

LAND USE REGULATION

Fall 2022

Professor Milne

Preliminary Syllabus

(August 17, 2021)

Required Reading:

SELMI ET AL., LAND USE REGULATION: CASES AND MATERIALS (5th ed.) (“Text”)

LAND USE SUPPLEMENT (“Suppl.”)

Material in Canvas modules

Course Objectives

1. Understand planning principles that shape the design of local land use regulations.
2. Develop the skills to navigate and interpret state enabling legislation and local land use regulations
3. Learn statutory, constitutional and administrative law theories that influence the design and use of local land use regulations.
4. Consider the relationship between local land use regulation and state policies.
5. Explore selected challenges facing local land use planning, including how to deal with climate change and access to affordable housing.

Office Hours:

Tentatively: Wednesdays, 3:15 p.m. to 5:00 p.m. Teams. Or by appointment.

Exam:

3-hour exam, open book (case book, supplement and course material you have prepared).

Syllabus

Note: The syllabus may change as the semester unfolds.

I. Who are the Land Use Regulators and What Are Their Challenges?

Introduction

Text pp. 3-16 (up to Notes and Comments), 20-24 (starting at Section 3), 559-573 (up to Notes and Comments)

The local land use regulators

Text pp. 28-33

NH Statute §§672 – 673:22 (Suppl. pp. 8-21)

Questions:

What is the “legislative body” for the Town of Hanover? (Note: To answer this question, you will want to consider not only NH law but also facts about Hanover available at the Hanover website, www.hanovernh.org.)

Which executive body or bodies in Hanover are responsible for land use planning under New Hampshire law?

Under New Hampshire law, how are Hanover’s planning board members selected?

Would the answers to these questions change if Hanover operated under a city council-manager form of government?

According to the New Hampshire statutes, what relevant experience must planning board members have?

If you are on a planning board and are interested in using local land use regulation to address climate change issues, what resources would you want to have available to help you? (Note: If you would like background reading about climate change, see Text, pp. 624-629.)

II. Zoning Ordinances and Comprehensive Planning

Euclidean zoning: The authority to zone and classic Euclidean zoning

Text pp. 41-52, 55 (notes 4 and 5)

NH Statute §§672:1, 674:16 through 674:20, 675:1 through 675:5 (Suppl. pp. 8-9, 28-30, 71-74)

In Canvas Module “Cases,” read *National Federation of Independent Business v. Sebelius*

Questions:

What are the basic characteristics of the Euclid zoning ordinance?

Do you agree with the way in which Euclid separated land uses?

What are the legal limits on the ability to zone?

What procedures are used to adopt a zoning ordinance in New Hampshire?

Dissecting a modern zoning ordinance

Hanover Zoning Ordinance (Suppl. pp. 103-224 (as necessary to answer questions below))

Text pp. 54-60 (including revisiting notes 4 and 5 on p. 55)

NH Statute §§674:19, 674:74 (Suppl. pp. 30, 71)

In Canvas Module “Cases,” read *Alpha Delta v. Hanover*

Questions:

Please find the Hanover Zoning Maps on the Hanover website, www.hanovernh.org.

Is the Hanover zoning ordinance cumulative or noncumulative? Which approach do you prefer?

Would the Hanover ordinance allow a lawyer’s office in his/her home in the Single Residence District?

If you own a home in Hanover, can you offer a room on airbnb?

Can six Dartmouth students live together in a rental house in the Single Residence District?

Under the Hanover ordinance, can the owner of a seasonal residence in the Goose Pond Zoning District convert the residence to a year-round residence?

If you own a home in Hanover’s Rural Residence zoning district, can you build a set of solar panels similar to the panels outside Oakes Hall?

Do you agree with the nonconforming use analysis in *Dartmouth Corporation of Alpha Delta v. Town of Hanover*?

Does the Hanover zoning ordinance address climate change?

The flexibility of zoning ordinances—Part 1—Zoning Amendments and Variances

Text pp. 60-73

NH Statute §§ 673:3, 674:33, 675:7, 675:8 (Suppl. pp. 14-15, 43-45, 75-76)

Hanover Zoning Ordinance (Suppl.)(as needed to answer questions)

Questions:

Who has the authority to amend a zoning ordinance in Hanover?

What is the standard for granting a variance in Hanover under the ordinance?

What body in Hanover makes the decision about whether to grant a variance?

How do amendments and variances differ in terms of how they allow flexibility in zoning ordinances?

The flexibility of zoning ordinances—Part 2—Conditional Uses (Special Exceptions), Floating Zones, and Planned Unit Developments

Text pp. 73-90 (up to note 6)

Hanover Zoning Ordinance (Suppl.)(as needed to answer questions)

Questions:

How do these flexibility mechanisms differ from zoning amendments and variances in Part I and from each other?

Which types of flexibility does each provide, and how does it operate?

Which of the flexibility devices discussed in the text have been incorporated into Hanover's zoning ordinance?

Mock Hearing, Zoning Board of Adjustment

Assignment to be distributed.

Comprehensive planning and its legal relevance—Part 1

Text pp. 179-197, 629-632

NH Statute §§674:2 through 674:8, 674:18, 675:6 through 675:7 (Suppl. pp. 22-26, 30, 75-77)

Read Hanover, NH, Master Plan (2003), Chapter 1: Introduction and Overview and Chapter 3: Land Use and Community Vision, at this link:

<https://www.hanovernh.org/planning-board/pages/hanover-master-plan-2003>

Read about efforts underway in Hanover to develop a new master plan,

<https://hanovernhmasterplan.com/>. Read what appears on the page at this link.

Questions:

Does the Hanover Master Plan create a sound basis for growth management?

Does the Hanover Zoning ordinance reflect the principles described in the Overview of the Hanover Master Plan?

Does the Master Plan or the Proposed Sustainability Master Plan address climate change? Affordable housing?

What are the minimum requirements for a Master Plan in New Hampshire?

Comprehensive planning and its legal relevance—Part 2

Text pp. 200-216, 221-225

Questions:

What is the legal relationship between a master plan and a zoning ordinance in New Hampshire? (Review New Hampshire enabling legislation assigned for the previous class.)

Does New Hampshire enabling legislation require municipalities to address climate change and affordable housing in their master plans?

Local Land Use Planning in Action: Review and Case Studies

In Canvas Module "Cases," read Portland Pipeline v. City of South Portland.

In Canvas Module, "Hanover Case Study Documents," read Hanover Town Meeting Warrant, Article Eight. Then read the Hanover Zoning Amendment Petition Definition of Family in the same module.

Questions:

If you were a Hanover voter at the 2022 Hanover Town Meeting, would you vote for or against the amendment to the definition of family that went to voters in 2020? Why? By what procedure did the article come before the Town Meeting?

Think about the local land use procedures described in the *Portland Pipe Line* case. Do you agree with the City of South Portland's Clear Skies Ordinance as a matter of policy? Should municipalities have the authority to adopt regulations that have an extraterritorial impact?

Do you have questions about what we have studied so far this semester?

III. Site Plan Review and Subdivision Regulation

Site plan review

Text pp. 91-94, 234-241 (through note 4)

NH Statute §§ 673:14, 674:43 through 674:44, 675:6 (Suppl. pp. 19, 51-52, 75-76)

In the Canvas Module "Cases," read *Trustees of Dartmouth College v. Town of Hanover*

Questions:

When does site plan review apply?

What governmental body in New Hampshire is responsible for administering site plan regulations?

How are site plan regulations adopted in New Hampshire?

What is the relationship between the site plan regulations and the zoning ordinance?

What would you have done if you were the lawyer representing Frito-Lay at the town hearings?

In what ways are Hanover's site plan regulations (Suppl. pp. 225-260) different from the site plan regulations discussed in *Summa Humma*?

Do you agree with Dartmouth or the neighbors in *Trustees of Dartmouth College v. Town of Hanover*—as a matter of policy and as a matter of law?

Do Hanover site plan regulations contain factors relevant to addressing climate change?

Subdivision review—the basic requirements

Text pp. 97-118

NH Statute §§ 672:14, 674:35 through 674:39, 675:6, 676:4, 676:16 through 676:18 (Suppl. pp. 11-12, 46-51, 75, 77-81, 87-92)

Hanover Subdivision Regulations (Suppl. pp. 261-327)(as needed to answer questions)

Questions:

When does subdivision review apply?

By what procedures are subdivision regulations adopted in Hanover?

What governmental body in New Hampshire is responsible for administering the subdivision regulations?

What are the procedures that a developer must follow when seeking subdivision approval in New Hampshire?

What is the legal relationship between the Hanover subdivision regulations and the master plan?

Does subdivision review address climate change issues?

Under the Hanover zoning ordinance, can a landowner subdivide property in the Goose Pond Zoning District?

Subdivision regulation, vested rights and development agreements

Text pp. 118-130 (through note 1), 90-91 (notes 6 and 7), 584-592

NH Statute § 674:39 (revisited) (Suppl. pp. 50-51).

Questions:

At what point do you think a developer should acquire a vested right to proceed?

Can you reconcile the use of development agreements with the use of zoning ordinances and amendments that we studied earlier in the semester?

Techniques for managing the costs of growth

Text pp. 139-141, 157-165

NH Statute §674:21.V (Suppl. pp. 31-33)

Visit the website for the City of Lebanon, NH and read the “Impact Fees FAQs” factsheet that you will find linked on this page, <https://lebanonnh.gov/545/Impact-Fees>.

Questions:

As a matter of policy, how much should the developer pay for the public costs of development?

What kinds of cost-shifting techniques are allowed in New Hampshire?

Do impact fees affect the affordability of housing?

If you were on a planning board, would you want to impose impact fees similar to those in Lebanon?

Creative subdivisions—PUDs and open space subdivisions

Text pp. 86-88 (revisited)

NH Statute §§ 674:21.I, (Suppl. pp. 30-31)

Hanover Zoning Ordinance §§ 901-903 (Suppl. pp. 192-195)

Hanover Subdivision Regulations, Articles 8 and 13 (Suppl. pp. 297-299, 306-309)

Assignment to be distributed.

Questions:

In Hanover, how is an open space development different from a planned residential development?

If you are a developer wanting to do development in Hanover on 200 acres in the Rural Residential Zone, why would you want to anything other than a

“classic” subdivision? If you are on the Planning Board, which type of development would you want to the developer to construct, and do you have any leverage to influence the choice? Would the project need to go through site plan review?

How much can the Hanover Planning Board use its subdivision review powers to protect environmentally significant land?

Judicial and political review of local land use decisions

Text pp. 73-78 (revisited), 113-116 (revisited), 229-233, 252-262, 282-285, Alpha Delta v. Town of Hanover (revisited, in the Canvas Module “Cases”)
NH Statute §§673:14 (revisited), 675:5, 676:3, 677:15, 679:1 through 679:12, (Suppl. pp. 19, 74, 77, 95-96, 97-100)

Questions:

What is the specific legal issue that the court is deciding in each case?

What standard of review does the court apply?

If you are a neighbor who does not like a development proposal, what recourse do you have?

Should your state of choice create a Housing Appeals Board similar to the New Hampshire Board (Suppl. pp. 97-100)?

IV. The Fifth Amendment’s Limits on Land Use Decisions

The power of eminent domain and the recognition of regulatory takings

Text pp. 378-388, 291-307

The evolution of regulatory takings law—Part 1

Text pp. 307-331

Suppl. pp. 429-433

The evolution of regulatory takings law—Part 2

Suppl. pp. 434-447

Questions:

What questions do you have about takings law based on the preceding two classes?

How does the material for today’s class build on the cases you read for the preceding two classes?

Exactions and regulatory takings law

Text pp. 349-376

In Canvas Module “Cases,” revisit *Lingle v. Chevron USA*

Review Session

Assignment to be distributed.

V. Selected Growth Control Issues

Protecting access to affordable housing

Text, pp. 685-694, 706-720

Suppl. (as required to answer questions)

Questions:

Does the New Hampshire enabling legislation impose inclusionary zoning obligations?

How does the New Hampshire Housing Review Board treat affordable housing questions?

Do the Hanover land use planning documents incorporate incentives for inclusionary residential patterns?

Controlling the pace of growth

Text pp. 615-621, 130-137

In Canvas Module “Other Techniques,” read Summary of Oregon’s Statewide Planning Goals.

NH Statute §§674:21.I, 674:22, 674:23 (Suppl. pp. 35-36, 36)

Questions:

What are the New Hampshire statutory procedures for moratoria?

Does Hanover have the legal authority to adopt an ordinance similar to the Ramapo ordinance? Could it incorporate an urban growth boundary into its zoning ordinance?

Will our experience with COVID influence the extent to which municipalities use these techniques, and if so, how? Will climate change considerations influence their use? Affordable housing considerations?

How did the City of South Portland use a moratorium in the *Portland Pipe Line* case in Canvas Module “Cases”?

Protecting aesthetics

Text pp. 959-962, 966-971, 983-991 (up to note 7)

Question:

What do you think is the best way to protect the “character” of a town center?

How high should rank aesthetics among land use planning priorities?

Protecting open space and environmentally sensitive land through TDRs and conservation easements

Text pp. 829-839

In Canvas Module “Other Techniques,” read Conservation Easement Stewardship: A Guide for Landowners *and* Transferable Development Rights

Questions:

Do the Hanover zoning ordinance and subdivision regulations protect ecologically sensitive land, and if so, how?
If you were a town planner, what devices would you want to use to protect ecologically significant land?
Does the New Hampshire enabling legislation provide any special protection for agricultural activities?
Do conservation easements and TDRs reduce greenhouse gas emissions?
Limit affordable housing?

Imposing statewide requirements—Vermont’s Act 250

Text pp. 497-498 (starting with note 1 on page 497)
In Canvas Module “Other Techniques,” read Act 250 Excerpts
In Canvas Module “Cases,” read In re B&M Realty

Questions:

Does Act 250 stop sprawl?
Does it effectively coordinate state and local land use policies?
Does it address climate change?

VI. Conclusion

Who should decide? What Challenges Lie Ahead?

Text pp. 547-559