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

---

RULE 7 MANDATORY APPEAL

REPLY BRIEF OF APPELLANT

Attorney for Appellant:

Carolyn K. Cole, Esq., Bar #14549
Cole Associates Civil Law, PLLC
18 Bank Street
Lebanon, New Hampshire 03766
(603) 678-8070

Oral argument requested.

Oral Argument to be presented by:

Carolyn K. Cole, Esq.

TABLE OF CONTENTS

TABLE OF CASES

TABLE AND TEXT OF STATUTES AND CONSTITUTIONAL SOURCE

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

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.

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.

SUPREME COURT RULE

RULE OF EVIDENCE

Rule 201. Judicial Notice

(a) *Kinds of facts.* A court may take judicial notice of a fact. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(b) *Kinds of law.* A court may take judicial notice of law. Law includes (1) the decisional, constitutional, and public statutory law, (2) rules of court, (3) regulations of governmental agencies, and (4) ordinances of municipalities and other governmental subdivisions of the United States or of any state, territory or other jurisdiction of the United States.

(c) *When discretionary.* A court may take judicial notice, whether requested or not.

(d) *When mandatory.* A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be heard.* A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of taking notice.* Judicial notice may be taken at any stage of the proceeding.

TABLE AND TEXT OF HANOVER ORDINANCES

Section 602 Special Exceptions

Uses of land and structures designated by this Ordinance as allowable only by special exception must be approved by the Zoning Board of Adjustment, in accordance with standards and procedures set forth in Article II of this Ordinance, prior to the issuance of a zoning permit.

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

Article IX, Section 902 of the Ordinance, defines an Institution:

Facilities primarily engaged in public services including, but not limited to, education, research, health, and public worship.....4

ARGUMENT

I. THE TOWN'S DELEGATION IS UNLAWFUL, *ULTRA VIRES* AND ARBITRARY

Appellant's Claim I – regarding unlawful delegation, arbitrary, capricious, and *ultra vires* action -- was properly preserved. *See* Verified Petition App. 1711-1712, 1721, 1724, 1725, pleadings 1798-1801, 1851, 1937-1941, and 2313-2318, and trial transcript at 38.[1]

In February 2016, based on an "anonymous report," the SAE National Fraternity, a private organization with no operations in New Hampshire, purportedly suspended Appellant's tenant's charter.[2] Thereafter, based solely on this private organization, Dartmouth severed its official association, known as "recognition," with Appellant's tenant.[3] Its tenant was provided no notice, process, or charge, and given no chance to confront the anonymous party, respond, or appeal in either case.[4] Thereafter, based on solely on Dartmouth's unreviewable action, the Town served a Notice of Violation on Appellant alleging that Dartmouth's unilateral, arbitrary, and non-adjudicated derecognition *caused* Appellant's property to be in violation of Section 902 of the 2015 Ordinance because the Fraternity House now "*no longer* constitutes a Student Residence."[5] Section 902, adopted in 1976, requires a "Student Residence," a use which comes into existence only via the issuance of a special exception, [6] to "operate in conjunction with another institutional use." Appellant's structure and use, a fraternity house with an accessory residential component, is not a Student Residence and is a lawfully nonconforming use[7] which predates the enactment of Hanover's first land use regulations.[8] Appellant has never sought nor obtained a special exception to operate a "Student Residence."[9]

---

[1] Appellant also requests evaluation of this claim under the "Plain Error Rule," Sup.Ct.R. 16-a.
[2] App. at 14.
[3] App. at 1.
[4] App. at 740.
[5] App. at 16.
[6] Section 602 of the Zoning Ordinance provides: Special Exceptions Uses of land and structures designated by this Ordinance as allowable only by special exception **must be approved** by the Zoning ZBA of Adjustment. *See also, 1808 Corporation v. Town of New Ipswich,* 161 N.H. 772 (2011).
[7] *See* Hanover Answer at ¶102, App. at 262, which admits that "Given that Petitioner'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."
[8] App. at 450 at ¶ 5.
[9] *See* Hanover Answer at ¶¶ 46, 101. App. at 2355, 2362.

In the face of these arbitrary, capricious, and *ultra vires* acts, the Town argues:

> "the ordinance sets forth the specific standards *required for a special exception* and does not delegate the standardless authority to any one body, nor does it require the approval of any other body. Instead, it merely requires that student residences be operated in conjunction with another institution."[10] [Emphasis added.]

Although the Town *now* claims conjunction is created by the mere "union, association or combination with the College," the Violation Notice, which is the sole basis of the litigation, shows that "conjunction" begins and ends with College *recognition.*[11]

Conjunction is the voluntary association between private entities which the Town cannot compel or govern. U.S. Const. Amend. I. Dartmouth testified that it *may accept* or reject, revoke, or withdraw conjunction, and in doing so, it wields the unfettered power to limit others' zoning rights:

> "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. The effect that that decision has on that organization's *other rights* [ ] is not up to us to say. It's up to the town to say."[12]

Contrary to the Town's assertion, "conjunction" is indeed created and destroyed exclusively by Dartmouth's approval, which may be arbitrarily or capriciously withheld. The power to conjoin, and therefore approve or deny use under the Ordinance, is vested in a private, unconstrained, and unreviewable entity; yet its will has the force and effect of law since mere de-recognition implicates a zoning violation. More than a century ago, the United States Supreme Court found this type of plenary power repugnant to liberty, invalidating a zoning ordinance that,

> "while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously." *Eubank v. City of Richmond*, 226 U.S. 137, 143–44 (1912).

The trial court deemed Dartmouth, whose stated mission is to acquire Appellant's property by means of its power to derecognize,[13] "a party whose interest might have been adverse to SAE's."[14] The

---

[10] Hanover Br. at 10. "Standards for a special exception" are irrelevant since Appellant does not seek one.
[11] The concept, "recognition" did not exist in 1976. *Forsyth Aff.* App. at 722, ¶ 8(d),
[12] *See* Testimony of Dartmouth Counsel O'Leary. Transcript of Appeal dated June 23, 2016, lines 13-21. App. 2093.
[13] *See*, Report of the Presidential Steering Committee for Moving Dartmouth Forward, App. 862.
[14] Order at 11.

Guillou Court found unchecked power and unbounded authority to be an unlawful delegation of governmental authority because "the potential for arbitrary and unprincipled decisions is great." *Guillou v. Div. of Motor Vehicles*, 127 N.H. 579 (1989). This Court also ruled a zoning ordinance unlawful that conferred the unfettered ability upon a lake association to decide whether to permit a property owner a special exception. *Fernald v. Bassett*, 107 N.H. 282, 284 (1966). *See also Ackley v. Nashua*, 102 N.H. 551 (1960) (City ordinance invalid which conditioned variance on written consent of neighbors). The Town asserts that *Guillou* and *Fernald* are inapplicable because the discretionary authority in those cases was not governed by any standards. This is a distinction without a difference. No arm of the Town supervises the entry into a conjoined relationship, sets the standards thereof, or determines how conjunction can be created or severed. Indeed, no standards governed SAE's derecognition, given that it originated from remote sources two steps removed from Dartmouth. Section 902 fails to govern the exercise of Dartmouth's discretion; fails to guard against whim, arbitrariness, and caprice; fails to assure uniformity in the operation of the law; and fails to furnish criteria by which the reasonableness of a zoning violation based on discretion may be tested. *Marta v. Sullivan*, 248 A.2d 608, 611 (Del. 1968) *citing Fernald v. Bassett*. Section 902 reflects an unlawful, *ultra vires* delegation of authority to a private party whose commercial interests conflict with those of Appellant.[15] This Court should invalidate Section 902 and reverse the judgment of the trial court.

II. THE TOWN UNLAWFULLY CLASSIFIES INSTITUTIONS

The Town admitted ¶ 17 of the Verified Petition[16] which alleged: "several years ago the fraternity tenant affiliated itself with ExL university (a local not-for-profit educational *institution* based in Hanover) and started hosting its approved curriculum there, and public (and televised) lectures were provided to attendees in the first floor common area." Nevertheless, the Town now claims that it "never admitted that ExL University is an Institution *as that term is defined in the Hanover Zoning*

[15] ZBA member Harrison, the sole abstaining vote at the rehearing, declared: "**I don't think [ ] Dartmouth has the right by means of an administrative decision to remove the in conjunction with.**" App. 2204. Mr. Harrison was correct.
[16] *See* Hanover Answer at ¶ 17. App. at 2350.

Ordinance;" and even, [sic] if it were, there is no evidence that the Appellant's student residence operates in conjunction with that apparently defunct organization."[17] The Town has provided no basis for distinguishing between "institutions" and "Institution[s] as that term is defined in the zoning ordinance." Hanover classifies institutions not by whether they meet the definition, but by the outcome.

"Institution" is defined in 2015 Ordinance as "Facilities primarily engaged in public services including, **but not limited to**, *education*, research, health, and public worship." Appellant's undisputed credentials as an "Institution" can be found at App. 1812-1814.[18] While proclaiming the "white church," Appellant's tiny abutting neighbor, "an institution in and of itself,"[19] the ZBA held that Appellant was not a "major" institution, thus unqualified for the designation:

> "the College and the other *major* landowning institutions in town are ineluctable facts...The recitation of named institutions gives a sense of what "Institution" was intended to encompass: Dartmouth College, Mary Hitchcock Hospital, CRREL and the Hanover and Dresden Schools. [ ] By contrast, the Petitioner [ ] is a trust with a limited private purpose. . . arguably an exclusive, not a public purpose [thus] not an "Institution" within the meaning of the Zoning Ordinance."[20]

Dartmouth is also a not-for-profit *private* organization with an exclusive *private* purpose.

Prior to 2015, the Town did not question institutions within the institutional zone about "conjunction." Alex Iskandar, who worked at CRREL during the entire 1970s testified:

> "During my tenure at CRREL, CRREL did not operate in association with Dartmouth College or Mary Hitchcock Hospital or any other institution in the area. I can attest that, at no time did CRREL provide any health or safety oversight of the students living in student housing who interned for CRREL, nor did we field any inquiries regarding our capability of doing so."[21]

The Town has historically classified – and continues to classify to this day – fraternal organizations that own their land as "institutions." In 2003, the ZBA found that Zeta Psi, a permanently derecognized fraternity with no conjoined relationship to Dartmouth, was the Institution that owned the land and that the Zoning Ordinance permitted it to use its land for uses related to the purposes of

---

[17] Hanover Brief at 20. This is an odd allegation considering Hanover admitted SAE was affiliated with ExL University.
[18] App. 1812-1814.
[19] *See* App. at 1633.
[20] Decision at ¶ 14 (c), App. 1137, 1142-43.
[21] *See* Letter of Alex Iskandar, dated June 14, 2016, App. 990.

the Institution, such as an accessory student residence, but not for purposes unrelated to the Institution, such as newspaper offices.[22] Similarly, in 2011 the Town opined that derecognition would not affect its zoning status because Gamma Delta is "the Institution that owns the land."[23] In late 2017, the Town granted the Dartmouth Corporation of Alpha Delta (previously before this Court) the right to operate its office facilities at its property because Alpha Delta is the institution that owns the land.[24]

RSA 674:20 mandates uniform treatment for classifications of structures within a zone. All institutions that own land within the zone have the right to use *their* land in a manner consistent with the institution. Whether the Appellant as a fraternal institution has been distinguished as a class different than other similarly situated fraternal institutions or from other similarly situated institutions in general, the Town has impermissibly established classifications and has therefore treated similarly situated individuals in a different manner. These classifications do not exist in the Ordinance. Appellant has met its burden of showing that it was classified differently than other similarly situated parties within the zone, and that its constitutionally important right to enjoy its property has been impacted. The burden of justifying the classification now rests with the Town. *Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. at 757–58. The ZBA's finding denying Appellant's status as an institution represents an improper and inconsistent reading of the Ordinance and a discriminatory violation of its entitlement to equal protection of its substantive due process rights.

III. WAUGH'S EX-PARTE ASSISTANCE TO THE COLLEGE WAS PART OF A PATTERN OF THE ZBA'S BIAS AND NOT A HARMLESS ERROR

In 1998 the ZBA justified its decision to permit Dartmouth College to build a rugby clubhouse without a special exception by redefining the use as "educational" (thus permitted by right) and not "recreational." ZBA member Waugh authored this decision.[25] At the time, Hanover's attorney warned

[22] Town of Hanover ZBA Case No. 33028-Z2003-15, Section 3, dated July 17, 2003, APP. at 793.
[23] *See* Brotman email in the Gamma Delta inquiry dated October 21, 2011, App. at 814.
[24] *See* Hanover Zoning Administrator Decision dated September 8, 2017, a town agency decision in Appellee's possession. App. at 2381. Appellant requests the Court take judicial notice of this document. N.H. R. Evid. 201(b)(e).
[25] App. at 1240-1244.

the Town that its bias toward Dartmouth would eventually be scrutinized.[26] In spite of that warning, the Town continued for decades allowing Dartmouth to ignore the obligations enforced on others.[27]

"A fair trial in a fair tribunal is a basic requirement of due process." *Peters v. Kiff*, 407 U.S. 493, 501–03 (1972). Our State Constitution demands that all judges be "as impartial as the lot of humanity will admit." N.H. CONST. pt. I, art. 35. This applies to members of boards acting in a quasi-judicial capacity. *Winslow v. Town of Holderness Planning Bd.*, 125 N.H. 262, 267–68 (1984). The Due Process Clause protects a party from a tribunal incapable of rendering an impartial verdict.[28] Even if there is no showing of actual bias in the tribunal, due process is denied by circumstances that create the likelihood or the appearance of bias. *Peters*, 407 U.S. at 503.

These principles compel the conclusion that the ZBA was incapable of rendering a fair and impartial decision in this case. Dartmouth is an economic and ideological competitor to Appellant with a stated intent to condemn and acquire Appellant's land. Bias has pervaded this case, which has resulted in inconsistent results for similarly situated landowners. Waugh's "assistance" to Dartmouth in obtaining a more favorable result is not an isolated incident. The pre-2015 record shows no less than 10 instances of College-fraternity disaffiliation known by the Town – none of which resulted in zoning violation. Fraternities seeking a special exception to operate as a "Student Residence" were not required to prove "conjunction" with the College.[29] Only in 2015, when Dartmouth resolved to "acquire [privately-owned fraternity] facilities and repurpose them for the College's residential, social and academic purposes"[30] by using derecognition[31] to cause the zoning ordinance to "apply

---

[26] Letter from Walter Mitchell dated April 27, 1998. App. 1249. "[T]he judge did seem to have some concern that one natural conclusion from our arguments is that Dartmouth College could use its property without the need for a special permit and another owner, proposing the exact same use, would need a special exception. I don't think that concern should be a part of the issue that was before the court, but the judge's reaction did concern me."

[27] *See*, Dartmouth's construction of new student residences without receipt of special exceptions, Dartmouth's installation and rental of cellular transmission facilities without zoning approvals, and Dartmouth's rental of its residences to unaffiliated summer camps that are expressly "not affiliated with Dartmouth College" App. at 1458-59.

[28] U.S. Constitution Amend V and XIV.

[29] *See* February 4, 2010 Decision in case 37015-Z2010-02, C.R. 1569, 1571; see also 2003 Zeta Psi ruling, App. at 1446; *Zeta Psi Special Exception* ZBA Decision February 28, 2008 Case No. 33028-Z2008-03, App. at 1129; *See Tri-Kap Special Exception,* ZBA Decision February 28, 2008 Case No. 33028-Z2008-03, App. at 1129.

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

[31] *Id.*

differently,"[32] did the Town, in fact, apply the zoning ordinance differently, when it served a violation notice on the Corporation Alpha Delta whose fraternal tenant had been recently derecognized.

Alpha Delta appealed its violation notice, arguing that it was grandfathered from Section 902 or, alternatively, it *did* "operate in conjunction with" Dartmouth because of decades of "affiliations" with the College.[33] The ZBA denied its appeal, with Waugh authoring the adopted opinion. The ZBA determined that mere affiliation was not sufficient for "conjunction;" rather, "conjunction" meant "the potential for health and safety oversight by Dartmouth College"[34] and Alpha Delta had not proven that the College did not provide these services in 1976. Alpha Delta sought a rehearing with a 240-page motion and 18 Exhibits presenting *new evidence* that the ZBA's decision was erroneous.[35] The ZBA was not interested in ensuring that all possible available evidence in that matter be considered – *a search for the truth*, citing its established policy of restricting a party to offering evidence at a rehearing

"that was not available to [it] at the time of the first hearing. . .The board and those in opposition to the appeal should not be penalized because the petitioner has not adequately prepared his original case and did not take the trouble to determine sufficient grounds and provide facts to support them."[36]

Unlike Alpha Delta, Appellant developed a substantial factual record and *prevailed* on its initial appeal of its Violation Notice, having proven that its property was lawfully non-conforming in 1976. Significantly, the ZBA, ruled that the *only relevant time* for which it would consider evidence involving

"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)."[37] [Emphasis added.]

Accordingly, the ZBA refused to consider Appellant's evidence outside of the relevant timeframe.[38]

---

[32] App. at 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**."
[33] App. at 1526-1532, 1561-1565.
[34] App. at 450.
[35] App. at 2287. Chairman Radisch admitted that the motion contained "new facts." App. at 974.
[36] App. at 973.
[37] *See* first Decision at ¶¶8, 10 dated April 18, 2016, App. at 452.
[38] *Id.*

Dartmouth was properly noticed but "did not take the trouble" to attend either of two (2) public hearings of Appellant's appeal, "assum[ing] that this case would go the same way the Alpha Delta case did." [39] Nevertheless, hours b*efore* the ZBA vote, Waugh, believing that the College would be unsatisfied with the decision *that he authored*, found it "critical" to notify the College's *legal counsel*[40] through Administrator Brotman how Dartmouth, with the belated submission of "some evidence on the grandfathering issue," could reverse the decision. The trial court found this ex-parte advance for the express purpose of soliciting evidence that could lead to a different outcome to be "reasonable:"

> "SAE was the only party present at those hearings, and it had reasons 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."[41]

In the "search for the truth," however, Waugh did not invite all parties with "facts" and he did not invite all abutters or institutions. He invited *and assisted* one. Moreover, since the College is a "*party* who interests [are] adverse to SAE's," it *also* had "reasons to present only evidence" helpful to its cause. Indeed, when Dartmouth moved for a rehearing, it submitted documents which it possessed but it *withheld* all exculpatory documents from the relevant period around 1976.

As required by both RSA 677:4 and the established policy of the ZBA, Dartmouth's motion did not allege error or that it had even been aggrieved by the original decision. Appellant attempted to exercise *its right* to object to the motion,[42] but the Town refused to accept the Objection.[43] This refusal was "plain error;" it affected Appellant's rights and diminished the fairness of the proceeding. Sup.Ct.R. 16-a. "Interested parties are *entitled to object to any error* they perceive in governmental

---

[39] *See* Email from Bernard Waugh, dated April 18, 2016 at 2:13 p.m. Brotman handwrote "√ Done 4.19.16 @ 8:28, 8:31 a.m." App. at 1048. "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 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."

[40] Dartmouth Legal Counsel is not the registered notice party for land use matters at the Town of Hanover. See App. at 53.

[41] Order at 11-12.

[42] App. 1050,1034, 2280 *et seq.*

[43] App. 1054.

proceedings." *Appeal of Allen*, Docket No. 2017-0313, May 11, 2018, *citing Fox v. Town of Greenland*, 151 N.H. 600, 604 (2004). Instead, the ZBA created special rules for Dartmouth:

> BERNIE WAUGH (BW): I will make a motion that we grant [Dartmouth's motion for rehearing]... new information is one of the more common reasons to grant a rehearing, and I think we have some new information.
>
> JEREMY EGGLETON (JE): . . .I know that we did not [ ] grant the rehearing in the other fraternity case that was similarly situated arguably [ ] and I'm trying to figure out how to distinguish their submission from Dartmouth's submission in this case **to the extent that the college surely had notice of the original hearing and an opportunity so submit evidence at the time** –
>
> ARTHUR GARDINER: I heard it was the other way around, and we said [the applicant] hadn't carried their burden of establishing that they had operated in connection with the college.[]
>
> JE: **But is that materially different from, *"we had an opportunity to come and present evidence and we didn't choose to exercise that opportunity?"*** [ ]
>
> BW: Oh, I think they're significantly different.[44]

At rehearing, the College produced no witnesses and no documents from the relevant timeframe, while Appellant supplied both.[45] The ZBA reversed its prior decision, ignoring the only relevant time period that mattered. The reversing ZBA Decision was based entirely upon Dartmouth's submissions from times *other than* the relevant period around 1976[46] and in the face of Dartmouth's own dispositive 1976 College statement that: "**At this point in time, the College is not making any regular fire safety, general safety inspections of the fraternities."**[47] The trial court found "SAE produced evidence tending to prove that the College never provided health or safety services to it from 1972 to 1976," Order at 4, but nonetheless did not want to "gainsay that the ZBA's determination that SAE's evidence was unpersuasive," *id.*, even though there is no evidence that SAE's presentation was incomplete or inaccurate. The Court committed legal error by ignoring the relevant timeframe required

---

[44] App. at 1964, 1965, 1966, 1968.
[45] *See* Appellant's Brief at 8, footnote 42.
[46] *Not one* of the College's documents between 1905 and 1965 evens mentions Appellant or the SAE Fraternity. Moreover, the Town cites a 1978 Fraternity Constitution as "evidence" of conjunction. Neither the ZBA nor the trial court relied on this document, for good reason. The Fraternity Constitution of 1978 was entered into only after the Chairman of Dartmouth's Board of Trustees guaranteed the permanent independence of the SAE fraternity and that Dartmouth would never attempt to impair SAE's independence. *See* Affidavit of Jon Zehner at App. 986-988.
[47] *See* letter dated November 1, 1976 from John G. Skewes, Business Manager of the College. App. at 1592-1593.

to assess nonconformity. While the ZBA is entitled to a presumption of validity on its finding of facts, it is entitled to no level of deference when inferring non-existent facts to back into its desired outcome.

The Town claims that *"[e]ven if Mr. Waugh's comments did reflect bias against appellant in favor of Dartmouth College*, [ ] ... any alleged error was [ ] harmless, see Order at 12."[48] This is false. Appellant successfully met its burden of proof at the first hearing and won its appeal, retaining its property rights. *But for* Waugh's assistance to the College, there would not have even been a petition for rehearing. Waugh was the prime mover to grant the College's motion, and vigorously advocated to change the rules to benefit the College. More than "mere participation," Waugh actively advocated on behalf of an adverse party. This appearance of bias disqualifies Waugh and invalidates the decision. *Winslow*, 125 N.H. at 268, relying on *Rollins v. Connor*, 74 N.H. 456 (1908). "The *Rollins* court held that *mere participation* by one disqualified member was sufficient to invalidate the tribunal's decision because it was impossible to estimate the influence one member might have on his associates." *Id.* In view of the important property rights involved, and the State constitutional mandate for judicial impartiality, this Court must consider this rationale sufficient to justify application of the *Rollins* rule to this case. The ZBA Decision was rendered by a tribunal *at least* one of whose members participating in the decision was disqualified.[49] The personal disqualification of Waugh renders the ZBA Decision voidable.

CONCLUSION

For the reasons stated above, the Appellant respectfully requests that this Court invalidate Section 902 of the Ordinance, grant Appellant's appeal, and reverse the trial court's judgment.[50]

---

[48] Hanover Br. 27.

[49] Appellant respectfully requests the Court to take judicial notice of Supreme Court Case 2017-0595, *Dartmouth College v. Town of Hanover and Town of Hanover Planning Board*, where (1) the Town *declined* to defend the ruling of *its own* Planning Board that was adverse to Dartmouth, and (2) ZBA Member Jeremy Eggleton, who authored the Decision to deny Appellant's appeal (favorable to Dartmouth), *represents Dartmouth* against the Town.

[50] As the Town's brief is replete with alleged facts not found in or cited to the record, Appellant respectfully requests the Court to ignore such statements pursuant to Sup.Ct.R. 16 (9).

CERTIFICATIONS

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.

June 20, 2018

Respectfully Submitted,

NH ALPHA OF SAE TRUST

By its Attorneys,

COLE ASSOCIATES CIVIL LAW, PLLC

Carolyn K. Cole, NH Bar #14549
18 Bank Street
Lebanon, N.H. 03766
ccole@coleassociateslaw.com
(603) 678-8070