another institutional use."[35]

Appellant timely appealed to the ZBA. Dartmouth College, an abutter, and was given an opportunity to submit testimony and demonstrate that it was "affected directly" by the proceedings. On March 24, 2016, Appellant comprehensively demonstrated that the College did not provide appreciable health or safety supervision over the SAE Fraternity around the time of the adoption of the 1976 amended ordinance. Dartmouth neither appeared at this public hearing nor submitted any evidence to rebut the Appellant's evidence. At the end of the presentation, the ZBA voted to keep the record open for an *additional week*, providing another opportunity for Dartmouth to appear and present to the board. The College again did not participate.

On April 18, 2016 *before* the ZBA voted on Appellant's appeal, ZBA member H. Bernard Waugh ("Waugh"), who drafted the ZBA decision, emailed Brotman asking her to provide the College's *legal department* with a separate and additional copy of the decision:

> "The other thing I wanted to discuss (in case I forget to raise it tonight) is that I think it's **critical** that Dartmouth's legal office should be sent a courtesy copy of this (assuming it garners a majority). **I can't help but think that the folks in the legal office must have assumed that this case would go the same way the Alpha Delta case did, but as you can**

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[33] *See* Transcript of Appeal dated June 23, 2016, lines 13-21. APP. 2093.
[34] Dartmouth claimed it derecognized SAE merely because the National SAE suspended the local chapter. As a result, not only has the Town relied on Dartmouth's determination of the fraternity's status, but Dartmouth disclaimed any investigation and relied upon another private third party.
[35] *See* Zoning Violation Notice dated February 12, 201, APP. at 892.

see, my take is that the evidence was much different. And if the College were to have some evidence on the "grandfathering" issue that it thinks is relevant, I want them to see the last paragraph about their chance to ask for a rehearing."[36]

Later that evening, the ZBA unanimously voted to grant Appellant's appeal finding that Appellant met its burden of proof that its property was lawfully non-conforming. [37]

In response to Waugh's invitation, the College filed a motion for rehearing claiming that "the Decision is unreasonable in that it was not based on an *accurate* factual record."[38] The College submitted evidence that it "found" in its archives but withheld evidence that, in fact, **no** services were being provided in or around 1976 when the Ordinance was adopted.[39] These documents revealed that the College did not control or supervise the fraternities on *any* level, including health and safety supervision, confirming in 1976 that: "**At this point in time, the College is not making any regular fire safety, general safety inspections of the fraternities."**[40]

Appellant attempted to object to the motion,[41] but Brotman refused to provide the Objection to the ZBA. The ZBA granted the College's motion. Following the rehearing, the ZBA reversed its prior decision and found that, despite the absence of an evidentiary record, the College provided appreciable health and safety oversight over the SAE Fraternity in 1976. The ZBA simply ignored Appellant's witnesses who were present in 1976 and the documents showing that the College *itself* disclaimed providing *any* oversight over the fraternities in and around 1976.[42]

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[36] *See* Email from Bernard Waugh, dated April 18, 2016 at 2:13 p.m., APP. at 1048. [Emphasis added.]
[37] *See* ZBA Decision dated April 18, 2016, APP. at 450.
[38] APP. 468 *et seq.*
[39] Appellant located the documents from 1972-1976 *in the same boxes* as those provided by the College. APP. 2299.
[40] *See* letter dated November 1, 1976 from John G. Skewes, Business Manager of the College. APP. at 1592-1593.
[41] APP. 1034, 2280 *et seq.*
[42] *See, e.g.,* Affidavit of 1975 SAE President, Dan Forsyth, APP. at 720-723; Affidavit of SAE President, John Evans, APP. at 725-26; Letter of James Morgan, APP. at 728; Holmes Letter, APP. at 665, ¶ 7; Letter from Blake Beckstrom, 1979-80 SAE President, APP. at 730-731; Letter of William H. Mitchell., APP. at 733-35; Affidavit of Jeremy Katz, APP. at 737-743; Letter of Brandon Hudgeons, SAE member 1990-1994, APP. at 773-74; Letter of Michael Davidson, APP. at 776; Letter of Patrick McCarthy, APP. at 781; Letter of Dan Linsalata, APP. at 785.

Appellant also argued at rehearing that the stated intent of Section 902 is "to permit or allow institutions to use their land for uses related to the purposes of the institutions." The ZBA rejected Appellant's argument that it met the definition of "Institution" and that the SAE Fraternity – including its ancillary residential component -- operates in conjunction with the uses of the Fraternal Institution, finding that the Trust was not the right "type" of institution to qualify. All other claims of Appellant were rejected. Appellant timely filed its appeal to the Superior Court. The trial court affirmed the ZBA decision.

SUMMARY OF THE ARGUMENT

The trial court erred by failing to rule that (1) the ZBA's Decision *was ultra vires* because the enabling statute does not empower the Town to sub-delegate its zoning authority to private third parties; and (2) the Ordinance on its face and as applied is unconstitutional because it grants to a private third party the ability to deprive property rights without guidance or limitation and is an unconstitutional delegation of legislative authority.

The trial court also erred by ignoring the clear language of the 1976 Zoning Ordinance which mandates that the Institution that owns the land may use its land for uses related to the purposes of that institution and that the Appellant is an "Institution" as defined under the Amended Zoning Ordinance. Therefore, Appellant is not in violation of Section 902.

Appellant's rights to equal protection of substantive due process were violated when the Town created classifications and discriminated between similarly situated between institutions and between fraternal land owners within the applicable zone.

The trial court failed to apply the correct legal timeframe of reference for nonconforming uses where Appellant carried its burden of proof where the *only* evidence adduced at the relevant time of the Ordinance's adoption in 1976 supported Appellant's claims.

Finally, the trial court erred in denying Appellant's claims of violation of procedural due process where, *inter alia*, different burdens of proof were required of landowners, Appellant presented evidence of coordination between the Town and Dartmouth College in achieving a result that favored Dartmouth College, and the Superior Court failed to apply the "Juror Standard" to Appellant's claims of bias of the Town and ZBA members.

ARGUMENT

I. SECTION 902 IS AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY, AND THE ZBA DECISION WAS UNCONSTITUTIONAL, ARBITRARY, CAPRICIOUS, AND *ULTRA VIRES*.

A. SECTION 902 REQUIRES DARTMOUTH'S ASSENT FOR A PRIVATE LANDOWNER TO OPERATE A STUDENT RESIDENCE

Section 902 of the 2015 Ordinance, defines a Student Residence as "[a] building designed for and occupied by students, and operated in conjunction with another institutional use."[43] A "Student Residence" is a use permitted *only* by the grant of a Special Exception.[44] A use allowed by special exception is a use which comes into existence via the issuance of a special exception. *See, 1808 Corporation v. Town of New Ipswich,* 161 N.H. 772 (2011). The process is non-discretionary.[45] A landowner cannot be *deemed or implied* to have received a special exception to operate as a Student Residence.[46]

Section 206.1 of the Zoning Ordinance states a special exception may be allowed if the ZBA determines the current existing use and the proposed future use of the property do not adversely affect: (A) the character of the area; (B) highways and sidewalks and use thereof in the area; and (C) town services and facilities. The record demonstrates that the ZBA has, prior to

[43] *See* Section 902 of the 2015 Ordinance is attached hereto.
[44] *See* Section 206 of the 2015 Ordinance is attached hereto.
[45] *Id.*
[46] *See* 2014 Tri-Kap Decision Case No. 37020-Z2014-42, APP. 1208.

2015, *exclusively* centered on whether the current existing use and the proposed future use of the fraternity property meet the conditions described in Section 206.1.[47] As this Court has ruled, if the requirements of a special exception are met, the zoning authority does not have the authority to refuse permission. *1808 Corp.*, 161 N.H at 777.

The ZBA has now determined that "another institution" means Dartmouth College, although there are numerous institutions in the "I" zone.[48] Given that the concept of "recognition" did not exist in 1976, the ZBA concluded that "in conjunction with" means "the *potential* for health and safety oversight" by the College.[49] For the ZBA, the only acceptable manner to be conjoined is to receive the consent of the College, regardless of what that consent means; consent which may be conditioned, withheld or revoked at any time and for any reason. These terms are, however, undefined. In a similar matter, the Maine Supreme Court held:

> "Absent giving specific standards giving content to the [undefined] terms . . . . such proof is a matter of conjecture and results in a denial of equal protection of the laws to the property owner who is "reduce[d]. . .to a state of total uncertainty and . . . deprived of the use of his property." *Wakelin v. Town of Yarmouth*, 523 A.2d 575, 577 (Me. 1987).

Section 902 requires Dartmouth's consent before a private landowner can obtain a special exception to operate a Student Residence. Dartmouth reserves the right to recognize – or not recognize -- a student organization for any reason it chooses.[50] As a private institution which is *not* obligated to the constraints of constitutional process, its discretion to recognize is absolute, unregulated, and undefined. Yet, a denial of a special exception on the basis that Dartmouth did not consent would not survive constitutional scrutiny. In 1966, this Court held

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[47] *See,* presentation of historical determinations of the ZBA APP. at 558, 586-595.

- 2005 Decision in Case No. 37018-Z2005-30, granting Phi Delta Alpha special exception. APP. 1223.
- 2008 Decision in Case No. 33028-Z2008-03, granting Zeta Psi Special Exception, APP. at 1227, ¶¶ 2.
- 2014 Decision Case No. 37020-Z2014-42, granting Tri Cap Special Exception. APP. at 1212, ¶ 9.

[48] See Decision, APP. 449-450.

[49] *Id.*

[50] *See* Transcript of Appeal dated June 23, 2016, lines 13-21. APP. 2093.

> "[s]o far as the ordinance purports to confer upon the lake improvement association and the selectmen the authority and duty to decide whether an exception shall be permitted, it constitutes an unauthorized delegation of authority."

Fernald v. Bassett, 107 N.H. 282, 284 (1966).

The prohibition against delegating standardless power to private entities exists to protect against municipalities granting or denying special exceptions for reasons that are unconnected to the ordinance but that masquerade as quasi-judicial findings of fact. *Wakelin*, 523 A.2d at 577. If the College, simply by not recognizing an entity whose property otherwise complies, could cause the rejection of a special exception, Dartmouth would have power to effect zoning changes on property it does not own. This provides the College with the unchecked power to wage economic war. Dartmouth is an admitted adversary to the SAE Trust, both economically for rental income and ideologically for "values." As applied in the instant case, the College may arbitrarily render any fraternity property unusable and worthless, grabbing land for its own benefit. "[I]n the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. A statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311-312 (1936).

This case deviates *further* from the constitutional considerations of a denial of a special exception because the ZBA terminated a use allowed only by special exception even though Appellant never requested, required, or received a special exception. As a matter of law, its property is not, and has never been, a "Student Residence."[51] The Town terminated Appellant's

[51] Appellant's right to continue a nonconforming use is a vested right, secured not only by statute, but also by the State Constitution. Const. Pt. 1, Art. 23; RSA 674:19. Section 902 is the "*Definition*" of "Student Residence."

lawful nonconforming accessory residential use because Dartmouth severed its official relationship with Appellant's tenant. The Town never investigated what "health and safety services" the College purportedly provides.[52] The College admits that, prior to the Zoning Violation, as recent as 2015, it has provided little or no supervision over the fraternities:

> "Unlike affinity houses and living-learning communities, residential Greek organizations have no undergraduate advisors or Community Directors; hence supervision in these spaces by more mature community members is often inconsistent and only intermittent."[53]

The Town neither inquired into the lawfulness of Dartmouth's motives, nor did it limit Dartmouth's unfettered discretion. The Town's application of Section 902 thus grants to a Dartmouth College, who intends to "acquire the facilities" of fraternities, the unchecked ability to deprive them of their property.

Appellant challenges the validity and application of Section 902 of the Town's zoning ordinance. "A statute will not be construed to be unconstitutional where it is susceptible to a construction rendering it constitutional." *City of Claremont v. Truell,* 126 N.H. 30, 39 (1985). However, a zoning board's decision that exceeds the powers delegated to it by the zoning enabling legislation is *ultra vires. Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 754 (2007). For the reasons below, Section 902 of the Zoning Ordinance is unlawful, and incapable of a construction rendering it constitutional.

B. The Enabling Statute Does Not Empower the ZBA to Delegate Its Zoning Authority to Private Third Parties

It is well settled that towns have only that authority which is given them by the State. *Dugas v. Town of Conway*, 125 N.H. 175, 181–82 (1984). *Town of Jackson v. Town & Country Motor Inn, Inc.*, 120 N.H. 699, 701 (1980). "Municipalities that attempt to exercise . . . delegated

[52] Billing and internet services were lost via independent status. *See* Signet article, APP. 1279.
[53] *See* Report of the Presidential Steering Committee for Moving Dartmouth Forward, January 20, 2015. APP. 858.

power can only do so in a manner that is consistent with the provisions of the enabling statute." *Town of Tuftonboro v. Lakeside Colony, Inc.*, 119 N.H. 445, 448 (1979). It follows that towns have such powers as are *expressly granted* to them by the Legislature and such as are necessarily implied or incidental thereto. *Piper v. Meredith*, 110 N.H. 291, 295, 266 (1970). These granted powers must be interpreted and construed in the light of the police powers of the State which grants them. *Id.* The authority of a town, pursuant to its police power, to regulate the use of land and buildings by the enactment of zoning ordinances is not unlimited. *Loundsbury v. City of Keene,* 122 N.H. 1006, 1009 (1982). The police power is restricted by the express provisions of State statutes and by the specific guarantees of the State Constitution. *Burrows v. City of Keene,* 121 N.H. 590, 596 (1981). Both N.H. Const. pt. I, art. 2 and art. 12 are limitations on the so-called police power of the State and subdivisions thereof. *Id.* These constitutional provisions apply to non-conforming uses. *Loundsbury,* 122 N.H. at 1009. Hence, "a past use ... [creates] vested rights to a similar future use, so that a town may not unreasonably require the discontinuance of a nonconforming use." *Id.*

"[W]here zoning is exercised for considerations or purposes not embodied in an enabling act, it will be held invalid ... as an *ultra vires* enactment beyond the scope of the zoning authority delegated." 1 A.H. Rathkopf & D.A. Rathkopf, *Rathkopf's The Law of Zoning and Planning* § 1:11, at 1–35 (2005). Several notable restrictions place absolute and non-discretionary bars on zoning authority. RSA 674:19 protects the rights of nonconforming uses, while RSA 674:20 mandates uniform treatment for classifications of structures within a zone.

RSA 674:16 (V) provides: "In its exercise of the powers granted under this subdivision, the local legislative body of a city, town, [ ] may regulate and **control accessory uses on private land.**" While the Town is authorized under RSA 674:16 to make by-laws for purposes which fall

into the category of health, welfare and public safety, *Piper, supra*, 110 N.H. at 295, this statute does not allow the Town to sub-delegate its authority to control accessory uses on private land, such as Appellant's accessory residential use, to a third party. Consequently, the Town may not rely upon the College's discretionary affiliation justification to remove a vested right to enjoy one's own property. The ZBA's Decision violates the New Hampshire Constitution, Part I Article 37, RSA 674:19, exceeded legislative authority and is *ultra vires*.

C. The Town May Not Sub-Delegate Zoning Decisions to an Outside Party

When an ordinance delegates authority to an official or agency, subdelegation to a subordinate official or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent. *See U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 566 (D.C. Cir. 2004); *see also, Town of Freedom v. Gillespie*, 120 N.H. 576 (1980) (town was not barred from delegating authority to approve septic systems to town planning ZBA). However, while the Town may subdelegate its decision-making authority to *subordinates*, it may not subdelegate to outside private entities such as Dartmouth, absent affirmative authority to do so. *U.S. Telecom Ass'n.*, 359 F.3d 566. *See also, Louisiana Forestry Ass'n Inc. v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653, 671 (3d Cir. 2014). RSA 674:16 (V) provides no affirmative authority to the Town to delegate its decisions to Dartmouth.

D. The Town's Application of Section 902 is Unconstitutional Because it Effectively Grants to a Third Party - Which is Not Subject To Constitutional Restrictions - The Ability To Deprive Another of its Property Rights.

1. The Due Process Clause Guarantees the Protection of the Individual Against Arbitrary Action of the Government

No person may be deprived of "life, liberty, or property, without due process of law." N.H. Const. pt. 1, art. 1; U.S. Const. amend. V, XIV, § 1. That proscription applies fully to a state's

political subdivisions, including municipalities and municipal agencies. *Home Tel. & Tel. Co. v. City of Los Angeles,* 227 U.S. 278, 286-87 (1913). The touchstone of this due process guarantee is the "protection of the individual against arbitrary action of government." *Wolff v. McDonnell,* 418 U.S. 539, 558 (1974).

The Due Process Clause requires that procedures for the exercise of municipal power be structured such that fundamental choices among competing municipal policies are resolved by a responsible organ of government. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 688-89 (1976). It also requires that a municipality protect individuals against the arbitrary exercise of municipal power by assuring that fundamental policy choices underlying the exercise of that power are articulated by some responsible organ of municipal government. *McGautha v. California* 402 U.S. 183, 256 (1971). Delegating authority to rule away from the accountable governmental body first entrusted with the power to an interested private party endangers civil liberties and makes the actual governing decision maker unaccountable. Relying on the College's self-interested decisions places State power out of control by the public. N.H. Const. Part II, Art. 5, Part I, Art. 29.

2. Section 902 is an Unconstitutional Delegation of Legislative Authority Because It Fails To Proscribe Standards For The Guidance and Limitation of Those in Whom Discretion Has Been Vested and Violates Appellant's Due Process Rights

The ZBA may not lawfully delegate its zoning powers to neighboring landowners. *Fernald v. Bassett, supra*, 107 N.H. 282. This non-delegation principle is especially compelling when a zoning ordinance is involved, because such legislation regulates the right to the enjoyment of private property.

This case is controlled by *Guillou v. State, Div. of Motor Vehicles*, 127 N.H. 579 (1986). In *Guillou,* this Court held that a statute authorizing Director of Motor Vehicles to suspend or

revoke a driver's license "for any cause which he may deem sufficient" was an unconstitutional delegation of legislative authority because the statute in question does not prescribe any policies or standards for determining whether a suspension or revocation is appropriate and, therefore a violation of due process. Of note, *Guillou* was a public safety case where the New Hampshire General Court specifically issued a legislative authorization to an agency with primary domain expertise in protecting public safety.

If the language of Section 902 ("in conjunction with another institutional use") means that a residential fraternity can exist *only* if recognized by Dartmouth, it unlawfully delegates to Dartmouth College an uncontrolled, arbitrary, and undefined power to impose a zoning restriction and to limit the use of properties owned by others. The Ordinance does not obligate Dartmouth either to recognize or derecognize organizations that meet a verifiable set of criteria, require the Zoning Administrator either to inquire as to the reason for the derecognition, or to set limits on Dartmouth's unfettered discretion to act in arbitrary and capricious manners. Nor does the Ordinance investigate whether the circumstances surrounding recognition benefit or harm the community. The SAE Fraternity was not given notice or a hearing prior to de-recognition. As applied, Section 902 effectively empowers a private third party to deny zoning status to "Student Residences," and exclusively hold for itself the power upon which the ZBA's right to authorize the use rests. Conditioning land use on a third party's purported but unverified provision of services, which may be changed or withdrawn for any reason or no reason is, by definition, arbitrary. Accordingly, Section 902 is repugnant to due process in that the Ordinance fails to establish the required constitutional standards and guidelines to govern the exercise of discretion by the neighboring landowner. It fails to guard against whim, arbitrariness, and capriciousness. It fails to assure uniformity in the operation of the law. And it fails to furnish criteria by which the

propriety, reasonableness, and legality of a zoning regulation may be weighed and tested. *Eubank v. City of Richmond*, 226 U.S. 137, 143–44 (1912). The delegation of standardless, discretionary power to local neighboring landowners is unlawful. *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 566 (D.C. Cir. 2004); *Shook v. District of Col. Fin. Resp. & Mgmt. Assist. Auth.*, 132 F.3d 775, 783–84 & n. 6 (D.C.Cir.1998).

The Town may not subdelegate power to the College to do indirectly what it may not do directly. *Burrows v. City of Keene*, 121 N.H. 590, 597 (1981). The Town may not go through "*whatever process we want*" to decide if a property is allowed to continue its uninterrupted use; Hanover is limited by law as to when it may allow or restrict use of property. *Dugas*, 125 N.H. at 181. By deferring to the College's arbitrary choice of affiliation, the Town has restricted the use of Appellant's property arbitrarily. Under the non-delegation rule, the ZBA may not vest in any other municipal authority an uncontrolled zoning discretion. The Town may not delegate to neighbors, such as Dartmouth, such unregulated power that it may not delegate to its own municipal branches. *A fortiori*, the Town's application of its Ordinance degrades Appellant's rights even more so than these seminal cases, and merits reversal.

Dartmouth, as an economic and ideological competitor to fraternities and a land-locked entity deprived of expansion prospects acquirable by legitimate means, has every reason to endorse the Town's new regime, as it fits into Dartmouth's stated plan:

> **Further, with respect to any organizations in privately-owned residences that are derecognized, the College should be prepared to (1) report the derecognized House to the Town of Hanover, to ensure compliance with any applicable zoning or other laws *and* (2) acquire their facilities and repurpose them for the College's residential, social and academic purposes.** [54]

[54] *See*, Report of the Presidential Steering Committee for Moving Dartmouth Forward, APP. 862.

The College "reported" a zoning violation with the purpose to cause the fraternity to shut down and the house to become vacant. The College has unambiguous economic motives. "[A] bare . . . desire to harm a politically unpopular group" is not a legitimate state interest. *U.S. Dept. of Agriculture v. Moreno,* 413 U.S. 528, 534 (1973).

Section 902 is unconstitutional facially and as-applied since the use and enjoyment of Appellant's property requires affiliation with another institution under an ordinance that delegates standardless discretionary power to local neighboring landowners, resulting in virtually unreviewable restraints on Appellant's constitutional rights. *Guillou*, 127 N.H. 579. *See also Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

II. THE TOWN HAS ENGAGED IN A TAKING BY RESTRICTING THE ACCESSORY RESIDENTIAL USE FROM THE PRINCIPAL USE AS A LAWFUL NONCONFORMING FRATERNITY

The ZBA found that "the property involved has operated as a college fraternity since it was first constructed between 1928-1931."[55] Prior to the adoption of the 1976 Ordinance, fraternities were permitted uses as a matter of right; after the adoption of Ordinance, fraternities were not permitted at all, unless they were statutorily protected as lawfully nonconforming. The Town admits that, since at least 1976, the present use of the property is lawfully nonconforming.[56] At the time of the 2016 violation, Appellant was using its property as a fraternity.[57] Because the Appellant's pre-1931 use of the Property existed prior to the enactment of the 1976 Ordinance with greater restrictions on use, the plain language of RSA 674:19 states that Appellant has no

[55] APP. at 450 at ¶ 5.
[56] *See* Hanover Answer at ¶102 which admits that "Given that Appellant's use of the Property as a fraternity house was established prior to the enactment of the Zoning Ordinance, the present use is a lawful, pre-existing nonconforming use and not a use permitted by special exception."
[57] *Holmes Letter*, APP. at 668, ¶ 26.

obligation to comply with any aspect of the subsequently-enacted ordinance or amendments thereto—particularly requiring operation "in conjunction with" another institutional use.

In denying Appellant's claim of a taking, the trial court confined the ZBA Decision to restricting the "continued use of the property *as a residence*" holding that, even if Appellant could no longer house students, it could nonetheless continue using the Property for its Fraternal Use:

> "[t]he question [before the Court] is not whether SAE's use of the building as a fraternity house was nonconforming, but whether its use of the building as a *student residence* was nonconforming with the 'in conjunction with' requirement" (Order at 6); and "[t]he certified record does not reflect any Town action that would prevent members of SAE from assembling, either publicly or in the fraternity house, to discuss or publish their views." (Order at 10)

The trial court erred by failing to rule that severing the accessory residential use of the property from its principal lawful nonconforming use as a Fraternity is a taking since it denies Appellant of the economically viable use -- and substantially destroys the value of -- its Property.

Part I, article 12 of the New Hampshire Constitution provides that "no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." Part I, article 12-a prohibits the taking of property for the benefit of a private party, such as Dartmouth. A zoning ordinance effects an unconstitutional taking if its application "to a particular parcel denies the owner an economically viable use of his or her land." *Buskey v. Town of Hanover,* 133 N.H. 318, 322 (1990). Zoning regulations that limit economic uses of property and substantially destroy its value are unconstitutional. *Id.* at 324.

Appellant's Property was built to be used as a gathering hall for Fraternity Uses.[58] Although a maximum of 18 individuals may reside full time in the property, *the building is explicitly designed to be used as a place of congregation* and is certified by the Town for

[58] Holmes Letter, APP. 666.

occupancy in excess of 250 people.[59] The accessory rental of a small portion of the building provides primary financial support for the entire property.

The total amount of residential space is less than one quarter of the square footage.[60] The rest of the property is utilized by fraternity members whether or not residential occupants are on the premises or not.[61] Members meet, study, entertain, perform community service and socialize on the premise.[62] This manner of use is highly differentiated to a typical multi-person residential structure like a dormitory or apartment building. The Fraternity House does not exist to serve as solely a living area to 18 individuals. It serves to act as a fraternal house for private and public events to 100 local members who may be students living elsewhere and over 1,300 worldwide members. While 2% of the fraternity's members reside in the facility that residency is an accessory to its fraternal purpose, supporting it financially.

The accessory use doctrine functions as a response to the impossibility of providing expressly by zoning ordinance for every possible lawful use. *Town of Salem v. Durrett,* 125 N.H. 29, 32 (1984). When a given use of land is not explicitly allowed, it is nonetheless permissible if it may be said to be accessory to a use that is expressly permitted. *Id.* "An accessory use is not the principal use of the property, but rather a use occasioned by the principal use and subordinate to it." *Forster v. Town of Henniker*, 167 N.H. 745 (2015). "An owner of property seeking to engage in an accessory use need not apply for a special exception, so long as the accessory use is incidental to a permitted principal use." *Id.*

[59] *See* Certificate from Town of Hanover Fire Department, Office of Fire Prevention, APP. 1467.
[60] Holmes Letter, APP. 666.
[61] *Id.*
[62] *Id.*

The Town considers the residential component as an accessory to the lawful nonconforming use as a fraternity. In May 2001 the College "permanently" de-recognized the fraternity chapter of Zeta Psi.[63] Zeta Psi sought to lease a portion of the house to the offices of the Dartmouth Review and applied for a use permit.[64] Despite the fact that the College had de-recognized Zeta Psi two years earlier, the Zoning Administrator notified the landowner that, "[t]he principal use on this lot is a legal, pre-existing fraternity," and leasing to the Dartmouth Review was not ancillary to that use as a fraternity.[65] The Zoning Administrator specifically acknowledged that the fraternal Institution of Zeta Psi had the legal right to use the facility as a "student residence" because it was "'incidental to' the principal use [as a fraternity]."[66] On appeal in 2003, the ZBA affirmed the Zoning Administrator's decision that the Fraternal Institution was a lawful, non-conforming use as a fraternity with an accessory use as a residence, but that a lease to the Dartmouth Review was not ancillary to that use.[67]

The location and configuration of the Property renders it unusable for any private purpose other than a chapter house. The Trust is in the business of leasing the Fraternity House to a fraternity and derives its income from the payment of rent by the Fraternity. The Fraternity derives the bulk of its operating budget from sub-leasing the property to its residential members. These funds go toward upkeep of the physical plant, expenses for its significant property taxes, and for its social, political, and religious activities, and philanthropy for the wider community. Grievous harm would befall it if it lost its ability to derive income.

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[63] App. 245.
[64] APP. at 249.
[65] *Id.*
[66] *Id.*
[67] APP. at 252-255.

The nonconforming use of the property has been taken because the Town has restricted the Property's accessory use based on the College's arbitrary determination of affiliation. "Arbitrary or unreasonable restrictions which substantially deprive the owner of the economically viable use of his land in order to benefit the public in some way constitute a taking within the meaning of our New Hampshire Constitution." *Sanderson v. Town of Candia*, 146 N.H. 598, 599 (2001). The action to destroy and diminish all enjoyment of the Appellant's land exclusively accrues to its large and politically powerful neighbor, the College. The Town's enforcement of Section 902 is an unconstitutional taking of Appellant's fundamental right to economically viable use its Property. The Town's actions facilitating Dartmouth's ability to acquire Appellant's property constitute an unlawful taking in violation of the N.H. Constitution, Article I, Section 12-a.

III. APPELLANT IS THE "INSTITUTION" THAT OWNS THE LAND AND THEREFORE, IS NOT IN VIOLATION OF SECTION 902

A. THE APPELLANT IS AN "INSTITUTION" AS DEFINED UNDER THE ORDINANCE

The 1976 Ordinance defines "Institution" as follows: "Facilities primarily engaged in **public services** including, **but not limited to**, *education*, research, health, and public worship." The plain language of the definition is clear that the Town intended to broadly define institutions. "Facilities" is used in the plural sense, identifying that there could be many institutional facilities within the zone. "Public services" is similarly defined broadly, listing some examples of public services but adding "including, but not limited to" in order to ensure that the term is interpreted as broadly as possible. The Town did not vote to limit "institutions" to specific institutions, or to provide a very limited and rigorous set of qualifications for defining an institution. All institutions are defined in the same definition and same class, however large or small. Dartmouth, too, is an exclusive *private* institution.

Appellant produced uncontroverted evidence that it met the definition of "Institution" in the Ordinance.[68] Appellant is an Institution because it because it owns a facility "primarily engaged in public services including, but not limited to education, research, health, and public worship." In response to this, the ZBA responded by classifying institutions as "major" and "minor," stating that the Appellant is not the *type* of institution that the voters were referring to.[69] This is reversible error and an *ultra vires* exercise of police power in contravention to RSA 674:20, which expressly mandates uniformity among classes within the institution zone.

B. THE 1976 ZONING ORDINANCE MANDATES THAT THE INSTITUTION THAT OWNS THE LAND MAY USE ITS LAND FOR USES RELATED TO THE PURPOSES OF THE INSTITUTION

The ZBA's decision that the Zoning Ordinance requires that the Property be used in conjunction with Dartmouth College is erroneous since Dartmouth College is not the Institution that owns the land. The trial court declined to rule on this issue.

In 1976, Hanover amended its Zoning Ordinance by creating a new "I" Institutional zone. The "Objective" of the 1976 Ordinance defines the "I" Institution zone as follows:

> **It is the intent of this provision to permit or allow institutions to use their land for uses related to the purposes of the institutions.** APP. at 708.

It is an elementary principle of construing regulatory language that all words must be given effect, and that the legislative body will not be presumed to have enacted superfluous or redundant words. *State v. Burke*, 162 N.H. 459, 461 (2011). The possessive pronoun "their" and the plural word "institutions" were intentionally drafted to show that the many institutions that own the land in the "I" zone could use their land in relation to their primary function.

Prior ZBA rulings support this interpretation. In 2003, the ZBA found that Zeta Psi was the Institution that owned the land and that the Zoning Ordinance permitted it to use its land for

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[68] APP. 1812-1814.
[69] Decision at ¶ 14 (c), APP. 1137, 1142-43.

uses related to the purposes of the Institution, such as a student residence, but not for purposes *not* related to the Institution, such as the Dartmouth Review.[70] Similarly, in response to an inquiry by agents from the Gamma Delta Chi seeking clarification of the zoning significance of an impending de-recognition by the College, in 2011 the Zoning Administrator opined that derecognition would not affect its zoning status because Gamma Delta is the institution that owns the land.[71] The only requirement that can logically be read into the definition is that the student residence must be operated in conjunction with another institutional use of the landowner.[72] Since Dartmouth does not own the Property, this disqualifies Dartmouth as "the institution" contemplated. Compliance with the current Ordinance is achieved through operation in conjunction with the institution owning the land. The Town has determined that similarly-situated fraternities are "Institution(s)" and that a student residence is related to the purposes of the Fraternal Institution.[73] Appellant does not violate Section 902 because it, like Zeta Psi and Gamma Delta, is the Institution that owns the land and operates *its* land for uses related to the purposes of the institution.

The Town's proposed reading produces an absurd result. If all property had to be operated in conjunction with *another* institution's purposes, Dartmouth would not be able to operate its own student residences without the approval of a private third party. The clear purpose of the ordinance is to allow institutions to maximize use of their own land, not tether them others.

The Ordinance requires that a Student Residence be operated in conjunction with *another* institutional use. Even if, *arguendo*, the SAE Fraternal Institution is not an "Institution," Appellant still operates its facility in conjunction with yet *another* institutional use. Several years prior to

[70] Town of Hanover ZBA Case No. 33028-Z2003-15, Section 3, dated July 17, 2003, APP. at 793.
[71] *See* Brotman email in the Gamma Delta inquiry dated October 21, 2011, APP. at 814.
[72] *Id.*
[73] APP. at 814; APP. at 793.

the derecognition, the Fraternity House affiliated itself with ExL.[74] The Town admits that ExL University is an "Institution," as defined by the Ordinance, and that the SAE "is affiliated" with this Institution. *See* Hanover Answer ¶ 17. A special exception is non-discretionary when its terms are met. It is impossible for the Town to admit the facts demonstrative of compliance and simultaneously deny compliance with the terms of the Ordinance. *1808 Corp.*, 161 N.H. 772.

IV. THE TRIAL COURT ERRED BY FAILING TO RULE THAT APPELLANT'S RIGHTS TO EQUAL PROTECTION WERE VIOLATED WHEN THE TOWN INTRODUCED CLASSIFICATIONS DISCRIMINATING BETWEEN SIMILARLY-SITUATED INSTITUTIONS AND FRATERNAL LAND OWNERS

The trial court erred as a matter of law by denying Appellant's claims that the Town created classifications of (1) institutions in the "Institution" zone, (2) fraternal institutions existing prior to the Steering Committee Report and those thereafter, which is a violation of Appellant's equal protection of substantive due process rights under the State and Federal Constitutions. Devoting a single sentence to these two claims, the trial court held (Order at 7):

> "[T]he court finds no meaningful distinction between the [equal protection claim based on classifications] claim and SAE's selective enforcement claim. Additionally, SAE has not adduced *any* evidence that the ZBA consciously, intentionally discriminated against it."

However, the trial court did not, in fact, address Appellant's claims and it erred in two respects: (1) by failing to find that the Town created classifications of institutions, fraternal and otherwise, which treated Appellant differently; and (2) by failing to place the burden of justifying the classification on the Town, as enunciated in *Cmty. Res. for Justice*, for evaluating an equal protection claim once the establishment of classifications has been shown.

"[A]n equal protection challenge to an ordinance is an assertion that the government impermissibly established classifications and, therefore, treated similarly situated individuals in a different manner." *Taylor v. Town of Plaistow*, 152 N.H. 142, 146 (2005). Classifications

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[74] *Id.*

involving "important substantive rights" are subject to intermediate scrutiny. *Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. at 757–58. The burden of justifying the classification rests with the government (in this case, the Town). *Id.* To meet this burden, the Town may not rely upon justifications that are hypothesized or "invented *post hoc* in response to litigation," nor upon "overbroad generalizations." *Id.*

A. THE ZBA VIOLATED PETITIONER'S RIGHTS WHEN IT CREATED CLASSIFICATIONS OF INSTITUTIONS AS A MEANS OF DEPRIVING APPELLANT OF AN IMPORTANT SUBSTANTIVE RIGHT TO USE ITS PROPERTY.

Appellant meets the definition of institution because its facility is "primarily engaged in public services including, *but not limited to* education, research, health, and public worship," discussed *supra*. The ZBA determined that Appellant's Institution is not the *type* of Institution the voters of Hanover intended, distinguishing between "major" and "minor" institutions.[75] In so finding, the ZBA intentionally disregarded the language of the voter-approved Ordinance, the uniformity mandate of RSA 674:20, and violated the Appellant's constitutional rights to equal protection by creating new and non-uniform classes of Institutions in the "I" zone.

The ZBA denies that Appellant is an "Institution" as contemplated above because it is not a "major" institution.[76] The ZBA classified between "institutions it believes the voters of Hanover intended" and those institutions "they believe did not." By doing so, the ZBA has established a classification of institutions based on distinctions not found in the language of the Zoning Ordinance, and its justification for creating the disparate treatment is distressingly thin, particularly where the ZBA has contradicted its own historical rulings. The ZBA repeatedly considered Fraternal Institutions as "Institutions" contemplated under the Ordinance.[77] The ZBA considered

[75] Decision at ¶ 14 (c), APP. 1137, 1142-43.
[76] Decision at para. 14(c), APP. 1137, 1142-43.
[77] *See* Decision, Case No. 33028-Z2003-15, July 3, 2003, APP. at 1445-46. This Decision was signed by ZBA member Arthur Gardiner who similarly heard Appellant's appeal.

Zeta Psi "the institution that owned the land" and was willing to "permit or allow [the] institution to use [its] land for uses related to the purposes of the institution []." APP. 1445. Likewise, Brotman's 2011 advisory email to Gamma Delta Chi: "In the situation you have described, ***the institution having ownership in the land is the fraternal/Greek organization.***" The Institution that owns the property at 38 College Street is similarly situated to Zeta Psi and Gamma Delta Chi.

The ZBA has scoffed at Appellant's evidence that a primary purpose of the SAE Fraternal Institution is education.[78] Yet in 1998 when Dartmouth wanted to build a meeting house with alcoholic service facilities for its Rugby club, it argued, and the ZBA agreed, that no special exception was required because it was considered an "educational" use.[79] Its purpose is to provide social place, defined as a drinking room for rugby players for use *after they complete a physical education regimen which exclusively occurs outside on nearby sports fields*.[80] The ZBA believed the rugby club's drinking facility to be an "educational purpose," but the 38 College Street fraternity house, complete with a library, seven study rooms, and gathering space for public events and speakers is not. Hanover ZBA approval revolves not on use, law, and facts, but on whether the property owner is Dartmouth, which may use its land as it chooses, and any other entity, which may not, which was -- *even in 1998* -- a concern for the Town's own attorneys.[81]

The Town has created class of Institutions in the Institutional District that it treats differently from the Appellant. The SAE Trust is an institution that owns land in the Institutional Zone, similar to other institutions. All institutions that own land within the zone are entitled to use their land in a manner consistent with their institution. Beyond its hypothetical and overbroad

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[78] Decision at para. 14(c), APP. 1137, 1142-43.
[79] *See* Decision for Rugby Club, APP. 1240-44.
[80] A "tap room" is a room built for the distribution of alcoholic beverages where large amounts of beer in kegs can be "tapped" for common distribution and service to large audiences of visitors.
[81] *See* Letter from Walter Mitchell to Town of Hanover, APP. 1245.

generalization as to what the voters of Hanover meant by the word "institution," the ZBA has not demonstrated that its distinction between "major" and "minor" institutions in allocating the rights and benefits of the zoning ordinance is substantially related to an important governmental objective, and once again, it has impermissibly relied upon justifications that are hypothesized or invented *post hoc* in response to litigation. Accordingly, the Town has violated Appellant's constitutional rights to equal protection, and the trial court erred in upholding the ZBA when it refused to apply the intermediate scrutiny standard to Appellant's claims.

B. The ZBA Violated Appellant's Rights When It Created Classifications of Fraternal Institutions Existing Pre-2015 as a Means of Depriving Appellant of its Important Substantive Right to Use its Property.

As applied, Section 902 creates a classification of fraternal institutions that existed prior to 2015, the year that Dartmouth weaponized zoning.

Prior to 2015, the Town never enforced Section 902 against a landowner whose fraternity tenant had severed ties with Dartmouth College, even where the Town was on notice of the change in relationship. Brotman admitted that she could not remember *ever* issuing a notice of violation to any fraternity that had been derecognized. [82] Appellant has shown nine (9) such instances of deliberate and knowing non-enforcement. The trial court found:

> "even if the phrase 'in conjunction with' is ambiguous, the ZBA has consistently interpreted it to mean that the College must have 'appreciable oversight of health and safety issues at the Fraternity.' [ ] As the ZBA noted in its decision, the only other time it has interpreted the phrase was in the *Alpha Delta* case, where the ZBA applied the exact same application."[83] Order at 9.

The trial court incorrectly held that "SAE has not adduced *any* evidence that the ZBA consciously, intentionally discriminated against it" even though Appellant identified 9 *specific instances* where fraternities *situated similarly in all relevant aspects* were treated differently,"

[82] *See* deposition of Brotman. APP. 1501, 1505.
[83] The consistent findings of the prior 39 years in the Certified Record were ignored and replaced with reasoning that the solitary finding after 2015 was consistent to itself.

Cordi-Allen v. Conlon, 494 F.3d 245, 250-51 (1st Cir. 2007), where all 9 fraternities continued to operate and occupied their fraternity houses with no enforcement action from the Town. The Town's selective enforcement of the Zoning Ordinance marked by its 2015 policy change indisputably was conscious and intentional. The Town was specifically notified that the College had de-recognized these fraternities, and yet the Town did not find these fraternities in violation of Section 902 of the zoning ordinance.[84]

In 2015, the Town's conscious and deliberate non-enforcement of the "in conjunction with language" suddenly changed. Dartmouth's announced goal to acquire privately-owned fraternity houses by reporting de-recognition to the Town privately and illegally legislated a shift in zoning interpretation and enforcement policy to one contrary to three decades of precedent and policy.

In a prior case, Zoning Administrator Brotman was deposed and asked to what the extent of the necessary relationship between the college and the fraternity is to be considered "in conjunction with." She responded: "I don't know that I can answer that."[85] In light of this, her enforcement of this new interpretation of the Zoning Ordinance was arbitrary, not reasonable, *and* clearly did not rest upon some ground of difference having a fair and substantial relation to the interpretation of the ordinance. *Cmty. Res. for Justice*, 154 N.H. at 758.

V. THE TRIAL COURT ERRED BY FAILING TO APPLY THE CORRECT LEGAL TIMEFRAME OF REFERENCE FOR NONCONFORMING USES

This Court will uphold the trial court's decision affirming a ZBA decision on appeal unless the evidence does not support it or it is legally erroneous. *Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. at 751. It "may set aside a ZBA decision if it finds by the balance of

[84] *See* Letters from Dartmouth College notifying Town of de-recognition in 1991, APP. 1282-83. *See also*, February 8, 2008, Case No. 33028-Z2008-03 Zeta Psi application for Special Exception, APP. at 1227, ¶¶ 2, 15: "The fraternity house was constructed more than 80 years ago, long before the first Adopted Zoning Ordinance was enacted, has since that time provided housing for up to 16 students."

[85] *See* Transcript of Deposition of Brotman Deposition, APP. at 1511, lines 12-179.

probabilities, based on the evidence before [it], that the ZBA's decision was unreasonable." *Simplex Technologies v. Town of Newington,* 145 N.H. 727, 729 (2001).

The trial court found that "the College produced evidence tending to prove that it provided fire safety services from 1949 to 1973" and that "SAE produced evidence tending to prove that the College never provided Health or Safety services to it from 1972 to 1976." But then it ruled that "there was sufficient evidence for the ZBA to reasonably conclude that SAE operated "in conjunction with" the College in 1976. Order at 7. The trial court erred as a matter of fact and law by failing to apply the correct legal timeframe of reference for nonconforming uses.

A. THE *ONLY* RELEVANT TIME TO CONSIDER IN THIS APPEAL IS THE TIME PERTAINING TO THE PERIOD AROUND 1976 WHEN THE ZONING ORDINANCE WAS AMENDED.

In its original Decision after the first hearing, the ZBA ruled that some of Appellant's evidence was **not relevant** to its inquiry because it was outside the applicable time period:

> "The packet of exhibits contains additional testimony, but not with relevant personal knowledge **pertaining to the period around 1976**, which is the period when the 1976 Zoning Ordinance – with its requirement that a student residence be "operated in conjunction with another institutional use" – was enacted. **The law is clear that from the standpoint of proving a lawful nonconforming use, the time of enactment is the crucial point of time,** *see, e.g. Residents Defending Their Homes v. Lone Pine Hunters' Club, Inc.*, 155 N.H. 486 (2007)." Decision at ¶¶8, 10. [Bold emphasis added.]

"Nonconforming uses relate to conditions which exist prior to the time a zoning ordinance is passed." *New London Land Use Ass'n v. New London Zoning Bd. of* Adjustment, 130 N.H 510, 515 (1988). As H. Bernard Waugh has written:

> "What you need to know is what was happening on the property when the zoning restriction was first enacted. That's the *only* relevant time."[86]

By law and the ZBA's own standards, Dartmouth needed to provide evidence containing *relevant personal knowledge* that it exercised "*appreciable* health or safety supervision or

[86] *See* H. Bernard Waugh, Jr.: "*Grandfathered. The Law of Nonconforming Uses and Vested Rights* (2009 Ed.)," page 5 at https://www.nh.gov/oep/resource-library/land- use/documents/ grandfathered-nonconforming-uses.pdf.

oversight over the resident lives of students living at SAE" *during* the period around 1976. The record shows that it did not.

The ZBA ignored the facts presented by multiple affiants for the ZBA to question and cross-examine. The ZBA further ignored the information showing evidence having been in Dartmouth's possession that controverted Dartmouth's stated position and testimony. Even though Dartmouth proffered no witness to provide evidence about the status of the relationship in 1976,[87] at the College's request, [88] the ZBA *inferred* that the College provided *appreciable* health and safety oversight to SAE in or around 1976, relying only on unverified and unsubstantiated documents that contained no relevant personal knowledge pertaining to the period around 1976. No reasonable fact finder could have made that determination given Appellant's documents dating between 1972 to 1976 and testimony from people with actual knowledge of the relationship between the College and the SAE fraternity in or around 1976 showing that the College itself disclaimed involvement in health and safety oversight of fraternities.

The Court committed legal error. Although the ZBA may be entitled to a presumption of validity on its finding of facts, the ZBA is entitled to no level of deference for its determination to infer non-existent facts to back into its desired outcome. In the initial ZBA case, Appellant's submissions from periods *other than the applicable* time were ignored.[89] The purported factual submissions by Dartmouth from times other than the relevant period must also be ignored. The

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[87] *See, e.g.,* Affidavit of 1975 SAE President, Dan Forsyth, APP. at 720-723; Affidavit of SAE President, John Evans, APP. at 725-26; Letter of James Morgan, APP. at 728; Holmes Letter, APP. at 665, ¶ 7; Letter from Blake Beckstrom, 1979-80 SAE President, APP. at 730-731; Letter of William H. Mitchell., APP. at 733-35; Affidavit of Jeremy Katz, APP. at 737-743; Letter of Brandon Hudgeons, SAE member 1990-1994, APP. at 773-74; Letter of Michael Davidson, APP. at 776; Letter of Patrick McCarthy, APP. at 781; Letter of Dan Linsalata, APP. at 785.

[88] "**I think that's a reasonable *inference* to draw from the evidence that's in front of you.**" *See,* transcript of the hearing conducted on June 23, 2016. APP. 2098-2099.

[89] *See* ZBA Decision, APP. 452: "The packet of exhibits contains additional testimony, **but not with relevant personal knowledge pertaining to the period around 1976**, which is the period when the 1976 [ ] Ordinance."

evidentiary record from the only relevant time demonstrates that the College expressly disavowed any and all responsibility over the fraternities.

The failure of the ZBA and trial court to apply the correct legal timeframe of reference to prove a nonconforming use deprived Appellant of the correct determination that the College did not provide health and safety oversight over the SAE Fraternity in the only relevant timeframe around 1976. The decision is thus both unreasonable and an error of law and has illegally deprived Appellant of its rights under RSA 674:19 and NH Constitution Part I, Article 23.

VI. THE TOWN HAS DEPRIVED THE APPLICANT OF ITS PROCEDURAL DUE PROCESS RIGHTS

The Town violated Appellant's procedural due process rights in violation of N.H. Const. Part 1, Article 35 which guarantees the "right of every citizen to be tried by judges as impartial as the lot of humanity will admit." RSA 673:14(I) provides that "No member of a zoning ZBA of adjustment....shall participate in deciding or shall sit upon a hearing of any question which the ZBA is to decide in a judicial capacity if that member ... if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law." RSA 500-A:12.

In *Winslow v. Holderness Planning ZBA,* 125 N.H. 262 (1984) this Court held that if a disqualified person *takes part* in a decision of the ZBA, the decision itself will be invalid - even if that member's vote was not determinative of the outcome. *Winslow* is the leading case for the principle that courts have no tolerance, and will find an "invalidating bias" has occurred when a ZBA member is linked to "advocacy of a position" favoring one individual, which can be "demonstrated by hearing conduct or by the course of proceedings, that make plainly evident the 'closed mind' of the zoning decisionmaker." *Id.* at 264 (citation omitted).

Evidence of bias comes from Waugh's ex-parte communications[90] with the non-appearing counsel of *one sole abutter,*[91] after Dartmouth chose not to attend any of the hearings during the appeal. This contact created the "presumption of prejudice" which results from precisely this type of interaction between a juror and an adverse party. *State v. Rideout*, 143 N.H. 363, 364-68 (1999). Waugh thought it "critical" to give Dartmouth's *attorneys* a road map showing how the College might sandbag Appellant and change the Decision. The solicitation for the College to resubmit, in the face its interest as a *competing* landowner conveys to Dartmouth the power and authority to decide its own case – hardly a constitutionally sufficient method for evaluating property disputes.

Later that evening, the ZBA issued its 5-0 decision granting Appellant's appeal, but then, in an unprecedented qualification, Waugh wrote "...it is conceivable that contrary evidence could be adduced if a party with standing to request a rehearing (such as the College itself) were to present such evidence." Decision at ¶ 11. APP. at 452. This was *ultra vires* advocacy for Dartmouth, who waived its right to be a party by not appearing at the original appeal.

Dartmouth's legal office filed a motion for rehearing, submitting evidence that it "found" in its archives through 1972 but withholding evidence that **no** such services were being provided in or around 1976 when the Ordinance was adopted. The College did not allege legal error, provide information that it did not previously have in its possession, or assert that it was aggrieved in any way by the decision.[92] Appellant attempted to file an Objection to the College's motion with Brotman who refused to provide to the ZBA prior to its deliberation session.[93] Municipalities

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[90] *See* Email from Waugh, dated April 18, 2016 at 2:13 p.m., APP. at 1048.
[91] Other abutters did not receive similar notice.
[92] APP. 468 *et seq.* These are the standards required by both RSA 676:5, 677:2 and the ZBA's own stated policy. *See* APP. 2285 *et seq.* The College does not have standing under RSA 677:2 to seek a rehearing where "the only adverse impact that may be felt by [them] as a result of the ZBA's decision is that of increased competition with their businesses." *Nautilus of Exeter v. Town of Exeter,* 139 N.H. 450, 452 (1995).
[93] APP. at 1034, 2280. However, neither Brotman nor town employees, nor, for that matter, the ZBA's own published rules, could provide any justification for denying the filing of a party's Objection. APP. 1842.

have a constitutional obligation to provide procedural due process, notice and the opportunity to be heard. *Richmond Co. v. City of Concord,* 149 N.H. 312 (2003).

Waugh moved to grant Dartmouth's request he had solicited. When other ZBA members voiced concern that the requirements for rehearing were not met, Waugh voiced his opinion that the burden of proof on Dartmouth was *different and substantially less.*[94] Waugh then concurred with Arthur Gardiner's statement that "I don't think [the College] ha[s] the same burden to present it in the first instance."[95]

Waugh's actions have created the appearance of his bias and impartiality. Prejudgment bias undermines the due process right to a fair hearing. *See Winslow*, 125 N.H. at 269. The fact that Waugh did not participate in the vote denying Appellant's appeal after the rehearing is of no moment. The second hearing may never have happened but for Waugh's personal interventions. The proceedings were tainted to the point where it was impossible to "unscramble the eggs" given Waugh's direct and indirect assistance to the College. The Town's refusal to provide the ZBA with Appellant's objection the lower burden of proof required of Dartmouth versus the affected landowner, and the ZBA's improper grant of the College's motion in disregard of the law and its own policy in favor, shows that Appellant was deprived of its procedural due process rights under the Constitution. N.H. Const. pt. 1, art. 2, 14, 15, 35; U.S. Const. Amend. V, XIV, § 1.

CONCLUSION

For the reasons stated above, the Appellant respectfully requests that the Court find that the trial court erred in holding that the Appellant was in violation of the Zoning Ordinance.

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[94] *See* Transcript of Deliberative Session, June 2, 2016, APP. 1966-1968.
[95] *Id.* at APP.1974-1975.

CERTIFICATIONS

The undersigned certifies that the appealed decisions are in writing and are appended to this brief.

The undersigned certifies that the foregoing brief conforms with Supreme Court Rule 26(2), (3), and (4).

The undersigned certifies that this appeal has been served on opposing counsel.

REQUEST FOR ORAL ARGUMENT

The Appellant respectfully requests an oral argument.

May 1, 2018

Respectfully Submitted,

NH ALPHA OF SAE TRUST

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STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS. Docket No. 16-CV-283

New Hampshire Alpha of SAE Trust

v.

Town of Hanover, and
Town of Hanover Zoning Board of Adjustment

ORDER

The plaintiff, New Hampshire Alpha of SAE Trust ("SAE"), has filed a complaint against the defendants, the Town of Hanover ("Town") and the Town of Hanover Zoning Board of Adjustment ("ZBA"), appealing a ZBA decision pursuant to RSA 677:4 (Supp.2015). (Index # 1.) Specifically, SAE appeals the ZBA's July 18, 2016, decision denying its administrative appeal of the Town Zoning Administrator's February 12, 2016, administrative decision finding that SAE's use of its property at 38 College Street in Hanover violated the Town zoning ordinance because the property no longer constituted a "Student Residence," as defined by Section 902 of the ordinance. (C.R. at 16.) The court held a hearing on this matter on April 5, 2017. Thereafter, the New Hampshire Supreme Court decided a similar case in *Dartmouth Corp. of Alpha Delta v. Town of Hanover*, ___ N.H. ___, 159 A.3d 359 (2017) (hereinafter "*Alpha Delta*"), and this court gave the parties leave to file supplemental memoranda addressing the applicability of that case to the matter at bar. After review of the certified record, the pleadings, and the applicable law, the court AFFIRMS the ZBA's decision denying SAE's appeal of the Zoning Administrator's February 12, 2016 decision.

CLERK'S NOTICE DATE
3/2/17
CC: C Cole, L. Spector-Morgan

I. Factual and Procedural Background

The certified record supports the following relevant facts. SAE owns a fraternity house ("building" or "fraternity house") and surrounding property located at 38 College Street in Hanover (Tax Map 38, Lot 2). (C.R. at 43, 662–63, 1152.) The fraternity house was built in the late 1920's specifically to accommodate the Dartmouth College ("College") chapter of Sigma Alpha Epsilon. (C.R.. at 662.) Members of SAE have continuously occupied the building since 1931. (*Id.*) SAE derives income from SAE members who pay to live in the building. (C.R. at 663.)

From the moment that the Town adopted its first zoning ordinance in 1931 until the ordinance was amended in 1976, SAE was permitted to use the building as a fraternity or student residence as of right. (*See* C.R. at 672–75, 677–79, 691–94.) Since the Town amended its zoning ordinance in 1976, however, the property has been zoned as "'I' Institution." (*See* C.R. at 708.) The intent of the Institution zoning district is to "permit or allow institutions to use their land for uses related to the purposes of the institutions." (C.R. at 718.) As such, all property uses within the Institution district "must relate to the uses of the institutions having ownership interest in land in the district." (C.R. at 717.) Within the Institution district, neither student residences nor fraternities are permitted as of right, but student residences may be permitted by special exception. (C.R. at 718.) The zoning ordinance defines a "Student Residence" within the Institution district as a "building designed for and occupied by students *and operated in conjunction with another institutional use.*" (*See* Index # 9, at 2 (emphasis added).)[1]

[1] The Certified Record does not contain a full copy of the Town's 2015 Zoning Ordinance. (*See* C.R. at 16, 1137–45.) However, the parties have provided excerpts from relevant sections of the 2015 ordinance. (*See, e.g.*, Index #9, at 2; Index # 8 at 84.) Pursuant to N.H. R. Ev. 201(b)(4) & 201(c), the court takes judicial notice that the Town's Zoning Ordinance can be found online at: https://www.hanovernh.org/sites/hanovernh/files/uploads/2017_zo.pdf.

On February 4, 2016, the College learned that SAE's national charter had been suspended due to SAE's violations of its own health and safety policies. (C.R. at 1.) As a result, the College revoked its official recognition of SAE, including privileges like recognition as a college-approved housing facility and provision of insurance coverage. (*Id.*) Additionally, the College notified the Town that it no longer recognized SAE as a student organization. (*Id.*)

On February 12, 2016 the Town Zoning Administrator issued an administrative decision notifying SAE that its use of the fraternity house as a student residence violated Section 902 of the Town's zoning ordinance. (C.R. at 16.) The Administrator explained that the building was no longer being used "in conjunction with an institutional use," *i.e.* in conjunction with the College, and, therefore, no longer met the definition of a student residence within the Institution district. (*Id.*) The Administrator informed SAE that continued occupation of the building after March 15, 2016, would result in fines of $275.00 per day for every day that the violation continued. (*Id.*)

SAE timely appealed the administrative decision, and the ZBA held a public hearing on March 24 and 31, 2016 to consider SAE's appeal. (C.R. at 422–23, 432–33.) During the hearing, SAE argued that its use of the fraternity house was a lawful nonconforming use because SAE never operated the building "in conjunction with" the College. (*See* C.R. at 99.) No one presented evidence to contradict SAE's claims. (C.R. at 452.) On April 18, 2016, prior to the ZBA issuing its decision, ZBA member Bernie Waugh ("Waugh") sent an email to the Zoning Administrator, urging her to send the ZBA's decision to the College so that it would be aware of its "chance to ask for a rehearing." (C.R. at 1048.) Later that day, the ZBA published a decision granting SAE's appeal and finding that its use of the building as a student residence was a lawful

nonconforming use. (C.R. at 449–53.) In its notice of decision, the ZBA noted, "it is conceivable that contrary evidence could be adduced if a party with standing to request a rehearing (such as the College itself) were to present such evidence." (C.R. at 452.)

On May 16, 2016, the College requested a rehearing. (*See* C.R. at 456–72.) SAE objected to the rehearing on two grounds: first, that Waugh was biased against SAE; and second, that the College did not have standing to request a rehearing. (C.R. at 1026–39.) Despite these objections, the ZBA held a public rehearing on June 23, 2016. (C.R. at 1141.) While the ZBA did not rule on SAE's objections prior to the rehearing, it noted in its final decision that: (1) any potential bias on the part of Waugh was moot because he did not participate in the rehearing; (2) the ZBA had broad discretion to grant a rehearing; and (3) the College was an interested party. (C.R. at 1141–42.)

During the rehearing, the College produced evidence tending to prove that it provided fire safety services to its fraternities from 1949 to 1973, the College established an independent governing board for fraternities in 1971, and the College appointed a business manager for fraternity issues in 1972. (C.R. at 1137–38.) Conversely, SAE produced evidence tending to prove that the College never provided health or safety services to it from 1972 to 1976, the fraternity corporation was run and managed exclusively by members of SAE, and SAE otherwise attempted to maintain independence from the College. (C.R. at 1138–39.) The ZBA weighed this evidence and concluded in its July 18, 2016 decision that "Dartmouth College engaged in appreciable health and oversight activities with regard to the fraternities generally and to the appellant in particular prior to 1976, especially in the area of fire safety." (C.R. at 1140.) As such, the ZBA reversed its original decision, finding that SAE's use of the building was *not* nonconforming, and denied SAE's administrative appeal. (C.R. at 1140, 1145.)

On September 1, 2016, the ZBA denied SEA's request for a rehearing of its July 18th decision. (C.R. at 1665)

On September 29, 2016, SAE filed a complaint in this court appealing the ZBA's denial of its request for a rehearing and the Zoning Administrator's February 12, 2016 decision. pursuant to RSA 677:4. SAE contends in its appeal that the ZBA erred on numerous grounds, and that the ZBA's decision was unreasonable and/or illegal. The Town and the ZBA object.

II. Standard of Review

Any person aggrieved by a ZBA decision may appeal to the superior court. RSA 677:4. However, "[j]udicial review of zoning board decisions is limited." *Town of Bartlett Bd. of Selectmen v. Town of Bartlett Zoning Bd. of Adjustment*, 164 N.H. 757, 760 (2013). It is the province of the ZBA, not the trial court, to resolve conflicting evidence and determine issues of fact. *Lone Pine Hunters' Club, Inc. v. Town of Hollis*, 149 N.H. 668, 671 (2003). Accordingly, "[t]he superior court is obligated to treat the factual findings of . . . the zoning board . . . as *prima facie* lawful and reasonable and cannot set aside [its] decisions absent unreasonableness or an identified error of law." *Bayson Prop., Inc. v. City of Lebanon*, 150 N.H. 167, 170 (2003) (quoting *Hannigan v. City of Concord*, 144 N.H. 68, 70 (1999) (internal quotations and original brackets omitted); *see also Town of Bartlett Bd. of Selectmen*, 164 N.H. at 760; RSA 677:6. "The review by the superior court is not to determine whether it agrees with the zoning board of adjustment's [factual] findings, but to determine whether there is evidence upon which they could have been reasonably based." *Lone Pine Hunters' Club*, 149 N.H. at 670 (quotation omitted). The appealing party bears the burden of proving that the ZBA's decision was "unlawful or unreasonable." RSA 677:6; *47 Residents of Deering v. Town*

of Deering, 151 N.H. 795, 797 (2005).

III. Analysis

As a preliminary matter, the court will first address the implications of the *Alpha Delta* opinion upon several of SAE's claims in this case. The court will then address SAE's claims not resolved by *Alpha Delta*, namely that the zoning ordinance creates an unconstitutional class, the ZBA erred by not finding administrative gloss, the ZBA's decision amounted to an unconstitutional taking, the ZBA's decision violated SAE's rights to expressive association and procedural due process, and the ZBA's actions were *ultra vires*.

A. *Alpha Delta*

A number of SAE's claims raise questions of law that the New Hampshire Supreme Court definitively addressed in *Alpha Delta*. The court summarizes these claims as follows: (1) SAE's use of the building as a fraternity was lawfully nonconforming; (2) the ZBA's interpretation of the phrase "in conjunction with" was incorrect or illegal; and (3) the ZBA selectively enforced the zoning ordinance. Based upon *Alpha Delta*, this court finds that: (1) the question properly before it is not whether SAE's use of the building as a fraternity house was nonconforming with the zoning ordinance, but whether its use of the building as a student residence was nonconforming with the "in conjunction with" requirement; (2) the ZBA's interpretation of "in conjunction with" was neither unreasonable[2] nor illegal; and (3) "[t]he mere fact that a Town may have been lax in its enforcement [of the zoning ordinance] in the past does not prohibit enforcement in the present." *See Alpha Delta*, 159 A.3d at 364–368. In the

[2] In fact, the New Hampshire Supreme Court interpreted the "in conjunction with" requirement as "hav[ing] some union, association or combination with the College," which is significantly broader than the ZBA's determination that the College must have had "appreciable oversight of health and safety issues at the Fraternity." *Alpha Delta*, 159 A.3d at 368; C.R. at 1140 ¶ 11.

interest of judicial efficiency, and because SAE's questions of law are fully resolved by *Alpha Delta*, the court declines to address these issues further.

To the extent that these claims turn on questions of fact, however, the court finds 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.

B. Allegedly Unconstitutional Classification

Next, SAE asserts that the ZBA violated its equal protection and due process rights by creating an unconstitutional classification within the Town's Institution district. Notably, SAE does not argue that the zoning ordinance as drafted creates a classification, but rather that the ZBA itself created a classification by treating SAE "differently than other owners of fraternity properties within the same zone." (Pl. Mem. Law., Index #8, at 33.)

However, the court finds no meaningful distinction between this claim and SAE's selective enforcement claim. Additionally, SAE has not adduced *any* evidence to suggest that the ZBA consciously, intentionally discriminated against it. *See Anderson v. Motorsports Holdings, LLC*, 155 N.H. 491, 499 (2007) ("[The plaintiff] must show that the selective enforcement was a conscious, intentional discrimination."). Accordingly, the court finds that the ZBA did not create a classification through the application of

selective enforcement.

C. Administrative Gloss

SAE also contends that the ZBA erred by not finding administrative gloss. SAE argues that "[b]ecause the 'in conjunction with' language of Section 902 is ambiguous . . . , it should have been subject to the administrative gloss doctrine." (Pl. Mem. Law, Index # 8, at 42.) Furthermore, SAE claims that "[a]ll rulings prior to 2015 have found that fraternities that pre-exist the Zoning Ordinance are lawful nonconforming uses, and since at least the early 2000s the Town has been on actual notice of the status of 'recognition' relationships between Dartmouth and local privately-owned fraternities." (*Id.*) Therefore, SAE concludes that the ZBA should have found that an administrative gloss existed.

"The doctrine of administrative gloss is a rule of statutory construction." *Anderson*, 155 N.H. at 501. "An administrative gloss is placed on an ambiguous clause of a zoning ordinance when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference." *Id.* at 502 (quoting *Nash Family Inv. Props. v. Town of Hudson*, 139 N.H. 595, 602 (1995)).

As such, the phrase the "in conjunction with" as it appears in the ordinance must be ambiguous in order for the administrative gloss doctrine to apply. However, when the Supreme Court considered the same phrase in *Alpha Delta*, it held that "under the *unambiguous* meaning of the word 'conjunction,' [the fraternity] must have some union, association or combination with the College." 159 A.3d at 368 (emphasis added). Therefore, this court finds that the phrase "in conjunction with" is not ambiguous, and therefore is not subject to the administrative gloss doctrine.

Additionally, even if the phrase "in conjunction with" is ambiguous, the ZBA has consistently interpreted it to mean that the College must have "appreciable oversight of health and safety issues at the Fraternity." (*See* C.R. at 1140 ¶ 11.) As the ZBA noted in its decision, the only other time it has interpreted the phrase was in the *Alpha Delta* case, where the ZBA applied the same exact interpretation. (*See* C.R. at 1143–44.)

D. Alleged Taking

SAE next claims that the ZBA's decision amounts to a taking through direct action, inverse condemnation, and regulatory condemnation. However, "[i]t is beyond question that the zoning of property to promote the health, safety and general welfare of the community is a valid exercise of the police power which the State may delegate to municipalities." *Buskey v. Town of Hanover*, 133 N.H. 318, 322 (1990). Nevertheless, "[a]rbitrary or unreasonable restrictions which substantially deprive the owner of the economically viable use of his land in order to benefit the public in some way constitute a taking within the meaning of our New Hampshire Constitution." *Sanderson v. Town of Candia*, 146 N.H. 598, 599 (2001) (quotation omitted). As such, a zoning ordinance "is not confiscatory if it has a reasonable tendency to promote the public welfare and gives due regard, under all the facts and circumstances, to plaintiff's property rights." *Id.* (quotation omitted).

SAE alleges that the ZBA's decision "substantially destroys the value of Petitioner's Property" and that there "is no alternative use of the property to the landowner that can be accomplished on the land, and the building cannot be adequately repurposed to any other use without spending substantially more money than the building is worth." (Pl. Mem. Law, Index # 8, at 77–78.) However, these allegations are starkly contradicted by SAE's own claims that the fraternity house is also "used as a

gathering hall for Fraternity meetings, events, and alumni functions, an academic study space for members of the fraternity and their invited guests, as venue for alumni reunions and functions, and as a venue for guest speakers and visitors." (*Id.* at 2.)

Additionally, the February 12, 2016, administrative decision, upon which the ZBA ruled, was limited to "continued use of the property *as a residence.*" (C.R. at 16 (emphasis added); *see also* C.R. at 1137.) As the ZBA noted in its notice of decision, SAE "may use the property in any manner consistent with the Zoning Ordinance." (C.R. at 1145.) As such, the court finds that SAE has not demonstrated that the Town substantially deprived it of all economically viable uses of the property.

E. Expressive Association

SAE next alleges that the "ZBA's decision violates the fraternal institution's Federal and State constitutional rights to expressive association." (Pl. Mem. Law, Index # 8, at 109.) However, upon review of the pleadings and the evidence, it appears that SAE bases this claim upon a misinterpretation of the Zoning Administrator's February 12, 2016 administrative decision. In its Memorandum of Law, SAE states that "according the [sic] Zoning Administrator's recent letter to the Fraternity, it is apparently the Town's belief that the property is condemned and cannot even be occupied by a parked car if the Administrator's determination is upheld." (*Id.* at 112.)[3] However, the administrative decision only stated that "the continued use of the property as a residence is a violation of the zoning ordinance." (C.R. at 16.) Thus, the Zoning Administrator's decision, as upheld by the ZBA, is limited to use of SAE's property as a residence. The certified record does not reflect any Town action that would prevent the

[3] Because the plaintiff does not provide a citation to the Certified Record, it is unclear to which letter this argument refers. As such, the court assumes that the plaintiff is referring to the letter that the Zoning Administrator sent to SAE on February 12, 2016. (*See* C.R. at 16.)

members of SAE from assembling, either publicly or in the fraternity house, to discuss or publish their views.

F. Procedural Due Process

Finally, SAE alleges that the Town and the ZBA acted in an *ultra vires* capacity and deprived it of its procedural due process rights. First, SAE argues that the ZBA treated it unfairly by encouraging the College to present evidence to rebut SAE's claims. (*See* Pl. Mem. Law., Index # 8, at 115.) Second, SAE alleges that the ZBA's proceedings were unduly influenced by Waugh's involvement in the appeal. (*See id.* at 116.)

As to SAE's first contention, the court notes that "under RSA 674:33 . . . the ZBA has broad authority to hear and decide appeals on subjects within its jurisdiction." *Accurate Transport, Inc. v. Town of Derry*, 168 N.H. 108, 112 (2015). "[T]he zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from *and may make such order or decision as ought to be made.*" RSA 674:33, II (emphasis added). Furthermore, "any person directly affected [by a ZBA decision] may apply for a rehearing . . . and the board of adjustment . . . may grant such rehearing if in its opinion good reason therefor is stated in the motion." *See* RSA 676:5, I.

The court is not convinced that the ZBA acted unreasonably or *ultra vires* given its broad statutory authority to hear and decide administrative appeals. At the March 24 and 31, 2016 hearings, the ZBA had to determine if SAE and the College acted "in conjunction with" each other forty years ago. SAE was the only party present at those hearings, and it had reason to present *only* evidence that would prove it *did not* act in conjunction with the College. In order to reach a complete and accurate determination of the facts, it was logical and sensible for the ZBA, in its search for the truth, to provide

notice to a lawful party whose interest might have been adverse to SAE's. As such, it was reasonable for the ZBA to seek additional evidence from the College in order to make the decision that "ought to be made." RSA 674:33, II.

As to SAE's second contention, the court does not find sufficient evidence in the certified record to conclude that the ZBA was unduly influenced by Waugh's actions. SAE relies primarily on an email that Waugh sent to the Zoning Administrator on April 18, 2016. (*See* Pl. Mem. Law., Index # 8, at 119.) However, despite SAE's contentions to the contrary, Waugh's intentions cannot be gleaned from the email. Nor is the email evidence of an *ex parte* contact. 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* C.R. at 1141.) Furthermore, any bias on the part of Waugh was immaterial because he did not participate in the rehearing. Accordingly, the court finds that the ZBA did not violate SAE's procedural due process rights.

IV. Conclusion

For the foregoing reasons, the court AFFIRMS the ZBA's July 18, 2016, decision denying SAE's appeal from the Zoning Administrator's February 12, 2016, decision.

SO ORDERED, this 3rd day of August 2017.

Lawrence A. MacLeod, Jr.
Presiding Justice

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS.

Docket No. 16-CV-283

NH Alpha of SAE Trust

v.

Town of Hanover

ORDER on MOTION for RECONSIDERATION

The plaintiff has filed a Motion for Reconsideration (Index #21) pertaining to the court's order of August 3, 2017. (Index #20.) The defendant -Town and ZBA- objects. (Index #22.) Neither party requested a hearing on the plaintiff's motion, and the court finds that a hearing is not necessary to address the parties' pleadings. *See Super. Ct. Civ. R. 13(b).* Accordingly, the court acts on the pending motion on the basis of the pleadings and the record before it. *Id.*

Upon consideration of the pleadings and the arguments set forth therein, the court finds and holds that there are no issues of fact or law which were not previously considered by the court or which warrant a different decision than that determined by the court in its prior order.

As such, the Motion for Reconsideration is DENIED.

SO ORDERED, this 5th day of October 2017.

Lawrence A. MacLeod, Jr.
Presiding Justice

CLERK'S NOTICE DATE
10/6/17
CC: C. Cole, L. Spector-Morgan

Zoning Ordinance 2015

Hanover, New Hampshire

as adopted
March 2, 1976
and subsequently
amended through
May 12, 2015

TABLE 204.4
"I" Institution

Objective:
The chief present land use in this district, and the use that can be expected in the future, is institutional. This use has certain peculiar needs that best can be met by identifying it as a special district. In addition to the normal institutional uses in this area, certain complementary and support facilities are desirable as Special Exceptions. Because of the specialized nature of these institutions, these support and complementary land uses involve a selective list of residential, commercial and public uses which are desirable in such a district providing the necessary safeguards are incorporated. It is the intent of this provision to permit or allow institutions to use their land for uses related to the purposes of the institutions.

Uses*:

Permitted Uses:

1. Recreation, Outdoor
2. Education
3. Child Day Care Agency
4. Church
5. Hospital
6. Residential Institution
7. Office
8. Governmental Use:
   limited to office, public safety, education, recreation, parking
9. Medical Center
10. Warehouse
11. Use accessory to permitted use

Allowed by Special Exception:

1. Forestry
2. Essential Service
3. Sawmill, Temporary
4. One-Family Dwelling**
5. Two-Family Dwelling**
6. Multi-Family Dwelling**
7. Hotel
8. Student Residence
9. Private Club
10. Retail Sales
11. Commercial Service
12. Restaurant
13. Publishing
14. Care and Treatment of Animals
15. Communication/Telecommunication Facilities
16. Institutional Dining Facility
17. Research Laboratory
18. Park and Ride Facility
19. Parking Facility
20. Auto Storage
21. Passenger Station
22. Governmental Use: limited to service
23. Use accessory to Special Exception

TABLE 204.4 (continued)
"I" Institution

Area and Dimensions:
Lot Size:
The minimum lot size shall be 60,000 square feet, and the minimum frontage*** shall be 150 feet, except that:

A. If the lot is contiguous to other land in the same ownership, there shall be no minimum lot size or frontage***; or

B. Provided the lot size is not less than 15,000 square feet, and the footprint of structures constructed or to be constructed on the lot does not cover more than 25% of the gross area of the lot, the Board of Adjustment by Special Exception may waive the 60,000 square foot minimum Lot size and/or the 150 foot minimum frontage***.

* All uses in the "I" district whether permitted or allowed by SPECIAL EXCEPTION must relate to the uses of the institutions having ownership interest in land in the district.

** Minimum lot size shall be 10,000 square feet for the first family; 5,000 square feet for the second family; 2,000 square feet for each additional family.

*** For lots on the turnaround portion of cul-de-sacs, see Section 209.1.

Setback Requirements:
For Buildings on lots adjoining residential districts the minimum side and rear setbacks adjoining the districts shall be 75 feet. The required front setback shall be 20 feet. For properties in the Institution District on which a setback line is shown on the Downtown Area Setback Line map, the minimum front setback shall be the distance established by the line shown on the Downtown Area Setback Line map. In all other cases there shall be no side or rear setback requirements.

Maximum Height:
Sixty (60) feet, except that the maximum height shall be 35 feet within 150 feet of a residential district. In cases where the land slopes downward from the street, the building height measured on any face other than the front shall not exceed 75 feet. See also Section 209.4.

Hundred-Year (100-Year) Flood: see Base Flood.

Hydric Soil:
Soil that is saturated or flooded during a sufficient portion of the growing season to develop anaerobic conditions in the upper soil layers. Hydric soil delineations shall be determined based on the most recent edition of the manual "Field Indicators for Identifying Hydric Soils in New England" published by the New England Interstate Water Pollution Control. Hydric soils normally have 4 inches or more of organic soil or muck and/or a gray mineral soil with mottled gray and rust-colored mottles in the upper 12 inches of the soil.

Hydrophytic Vegetation:
Plant species adapted for life in water or in saturated soils. (See list of common hydrophytic indicator species for Hanover available at the Planning and Zoning Office)

Impact Fee:
A fee or assessment imposed upon development, including subdivision, building construction or other land use change, in order to help meet the needs occasioned by that development for the construction or improvement of capital facilities owned or operated by the Town of Hanover, including and limited to water treatment and distribution facilities; wastewater treatment and disposal facilities; sanitary sewers; storm water, drainage and flood control facilities; public road systems and rights-of-way; municipal office facilities; public school facilities; public safety facilities; solid waste collection, transfer, recycling, processing and disposal facilities; public library facilities; and public recreational facilities not including public open space.

Inclusionary Housing:

- **Affordable:** For a unit which will be sold, "affordable" at a certain income level means that the total of mortgage payment or rent, real estate tax, and homeowners insurance for the dwelling unit is no greater than 30% of that income level.

  For a unit which will be rented, "affordable" at a certain income level means that the rent plus any mandatory fees for the dwelling unit are no greater than 30% of that income level.
- **Density Bonus:** A density bonus allows a developer to produce more units in a development than the base number of units which would otherwise be allowable under the zoning applicable to that development.
- **Median Family Income (MFI):** The median income level for families in Grafton County as defined and published periodically by the United States Department of Housing and Urban Development (HUD) and used to determine the eligibility of applicants for HUD's assisted housing programs. Very-low income families are those earning less than 50% of MFI. Low-income families are those whose earnings do not exceed 80% of the MFI. Moderate income families are those earning more than 80% but less than 120% of the MFI. The MFI applicable to a proposed development shall be the most recent such publication prior to the submission of application for the approval of the development. The MFI applicable to the resale of an affordable dwelling unit in such development shall be the most recent such publication prior to the resale.

Institution:
Facilities primarily engaged in public services including, but not limited to, education, research, health, and public worship.

Section 205 Permitted Uses

Permitted uses are ONLY those uses that are SPECIFICALLY LISTED UNDER PERMITTED USES in Tables 204.1 through 204.9, AND are allowed only providing the standards established by this ordinance are met. Unless a Variance, a Special Exception, or action on an appeal from an administrative decision is required, the necessary permit may be issued by the Zoning Administrator.

Section 206 Special Exceptions

Certain uses of land and Buildings may be allowed as a Special Exception only by approval of the Board of Adjustment, if general and specific standards contained in this ordinance are complied with. Before allowing such Special Exception, the Board of Adjustment shall first determine that the proposed use will conform to such standards including:

206.1 Such proposed Special Exception use shall not adversely affect:

A. The character of the area in which the proposed use will be located;

B. The highways and sidewalks and use thereof located in the area;

C. Town services and facilities.

206.2 Such proposed Special Exception use shall comply with all other applicable specific standards in this ordinance.

206.3 To assist an applicant in minimizing impacts on water resources or water resource buffers so as to achieve the purposes of Section 702.1 of the Ordinance, a Special Exception from setback requirements of the Ordinance may be granted by the Board of Adjustment in its discretion if the Board finds there is no adverse effect on neighboring properties and the criteria of Section 206.1 are satisfied.

206.4 Specific additional standards for Special Exception Use in Natural Preserve District:
In the Natural Preserve District, in granting a Special Exception, the Board of Adjustment shall first determine that:

A. There shall be the selective cutting of trees so as to assure an adequate stocking of residual growth; and

B. The general plan of selective cutting, if any, shall be approved in writing by the County Forester or other qualified forester.

206.5 If the Board of Adjustment approves an application for a Special Exception, it shall impose relevant conditions specified in Section 204; and the Board shall also impose such additional conditions as it finds reasonably appropriate to safeguard the neighborhood or otherwise serve the purposes of the ordinance, including , but not being limited to, the following:

A Setbacks larger than the minimums required by the ordinance;

B. Screening of part or all of the premises of the proposed use by walls, fencing or planting;

C. Modification of the design of any building involved in the proposed use;

D. Parking spaces greater in number than those otherwise required under this ordinance;

E. Limitation of the number of occupants or employees upon the premises, and restrictions of the method and/or time of operation and use, and of the size or extent

Street or Public Street:
A public highway which the town or state has the duty to maintain regularly or a highway shown on a subdivision plat approved by the Planning Board and recorded in the Grafton County Registry of Deeds which provides the principal means of access to abutting property.

Street Line:
Right-of-way line of a street as dedicated by a deed of record; where the width of the street is not established, the street line shall be considered to be twenty-five feet from the center line of the street pavement.

Structures:
Anything constructed or erected with a fixed location on, above or below the ground, or attached to something having a fixed location on, above, or below the ground. Structures include, but are not limited to, buildings, swimming pools, manufactured housing, billboards, and poster panels. It shall not include minor installations such as fences and safety fences, mail boxes, flagpoles, and retaining walls of a height of 4 feet or less as measured from the toe of the wall to the top of the wall at its tallest point. For the purposes of this definition electrical transformers and the following essential services are not considered structures: underground or overhead gas, electrical, sewer, steam, or water transmission or distribution systems, including poles, wires, mains, drains, sewers, pipes, conduit-cables, and similar equipment and accessories in connection therewith.

Student Residence, "I" Institution district:
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. This definition shall apply only to those student residences located within the "I" Institution zoning district.

Student Residence, Residential districts:
A building designed for and occupied by students including social rooms and a limited number of kitchens and operated in conjunction with another institutional use.

Substantial Damage:
Substantial Damage means damage of any origin sustained by a structure whereby the cost of restoring the structure to its before-damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred.

Substantial Improvement:
Substantial Improvement means any combination of repairs, reconstruction, alteration, or improvements to a structure in which the cumulate cost equals or exceeds fifty percent of the market value of the structure. The market value of the structure should equal: (1) the apprised value prior to the start of the initial repair or improvement, or (2) in the case of damage, the value of the structure prior to the damage occurring. For the purposes of this definition, "substantial improvement" is considered to occur when the first alteration of any wall, ceiling, floor, or other structural part of the building commences, whether or not that alteration affects the external dimensions of the structure. This term includes structures which have incurred substantial damage, regardless of actual repair work performed. The term does not, however, include any project for improvement of a structure required to comply with existing health, sanitary, or safety code specifications which are solely necessary to assure safe living conditions or any alteration of a "historic structure", provided that the alteration will not preclude the structure's continued designation as a "historic structure".