

LEGISLATIVE COMMITTEE MINUTES

HB1307

Bill as Introduced

HB 1307 - AS INTRODUCED

2022 SESSION

22-2629

08/11

HOUSE BILL

1307

AN ACT

modifying the authority and duties of the housing appeals board.

SPONSORS:

Rep. B. Griffin, Hills. 6

COMMITTEE:

Municipal and County Government

ANALYSIS

This bill modifies the authority and duties of the housing appeals board.

Explanation:

Matter added to current law appears in ***bold italics***.

Matter removed from current law appears [~~in brackets and struck through~~].

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty Two

AN ACT modifying the authority and duties of the housing appeals board. \

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Housing Appeals Board. Amend RSA 679:5 to read as follows:

2 I. It shall be the duty of the board and it shall have power and authority to hear and affirm,
3 reverse, or modify, in whole or in part, appeals of final decisions of ~~[municipal boards, committees,~~
4 ~~and commissions regarding questions of housing and housing development. This includes, but is not~~
5 ~~limited to:~~

6 ~~(a) Planning board decisions on subdivisions or site plans.~~

7 ~~(b) Board of adjustment decisions on variances, special exceptions, administrative~~
8 ~~appeals, and ordinance administration.~~

9 ~~(c) The use of innovative land use controls.~~

10 ~~(d) Growth management controls and interim growth management controls.~~

11 ~~(e) Decisions of historic district commissions, heritage commissions, and conservation~~
12 ~~commissions.~~

13 ~~(f) Other municipal permits and fees applicable to housing and housing developments.~~

14 ~~(g)]~~ ***planning boards, zoning boards of adjustment, building code boards of***
15 ***appeals, historic district commissions, and heritage commissions on applications for the***
16 ***development of housing.*** Matters subject to the board's authority may include mixed-use
17 combinations of residential and nonresidential uses. Such different uses may occur on separate
18 properties, provided such properties are all part of a common scheme of development.

19 2 Effective Date. This act shall take effect 60 days after its passage. ~

Amendments

Sen. Giuda, Dist 2
April 18, 2022
2022-1599s
04/10

Amendment to HB 1307

1 Amend the title of the bill by replacing it with the following:

2

3 AN ACT requiring the housing appeals board to submit an annual report.

4

5 Amend the bill by replacing all after the enacting clause with the following:

6

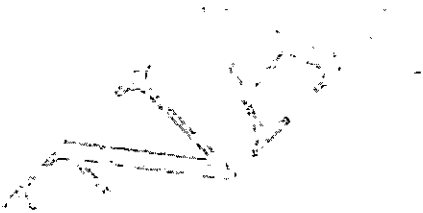
7 1 New Section; Housing Appeals Board; Annual Report. Amend RSA 679 by inserting after
8 section 19 the following new section:

9 679:20 Annual Report. Beginning on July 1, 2022, the board shall submit an annual report to
10 the speaker of the house of representatives, the senate president, the house clerk, the senate clerk,
11 the governor, and the state library that includes:

12 I. A brief description of all appeals brought to the board and a statement of the board's
13 decision on each matter, whether affirmed, reversed, or remanded.

14 II. A brief description of all rulings made by the board that were subsequently appealed to
15 the supreme court and the final disposition of those appeals, if known.

16 2 Effective Date. This act shall take effect upon its passage.



2022-1599s

AMENDED ANALYSIS

This bill requires the housing appeals board to submit an annual report.

DRAFT

Committee Minutes

AMENDED
SENATE CALENDAR NOTICE
Election Law and Municipal Affairs

Sen James Gray, Chair
Sen Regina Birdsell, Vice Chair
Sen Ruth Ward, Member
Sen Donna Soucy, Member
Sen Rebecca Perkins Kwoka, Member

Date: April 6, 2022

HEARINGS

Monday

04/18/2022

Election Law and Municipal Affairs

State House 100

1:00 p.m.

1:00 p.m.	HB 1163	relative to over voted ballots.
1:10 p.m.	HB 1174	relative to election challengers.
1:20 p.m.	HB 1667	relative to the standard and optional veterans' tax credits and the all veterans' tax credit.
1:30 p.m.	HB 1406	authorizing municipalities to collect compost.
1:45 p.m.	HB 1307	modifying the authority and duties of the housing appeals board.
2:00 p.m.	HB 1170	limiting the authority of New Hampshire delegates to policymaking conventions.
2:15 p.m.		Hearing on proposed Amendment #1218s, relative to the length of terms for Rockingham county officers and the election of the Gunstock Area Commission., to HB 1397 , relative to the length of terms for Rockingham county officers.

EXECUTIVE SESSION MAY FOLLOW

Sponsors:

HB 1163

Rep. Porter
Rep. Santonastaso

Rep. Berch
Sen. Soucy

Rep. Soti

Rep. Ward

HB 1174

Rep. Yakubovich
Rep. Love

Rep. Ankarberg

Rep. Abramson

Rep. Johnson

HB 1667

Rep. Pauer
Rep. Weyler

Rep. Baxter
Rep. Edwards

Rep. Binford
Rep. Foster

Rep. Homola
Sen. Avard

HB 1406

Rep. Egan
Rep. Weston

Rep. Gallagher
Sen. Hennessey

Rep. Myler

Rep. Alexander Jr.

HB 1307

Rep. B. Griffin

HB 1170

Rep. Wallace
Rep. Bernardy

Rep. Ulery

Rep. Hobson

Rep. Torosian

Tricia Melillo 271-3077

James P. Gray
Chairman

Senate Election Law and Municipal Affairs Committee
Tricia Melillo 271-3077

HB 1307, modifying the authority and duties of the housing appeals board.

Hearing Date: April 18, 2022

Members of the Committee Present: Senators Gray, Birdsell, Ward, Soucy and Perkins Kwoka

Members of the Committee Absent : None

Bill Analysis: This bill modifies the authority and duties of the housing appeals board.

Sponsors:
Rep. B. Griffin

Who supports the bill: Representative Barbara Griffin, Representative Tony Piemonte, Cindy Kudlick, Dave Keller, Robin Calitri, Kenneth Park Jr., Walter Kirsch

Who opposes the bill: Senator Bob Giuda, Representative Eric Gallager, Representative Marjorie Porter, Alvin See, Ben Frost, David Juvet, Ken Eyring, Elissa Margolin, Adam Schmidt, Ari Pollack

Summary of testimony presented in support:

Senator Birdsell introduced the bill for Representative Barbara Griffin

Natch Greyes – NH Municipal Association

- The policy question is what is the proper scope of the Housing Appeals Board.
- Last summer there was a case that dealt with whether or not the HAB could hear an appeal about the class distinction of a road that was going to be used to facilitate residential development.
- They are of the opinion that would be beyond the scope of housing and housing development.
- The law as it stands has broad language that this bill will clean up.
- It will clarify that the HAB should hear appeals from land use boards that deal with housing issues.
- It is only amending the scope of what the HAB does.

Representative Barbara Griffin

- This is one of four bills relating to the Housing Appeals Board that has survived.
- The Housing Appeals Board has a time frame of 6 months to render its decision.
- The board has issued over 15 decisions.
- The scope of the Housing Appeals Board as enacted is much broader than was represented.
- If the true purpose is to have an expeditious review of land use development, that is what it should be doing.
- The current list of jurisdiction that it has includes items that don't have to be related to an actual housing application.
- These include ordinance administration, innovative land use controls, growth management controls and permit fees.
- With this bill, the scope for decisions includes planning boards, zoning boards, building code of appeals, and the historic heritage commission.
- Those are the boards that the HAB should be dealing with.
- It simply reformulates the A-F listing of jurisdiction and lists out those bodies that do have applications for development of housing.

- In Goffstown the ZBA has been appealed twice and in one the decision of the ZBA was affirmed and the other the ZBA stated “its hands were tied.”
- A request for relief from the zoning board for an application for 16 units of housing proposed in an area zoned mixed commercial.
- It is very hard to have commercial development in town and the zoning board tries very hard to develop these areas to provide relief for property owners.
- This application in front of the zoning board was to put in only housing in front of a very large site that has some commercial development.
- The HAB overruled her zoning board and tied their hands in regards to the criteria of hardship.
- Now Goffstown is looking at a piece of land that will only be housing but was supposed to provide some property tax relief with commercial development.
- The Housing Appeals Board didn't like their zoning or the ZBA.
- That appeal was appropriate even under her amendment because it was an appeal from an application to the zoning board.
- She suggested to the committee that the HAB is simply differing in opinion from local land use boards that know best what the zone was intended to be in a community.

Summary of testimony presented in opposition:

Representative Eric Gallagher

- The Housing Appeals Board is fairly new and they have not had a chance to see how well it works.
- He believes it is premature to be modifying the scope of it at this time.
- The minority heard from many housing advocates with concerns that limiting the scope of the Housing Appeals Board could worsen the housing crisis in our state.

Ben Frost – NH Housing Authority

- New Hampshire has a housing crisis and it is a continuing impediment to the economic growth of the state.
- There has been a 37% increase in the median price of home sales over the past two years.
- There has been a 23% increase in the median rental cost in the past five years.
- These numbers are a reflection of the critically low inventory of housing that we have in New Hampshire.
- Part of the supply issue is the difficulty developers face at the local level.
- As they put forth proposals to create new housing sometimes they are faced with unnecessary regulations or unreasonable denials.
- The Housing Appeals Board was created as a means for people at the local level that face the denials, an opportunity to get their day before an impartial tribunal.
- It was created by the legislature with 3 members appointed by the Supreme Court.
- They are not a political body and have been up and running for over a year.
- The HAB provides property owners and builders with an opportunity to appeal local decisions without infringing on local control.
- There is no change that is required at the local level, it is strictly an appeals body.
- It does not have the power to override or bypass local regulations.
- HB 1307 proposes to reduce the scope of jurisdiction of the Housing Appeals Board.
- As it stands now, the Housing Appeals Board can hear appeals of local decisions on housing and housing development.
- It suggests that an individual property owner who is not developing housing on a property but is seeking a building permit for an addition would not be able to go to the housing appeals board.
- That is one of the reasons why the HAB was created, to hear appeals of local decisions.
- Another change is new language on lines 14 and 15 which lists out different boards that the HAB hear appeals of local decisions.

- Having a specific list like that in statute automatically excludes those Boards that are not on the list.
- Therefore, their decisions would not be appealable to the Housing Board.
- This seems unfair and will cause confusion as to when a person can or cannot go to the HAB.
- Any board that makes decisions regarding housing should be appealable to the HAB.
- He has heard that the HAB decisions are all favored toward the developers.
- The housing appeals board has heard about 40 appeals and has made 18 decisions so far.
- Six were findings against the municipality and reversed their decision.
- There was one split decision.
- In four decisions, the HAB agreed with the local board.
- Seven appeals were vacated and remanded.
- 11 decisions were in favor of the municipality and not the builder.
- The legal standard for the Housing Appeals Board is that it will assume that the local board did it right and the person that is appealing has to prove that they did it wrong.
- Senator Perkins Kwoka asked if the reason the Housing Appeals Board was created is that timing is relevant in housing development.
 - Mr. Frost replied that the time it takes for cases to be heard in Superior Court is the reason that the HAB was created. It can take almost two years for appeals to be settled in Superior Court. The HAB has a statutory deadline of 150 days from the time it receives an appeal.
- Senator Perkins Kwoka asked prior to the HAB how would the disputes between the property owner and the municipality be handled.
 - Mr. Frost answered that there were always routes of appeal but it depended on what the case was about and what stage of the project it was in. Some could go to the local ZBA, others had to go to Superior Court.
- Senator Perkins Kwoka asked if he could give an example of how the water/ sewer commission could affect housing.
 - Mr. Frost replied that the current statute would allow appeals of the local water sewer commission decision, say, to deny extension of a line to a housing development. Under the language of this bill that would not be appealable to the HAB as they are excluded from the list.
- Senator Ward commented that in paragraph three of his testimony it states the lack of housing supply is caused by some communities and asked if he took out those “some communities” would they be able to get enough supply in the others.
 - Mr. Frost replied probably not. It is going to take more than the HAB to meet the housing supply issues. It is an important element but not the soul solution.
- Senator Ward commented that in the following paragraph it states that the HAB does not infringe on local control and asked if he could explain that.
 - Mr. Frost explained that the HAB is about appeals and not about affecting the local process. All of the boards in a municipality follow their own processes. Whether the HAB exists or does not exist, those processes will continue. The Superior Court decisions do not infringe on local control and neither does the HAB.
- Senator Ward stated that if the HAB or the Superior Court changes something that goes against the rules and regulation of the municipality, that would be infringing on local control.
 - Mr. Frost replied that they cannot change the zoning or the regulations. They can only hear the appeal of a decision by a local board which applied those regulations. In Shattuck vs Frankestown, the planning board ignored its own standards and applied vague notions. In its decision the HAB reversed the planning board’s decision stated that they imposed their own opinion instead of applying the regulations.
- Senator Birdsell commented that she has heard from her local planning boards that the HAB decisions are lopsided and asked would they be open to adding members that are land use specialists
 - Mr. Frost answered that having land use expertise is in the qualifications for the members of the HAB.

Elissa Margolin – Housing Action NH

- They were one of a large group of stakeholders that started looking for solutions to delays that were happening in projects.
- Most of their members were not pursuing review of decisions because they could not pass on the cost of litigation and delay.
- There is a model here in New Hampshire which is the Bureau of Tax and Land Appeals which has been in existence since 1977.
- That is a model where they could access review quickly without an attorney.
- When HAB was being created it was really important that the private land owner had rights and standing.
- That would be problematic in the language proposed in HB 1307.
- The jurisdiction issue was discussed and it was determined that the language in RSA 679 would make sense so that all local reviews would be exhausted.
- They always wanted to find a review that respected local control.
- This language limiting jurisdiction would challenge that full exhaustion of local review.
- It would open loop holes.
- She confirmed for Senator Birdsell that the qualifications for members of the HAB include expertise in land use law.

Senator Bob Giuda

- The NH Municipal Association statement that the Pembroke issue was beyond the jurisdiction of the Housing Appeals Board is inaccurate.
- He confirmed with the Selectmen that a class 5 road was not granted out of a class 6 road to prevent the development of a housing development.
- This bill would narrow the scope of something that does not have a problem.
- The HAB does not dictate policy it ensures that the local land use boards are complying with existing state statutes and the towns own ordinances.
- In every case of appeals that went against the municipality, mistakes were made either in violation of the state statutes or their own local ordinances.
- With a .6% vacancy rate this would be unnecessary to limit the scope of the HAB, when the state is trying to create more housing.
- He presented an amendment for the committee to review.

TJM

Date Hearing Report completed: April 22, 2022

Speakers

Testimony



April 18, 2022

The Honorable James Gray, Chair
Senate Election Law and Municipal Affairs Committee
State House, Room 100
Concord, NH 03301

Subject: HB 1307 – modifying the authority and duties of the housing appeals board

Dear Chairman Gray:

I am writing to express New Hampshire Housing's opposition to HB 1307, which would significantly curtail the jurisdictional authority of the Housing Appeals Board. The Housing Appeals Board was created by the Legislature pursuant to RSA Chapter 679 to provide an alternative appeals process for local decisions on proposals for housing and housing developments.

New Hampshire's housing market is increasingly unable to meet the needs of our citizens to find adequate housing in the communities where they want to live and work. The supply of housing is simply not keeping pace with demand, and this is making housing more expensive. Our statewide rental vacancy rate is under 1%, well below the 5% we consider to indicate a balanced market. The cost of renting a 2-bedroom apartment has increased 23% in the past 5 years. Renter incomes have increased at a far slower rate, making it extremely difficult for workers to move to New Hampshire for jobs. For home purchasers, the median price of a home was \$389,500 in February 2022, 37% higher than two years earlier. The inventory of homes for sale is critically low.

This lack of supply is partly a reflection of the difficulty faced by property owners and developers in some communities as they have put forth proposals to create new housing. They often encounter resistance in the form of unnecessary regulations, onerous conditions of approval, or unreasonable denials. Frequently, they also face resistance from neighborhood opposition, which has traditionally been able to use the court appeals process to delay project development, often for many years. That delay either adds significantly to the ultimate cost of development, or simply discourages housing construction outright.

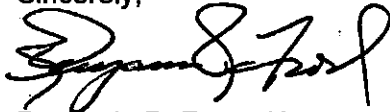
Some communities are effectively accommodating the needs of our citizens for more housing. However, many are not; and more housing is needed across a broad spectrum of New Hampshire's communities. The Housing Appeals Board provides a faster, easier, and less expensive appeals mechanism for housing development proposals. It provides property owners and builders with an enhanced opportunity to appeal local decisions, yet it achieves this without infringing on local control. No changes to local zoning or process are required by the Housing Appeals Board, and the Board applies the same legal standards as superior court in adjudicating decisions of local boards. The Board does not have the power to change or bypass local land use regulations. The Housing Appeals Board is part of a truly "New Hampshire" solution to the problems of our housing market.

Under RSA 679:5, the authority of the Housing Appeals Board is clearly defined. It states that the decisions of any local board, commission, or committee related to housing and housing development proposals that could be appealed to superior court may instead be appealed to the Housing Appeals Board. To limit the authority of the Housing Appeals Board only to the decisions of local land use boards unnecessarily reduces the Board's authority and provides an easy way for communities that want to thwart legitimate housing development proposals by continuing to maintain a "so sue us" posture. It is precisely those sorts of decisions that the Housing Appeals Board was designed and intended to address.

Since its formal establishment about 18 months ago, the Housing Appeals Board has received over thirty appeals and has made decisions in about half of those cases. These decisions reflect careful analysis and a balanced approach. As the Legislature intended, the Housing Appeals Board is doing its job to efficiently hear and decide matters in a way that neither favors developers, abutters, or municipalities. We respectfully urge your committee to recommend HB 1307 inexpedient to legislate.

Thank you for the opportunity to provide testimony to your committee. The staff of New Hampshire Housing will be happy to provide any additional information that your committee may require.

Sincerely,



Benjamin D. Frost, AICP
Deputy Executive Director/Chief Legal Officer

cc: Committee members



Testimony of Elissa Margolin, Director

in OPPOSITION to
HB 1307
Senate Election Law and Municipal Affairs Committee

April 18, 2022, SH Room 100, 1:45 pm

Mr. Chairman and Members of the Committee:

My name is Elissa Margolin and I serve as director of Housing Action NH. Housing Action NH is a statewide coalition of 80 organizations united around affordable housing policy and ending homelessness in New Hampshire. Our members include those who develop, manage, own and finance affordable housing, public housing agencies, supportive housing agencies and homeless service providers. They are key partners in the work to address the housing crisis in New Hampshire.

Housing Action NH opposes House Bill 1307 and we welcome this opportunity to address concerns, clarify the origins of the Board, and debunk some of the myths that have been circulating about the Board.

Origins of the Housing Appeals Board

Housing Action NH was one part of a larger group of stakeholders -- that included the BIA, the Homebuilders, the NH Association of Realtors -- that came together in 2017 to propose the Housing Appeals Board. Many stakeholders agreed that costly and lengthy delays in the court system were contributing to the supply side problem that is at the root of NH's housing crisis.

With the goals of efficiency and expertise in mind, the stakeholder group looked to the model of the Bureau of Tax and Land Appeals, that has been successfully providing this kind of review in New Hampshire for issues related to taxation since the mid 1970s.

Originally proposed in Senate Bill 557 in 2018, followed by Senate Bill 306 and House Bill 104 in 2019, the Housing Appeals Board was established July 1, 2020, when RSA 679 took effect.

No Impact on Local Control

The Housing Appeals Board was specifically designed to provide faster review and subject-matter expertise, but only after local reviews are exhausted (RSA 679:5 IV). In fact, as a review Board, the Housing Appeals Board only has concurrent jurisdiction with the Superior Court. As noted in a legislative bulletin from the NH Municipal Association in 2019: "The board would apply the same law and the same standards that a judge would apply, so a municipality would not be prejudiced by having an appeal brought to the board rather than to the court."

According to RSA 679, the Housing Appeals Board cannot rewrite local municipal zoning ordinances, or subdivision regulations, or site plan regulations, or local master plans, or conservation commission rules, or historic district commission rules. It also cannot impose planning concepts such as "smart growth." It simply reviews specific cases according to the established laws and ordinances like Superior Court. In addition, all decisions of the Housing Appeals Board can be appealed to the NH Supreme Court.

Helps Avoid Lengthy, Costly Litigation

Like the BTLA, the Housing Appeals Board helps both appellants and defendants avoid costly and lengthy litigation costs. Parties do not require legal counsel and can be represented by a project lead, site engineer, architect or pro se. (*Representation by Nonattorneys* ; Section 679:10).

It also enhances options of local landowners seeking review of local decisions impacting their private property. They too can access faster review of their cases at much less expense.

Other Myths

The Housing Appeals Board is not biased in favor of developers. It uses the same standards for case review as the Superior Court. Also, Board seats are not political appointments. Housing Appeals Board members are appointed by the NH Supreme Court.

Narrowing Jurisdiction Would Open Door to Unjust Gamesmanship

The rewrite proposed in HB 1307 of the jurisdiction of the Housing Appeals Board may seem benign at first glance. However, narrowing the jurisdiction would open the door to potential "workarounds" if a small group was looking to undermine housing development in other ways.

Narrowing the jurisdiction could also reintroduce tactical use of delays to undermine projects. Proposed housing projects that are more affordable for New Hampshire's workforce are the most vulnerable to delay tactics due to their more complex public-private financing.

Access to review is access to justice. We should not create new barriers for applicants seeking to access the timely review offered by the newly established Housing Appeals Board. We urge you to find HB 1307 *inexpedient to legislate*.

**THE STATE OF NEW HAMPSHIRE
HOUSING APPEALS BOARD
Governor Hugh J. Gallen State Office Park**

Johnson Hall, Room 201
107 Pleasant Street
Concord, NH 03301
Telephone: (603) 271-1198
TDD Access: Relay NH 1-800-735-2964
Email: clerk@hab.nh.gov
Visit us at <https://hab.nh.gov>



CASE NAME: Ronald A. Shattuck, Jr., et al. v. Town of Frankestown
CASE NO.: PBA-2021-01

ORDER

The matter before the Housing Appeals Board is the Frankestown Planning Board's 5 January 2021 denial of the Applicants' (Ronald A. Shattuck, Jr. and Melissa D. Shattuck) request to subdivide (after a minor lot line adjustment¹) a 36-acre parcel of residential/agricultural land into four (4) lots for single family home construction on each lot.

FACTS:

In 2015, the Applicants purchased a 6.436-acre parcel of land in Frankestown which is referred to as "Lot 17" and in 2019, an additional 33.409 acres referred to as "Lot 18" was purchased.²

In September of 2020, the Applicants filed an application with the Frankestown Planning Board to:

- a) adjust the lot line between lots 17 and 18;
- b) and to subdivide lot 18 into five (5) lots; four (4) new residential lots and one (1) remainder lot with the riding arena structure.³

¹ The lot line adjustment request is not directly addressed in this appeal. However, to comply with the proposed subdivision plan it is required and it was part of the subdivision application. CR at 1-11. A review of the lot line adjustment proposal discloses no zoning violations.

² The lot line adjustment would add approximately three (3) acres to lot 18 enlarging it to approximately 36 acres. The acreage of lots 17 and 18 are not consistently reflected in the Applicants' memorandum nor the Certified Record but this is not material since the actual survey data controls.

³ In 2019, the Applicants applied for, and received, a building permit to construct an indoor "equestrian arena," and constructed same on lot 18. CR at 243.

After filing the lot line adjustment and subdivision application, on 20 October 2020, the Planning Board conducted a site walk at the property. Certified Record (CR) at 29. And in the evening on that same day, the first of many hearings was held.⁴ The Planning Board continued this hearing until 17 November 2020. Between 20 October and 17 November, items requested by the Planning Board at the 20 October meeting were added by Meridian Land Services (“Meridian”) to the Subdivision Plan. (Subdivision Plan Concept 2, CR, Volume II.)⁵

At the 17 November 2020 Planning Board meeting, the Planning Board reviewed the revised Subdivision Plan. While one of the Planning Board members remarked that “[y]our original plan as presented is exactly what the voters have approved in the Town of Frankestown.” (Recorded meeting at: 1 hour 27 minutes.) other Planning Board members wished to have more information added to the plan and the meeting was continued to 1 December 2020.

Before the 1 December 2020 meeting additional information was again added to the Plan. (Subdivision Plan Concept 3, CR, Volume II.) At the Planning Board meeting on 1 December 2020, the application was continued until 15 December 2020 with the Planning Board again requesting additional plan information and changes were made. (Subdivision Plan Concept 4, CR, Volume II.)

As it had done at prior meetings, on 15 December 2020 the Planning Board yet again requested plan adjustments and the meeting was continued to 5 January 2021.⁶ After the 15 December 2020 Planning Board meeting, Meridian again added additional information to the

⁴ The Planning Board “accepted the plan as complete” at the 20 October 2020 hearing, in compliance with RSA 676:4. CR at 29.

⁵ Between 20 October 2020 and 25 October 2020, the Frankestown Conservation Commission conducted a site walk of the Applicant’s property. CR at 49-50. The Conservation Commission comments and recommendations were considered by the Applicants. Meridian Land Services added all known physical features, wetlands, streams, and slopes to ensure compliance with subdivision regulations and zoning requirements. This includes setbacks from physical boundaries, wetlands and existing historic or man-made structures to be left in place. While the Conservation Commission references the prior tree cutting and, like the Planning Board, suggests a violation of RSA 227 (the “Timber Harvesting” statute), the Certified Record discloses no such violation was ever advanced by State or local authorities.

⁶ Because of a further delay in a final vote, the Planning Board requested, and the Applicants agreed, to extend the 65 day time limit within RSA 676:4, I, (c)(1).

Plan set. (Subdivision Plan Concept 5, dated 18 September 2020, last revised 23 December 2020, CR, Volume II.)

On 5 January 2021, the Planning Board again met to review the Applicants latest plan. At that meeting, upon motion duly made, the board voted to deny the plan.⁷ The minutes in the Certified Record at pages 14-16 reflect the plan denial but do not mirror the written 11 January 2021 "Notice of Decision." CR at 43.

LEGAL STANDARDS:

The Housing Appeals Board review of Planning Board decisions is limited and it must treat the Planning Boards factual findings as "prima facie," lawful and reasonable. Further, it cannot reverse the Planning Board decision unless it is unreasonable or there are identified errors of law. *Prop. Portfolio Group v. Town of Derry*, 163 N.H. 754 (2012); *see also*, *Motorsports Holdings v. Town of Tamworth*, 160 N.H. 95 (2010).

As held in *Summa Humma Enterprises v. Town of Tilton*, 151 N.H. 75 (2004), the appealing party bears the burden of persuading the Housing Appeals Board that the Planning Board's decision was unreasonable. Thus, the Housing Appeals Board's role, like Superior court, is "...not to determine whether it agrees with the planning board's findings, but to determine whether there is evidence upon which they could have been reasonably based." *Id.* at 79.

Thus the Planning Board decision will be upheld unless it is unsupported by the record or is legally erroneous as viewed by a reasonable person based on the same evidence. *Prop. Portfolio Group* at 757.

⁷ As noted in FN 1 since there was no separate motion, this motion constitutes a denial of both the lot line adjustment request as well as the requested subdivision since both requests were contained in a single planning board application.

DISCUSSION:

Turning to the "Notice of Decision" dated 11 January 2021; the Planning Board provides five reasons for its denial. In addition it contains a preliminary statement that "...the overall plan as presented by the Applicant does not conform to the Francestown Subdivision Regulations as expressed in Section I. 'PURPOSE' and is not consistent with the general intent and spirit of the Town's Zoning Ordinance as expressed in Article 1, 'PREAMBLE.'"

Section I, "Purpose" of the Subdivision Regulations and the Zoning Ordinance "Preamble" are helpful in providing an overview of the itemized regulations and ordinances. However, they are not specific regulatory provisions but are designed to provide guidance to the Planning Board, Zoning Board and applicants in preparing land use requests. The Town in adopting a zoning ordinance and planning regulations must provide an understandable regulatory scheme to allow property owners the ability to clearly understand, with specificity, what is required when requesting a permit, or, just as important, relief to be requested from the Zoning Board of Adjustment or Planning Board if full compliance with the regulations or ordinance is difficult or impossible.

Applying this basic concept to Applicants' plan, one must ask what "relief" would be requested from the Zoning Board if a zoning "Preamble" violation exists. The Certified Record and the zoning ordinance disclose no objective zoning violations for this requested subdivision. Thus, the Housing Appeals Board finds that the Planning Board's findings that there is a zoning violation is both unreasonable and not in accordance with the actual, objective provisions of the Town of Francestown's zoning ordinance. Likewise, requesting a "waiver" of the Subdivision Regulation "Purpose" statement is inappropriate. All of the areas highlighted in the "Purpose" statement are the subject of specific planning regulations. If needed, those sections, not the "Purpose" statement, would be subject to a waiver request as allowed under RSA 674:36, II (n).

When asked about the specific zoning violation the Town opined that Article V, A.4 of the zoning ordinance was being violated along with "Table 2 on page 44." However, Article V,

A.4 is a Planning regulation—not a zoning provision, dealing with “Preservation of EXISTING Features.” While “Table 2 on page 44” is part of the zoning ordinance which outlines “permitted uses,” there is no evidence that the Applicants’ proposal violates those provisions.⁸

The next reason for denial expressly focuses on Section V, A.4 of the Town’s Subdivision Regulations which states as follows: “The subdivider shall identify and give due regard to the preservation and protection of existing features such as trees, scenic points, brooks, stone walls, streams, rock outcroppings, water bodies, aquifers, public areas, historic landmarks and other natural resources.” (Emphasis supplied).

This provision was discussed at length by the parties during the many referenced hearings. Reviewing this regulatory provision in a light most favorable to the Town does not disclose a violation. The plans identify and give due regard for the protection of existing features as required. In contrast, the Town wishes to review the proposal in the context of how the land existed prior to the legal cutting of trees on the property.⁹ The minutes reflect the Planning Board’s desire that the Applicants somehow restore the property to its “pre-cut” status as a condition for subdivision. CR at 15. In fact, the Certified Record at 15 clearly points to this issue when Planning Board member Sarah Pyle stated:

“With the clearing and grubbing of this property, protections that would have naturally been in place (and I would argue should have been) for both the historical character of the neighborhood and the environment – slopes and wetlands, have been stripped from this property. I believe that this work was done outside of the guidelines of both state and town laws (RSA 227 and Sub. Div. Regs. Sec. V).” CR at 15.

This statement reflects some of the Planning Board members’ thinking—specifically that the legal tree cutting triggered a violation of some sort. In fact, there is a suggested violation of

⁸ Article V of the zoning ordinance itemizes necessary criteria for “Open Space Development.” The Applicants have not proposed an “open space development.”

⁹ When queried during oral argument, neither side pointed to evidence of any tree cutting violations. This included no citations at the State or local level and the record contains evidence of a proper “notice of intent to cut and payment of stumpage fees.” CR at 235-242.

RSA 227 and Section V of the Town Subdivision violations. However, a close examination of both, together with the “notice of intent to cut,” (CR at 235-242), discloses no violations and certainly does not prohibit the creation of four (4) new lots each with an average size of 3 or more acres.¹⁰ CR, Volume II.¹¹ In addition, the above statement suggests that land with “significant slopes and wetlands” should not be developed. Standing alone that statement may be correct. However, in this instance the proposed lots conform to the Town’s zoning requirements, including slopes and wetlands, which were carefully considered by Meridian in establishing the proposed lot boundaries. While the Town argues that the proposed “narrow buffer and planting plan, [falls] far short of restoring the existing features that have been removed,” the Housing Appeals Board finds that this is not a violation of the Town’s subdivision regulations since no buffer is required¹² and, in fact, “buffer” is not defined in the Subdivision Regulations. (See, Subdivision Regulation, Section III, “Definitions.”) CR at 315.¹³

Next, the Town points to the Applicants’ failure to provide “building envelopes” as discussed in Subdivision Regulation, Section V (A)(5)(i). Upon review of the entire Certified Record, the Housing Appeals Board finds that while the Planning Board may designate a “building envelope” (CR at 329) no such designation was made.¹⁴ That fact notwithstanding, the prepared subdivision plans do show the limits of construction on each of the new lots. Subdivision Plan Concept 5, dated 18 September 2020, last revised 23 December 2020, CR, Volume II. Specifically, these limits reflect the required zoning setbacks from lot lines and other

¹⁰ Paragraph N.1 in Section V of the Subdivision Regulations confirms that no RSA 356-A registration is required for a four (4) lot subdivision. However, the threshold for a subdivision registration under RSA 356-A:3, I(a) is more than 15 lots—not “50 or more lots.”

¹¹ Although not in the Town’s “Notice of Decision” the minutes and testimony reflect a continuing focus on the “national and historic neighborhood district” recognition this area received in 1980. The problem with the Town’s position is that this “recognition” is not a Town regulation nor does it prohibit subdivision of land within it. Also, there is no evidence that any of the roadways abutting the Applicants’ property have been designated “Scenic Roads” under RSA 231:157-158.

¹² Buffers are required for “Open Space” subdivisions. See, Article V, 5.7(f) of the Town Zoning Ordinance. (CR at 289.) See also, Subdivision Regulation, Article V. (CR at 327.) There is no reference to buffers in this article which itemizes “Subdivision Plan Requirements.”

¹³ Although the applicant initially objected to the Planning Board’s request, Meridian did, in fact, add buffering to the later plan concept. (Compare Subdivision Plan Concept 1 with Subdivision Plan Concept 5, dated 18 September 2020, last revised 23 December 2020, CR, Volume II.)

¹⁴ When Building Envelopes were stated as a basis for denial, (CR at 16) the Planning Board minutes reflect: “Board states plan failed to provide building envelopes as requested by the board per Sub. Div. Regs. V (A)(A.5)(j) Lots. Agent states revised plan shows building in different areas. Board states revised plan continues to show buildable acreage but shows no building envelopes.” At that juncture, the board should have designated the building envelopes they desired.

possible impediments such as wetland buffers. The Housing Appeals Board finds this reason for denial unreasonable and not consistent with the actual facts. While the Planning Board may have requested “building envelopes” they never designated them. The Town’s Planning Regulations do not shift that burden to the Applicants.

In addition to referencing Subdivision Regulation V, A.4, Section 1(a) of the “Notice of Decision” also points to the definition of “buffer” in the Town’s Zoning Ordinance: “A landscaped buffer no less than 100 feet deep from public roads, 75 feet deep from adjacent properties shall be provided where appropriate to screen the development. The natural vegetation shall be retained whenever possible. If the natural vegetation is not sufficient to serve as an effective visual screen, landscaping may be required to provide such a screen. This buffer are shall be part of the open space, and shall be subject to the same restrictions that apply to the open space.” CR at 289.

As noted, although desired by the Planning Board, no “buffer” is required for a four (4) lot, non-open space subdivision, thus, there is no “buffer” violation. Section 1(a) of the “Notice of Decision” also suggests that the Applicants’ tree cutting was a violation of the “Wetland and Vernal Pool Conservation Overlay District.” See, Article II-A, 2-A.2 of the Town’s Zoning Ordinance. CR at 268-269. Proper timber cutting notices were filed and no violations have been brought forward. In addition, an examination of the submitted subdivision plans disclose no violation of the restrictions imposed on areas within the actual boundaries of the “Wetland and Vernal Pool Conservation Overlay District.”¹⁵

Next, the Town relies on the failure of the Applicants to “provide a sufficient sediment and erosion control plan” as per Section V, H.2 of the Subdivision Regulations. CR at 343. At the outset, the Certified Record provides no Town engineering report indicating violations of these provisions. The cited provisions are required to be met when:

¹⁵ Care must be taken in reviewing Article II-A, 2-A.2 of the ordinance. The “overlay district” is confined to the specific areas defined in Article II-A, 2-A.2.2. An examination of the Subdivision Plans discloses areas which are impacted by this overlay district. The building areas shown on the plan are not within the Overlay District.

- (a) there will be any environmental disturbance on slopes in excess of 15% or within 75 feet of wetland areas, drainage ways or open water and/or;
- (b) there will be earthmoving of an area of 1 acre or more and/or
- (c) there will be any road construction. CR at 343.

Meridian's plan shows no such conditions or encroachments and, as stated, there was no evidence from any Town consulting engineer pointing to a need for these control measures in accordance with the cited regulations. In addition, after subdivision should it be determined at the time of any construction that these regulations impact the proposed development, the Applicants would need to submit amended plans for review, and likely approval, by Town Officials or the Planning Board. Also, if an Alteration Of Terrain permit (AOT) is needed, those same issues would need to be addressed to the State's satisfaction prior to permit issuance. Based on the plans as submitted there are no violations of that subdivision regulation in conjunction with the proposed subdivision plan.

The Town's next reason for denial (number 4 in its 11 January 2021 "Notice of Decision") cites necessary compliance with the Town's zoning regulations, subdivision regulations, the Town's Master Plan, New Hampshire Statutes and any applicable Federal laws.

As previously discussed, the Town has not identified any specific zoning violations applicable to the proposed plan. Beyond the broad statement of RSA 674:36(b) and reference to the Town's Master Plan there are no specific regulatory impediments to approval. In fact, this area is identified for residential development on the Town's Master Plan and though it is not an "open space development" under Article V of the Town's zoning ordinance (CR at 285), the proposal creates four (4) lots each over three (3) acres in size. CR, Volume II. Even after construction of four (4) single family homes the undeveloped area on each lot is significant and each lot abuts the balance of the open space on the remainder of lot 18. CR, Volume II.

The Town also argues the “viewshed” and “character” of the neighborhood will not be protected.¹⁶ To suggest that single family residential construction on four (4) conforming lots realistically impacts “viewshed and character” of the neighborhood is not supported by any objective facts. This zone allows for possible residential subdivision and to deny a property owner’s subdivision request where the owner is in compliance with the regulations is unreasonable and inconsistent with the owners’ property rights. *See, Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727 (2001).¹⁷ In addition, the Housing Appeals Board disagrees with the Town’s decision that the “character of the neighborhood” is violated when the ultimate use proposed is consistent with the Town’s Master Plan and Zoning.¹⁸ As held in *Vigeant v. Town of Hudson*, 151 N.H. 747 (2005), when the use proposed is allowed by the Town’s zoning ordinance it is presumed reasonable. Again, there is no evidence in the Certified Record supporting a contrary conclusion.

The Town’s last reason for denial is also untenable. It states that “[n]o ‘substantial public benefit’ would result if the board were to grant a waiver or exception to the above regulations or concerns.” In the first instance, the Certified Record is devoid of any applicant requests for “waivers or exceptions.” Second, compliance with Town Subdivision regulations does not require an applicant to show a “substantial public benefit.”¹⁹ The Town cites Subdivision

¹⁶ Interestingly, development of the four (4) subdivided lots will start the process of buffer restoration and landscaping. Subdivision denial will likely delay that process. (Subdivision Plan Concept 5, dated 18 September 2020, last revised 23 December 2020, CR, Volume II.)

¹⁷ Although a zoning case, in *Simplex*, the Supreme Court clearly articulated the importance of weighing rules restricting a person’s use of his or her property against the New Hampshire constitutional guarantee of a person’s property rights.

¹⁸ It must be remembered that the application before the Town Planning Board was for a lot line adjustment and subdivision—not construction. Any construction on the subdivided lots will require review, approval and issuance of Building Permits.

¹⁹ The actual words “substantial public benefit” do not appear in the Subdivision Regulations nor are the words referenced in the questions posed to the Applicants in the Town’s ‘Final Subdivision Application.’ *See*, paragraph 6 of Appendix B of the Town’s Subdivision Regulations. CR at 362. Despite the wording of Subdivision Regulation, Section V, A.2, the Housing Appeals Board does not choose to speculate that this requirement is part of the Francestown Subdivision regulations and that it should be imposed on the Applicants. As an aside, prior to *Gray v. Seidel*, 143 N.H. 327 (1999), many zoning boards used “benefit to the public interest” as one of the five required zoning criteria. The Supreme Court in *Gray* reminded practitioners and zoning boards that the correct criteria was “not contrary to the public interest.” While this application is not a zoning case, the Town continues to advance zoning violations as a basis for denial—including, apparently, the requirement of a “substantial public benefit.” Like the Supreme Court in *Gray*, the Housing Appeals Board rejects this requirement since it is not part of the Town’s regulatory scheme.

Regulation (V)(A)(I)²⁰ as support for this reason for denial. However, that regulation and Section 5 in the "Notice of Decision" are not exactly the same. Nor is there any basis to deny the Applicants' request based on "community future needs" and the "current and future fitness of the land for development purposes." Subdivision Regulations, Section V, A.1 (CR at 327). Neither of these broad statements are well defined, factually supported, nor were they meaningfully communicated to the Applicants. It must be remembered that all municipalities have a duty to provide reasonable assistance to landowners seeking approvals. See, *Carbonneau v. Town of Rye*, 120 N.H. 96, 99 (1980). In the context of this case, the Town Planning Board repeatedly suggested zoning violations existed with no clear identification of the specific, applicable zoning provisions. In fact, before denying the Applicants' subdivision plan on 5 January 2021, the Planning Board through one member represented that "suggestions" had been made to the Applicants for "...ways in which we might approve a subdivision plan that met our rules and regulations and guidelines and while effort was made by the applicant to hear Board's expressed concerns, responses have not met those concerns and requests." (CR at 16.)

Generalized concerns of noncompliance which are not specifically itemized in the Town's zoning ordinance or Planning Regulations do not constitute a viable and reasonable basis for plan denial. Also contrary to the above statement, Meridian and the Applicants endeavored after each meeting continuance to amend and update the proposed plans to address valid suggestions requested by the Planning Board.

Instead of clearly "designating building envelopes," specifically stating what "public benefits" they felt important in conjunction with a four (4) lot subdivision in this location, defining specific zoning and subdivision violations, clearly outlining how the subdivision is problematic or unfit "for current and future development and the community's future needs,"

²⁰ Section V.A.1 of the Town's Subdivision Regulations states that while zoning compliance is required it also allows the Planning Board to "...look beyond the issue of zoning compliance and consider other issues, including, but not limited to, the community's future needs and the current and future fitness of the land for development purposes." CR at 327.

the Planning Board relied on opinions and concerns which were subjective, legally undefined, or unreasonable in denying this subdivision.²¹

As discussed herein, all the reasons articulated by the Planning Board resulting in denial are, by a balance of the probabilities²², either unreasonable or legally deficient. Thus, the decision of the Town of Frankestown Planning Board is reversed. The final subdivision/lot line adjustment plan submitted for review (Subdivision Plan Concept 5, dated 18 September 2020, last revised 23 December 2020, CR, Volume II) shall constitute the approved plan. As to the Applicants proposed "Findings" those consistent with this order are approved, all others are denied.

**HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:**



Elizabeth Menard, Clerk

Date: May 7, 2021

²¹ As the Certified Record shows, some Planning Board members inserted their subjective personal feelings about this subdivision to support denial. The Supreme Court in *Trustees of Dartmouth College v. Town of Hanover*, 198 A. 3rd 911 (2018) cautioned Planning Boards against using unsupported, "subjective feelings."

²² See, RSA 679:9, II.

**THE STATE OF NEW HAMPSHIRE
HOUSING APPEALS BOARD**
Governor Hugh J. Gallen State Office Park

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CASE NAME: Ronald A. Shattuck, Jr., et al. v. Town of Frankestown
CASE No.: PBA-2021-01

ORDER

The Housing Appeals Board has received a *Motion for Rehearing* filed by the Town of Frankestown ("Town") in case number PBA-2021-01. After further review of the Certified Record ("CR") and the points made in the Town's motion, the Housing Appeals Board rules as follows:

The Housing Appeals Board is fully aware of its standard of review required under RSA 679:9, II and recognizes that the standard of review is consistent with appeals to the Superior Court.

The Town suggests that the Housing Appeals Board "rejected the Planning Board's factual finding regarding the 'rural character' of the town, and, as a result, erroneously found that the Planning Board did not have the authority to require a buffer." A review of the Certified Record finds no factual underpinnings that suggests that the proposed, four-lot subdivision will "affect" the "rural character of the town." (CR at 327-328).

As noted in its original order, the Housing Appeals Board did not find the word “buffer” within the Planning Regulations. “Buffer” is referenced in the Zoning Ordinance and may be required in an open-space subdivision,¹ but, again, the Town urges that the Planning Board had the discretion to require a buffer for this four-lot subdivision.

The Town refers the Housing Appeals Board to section 5(A)A.4 of the Subdivision Regulations which discusses the preservation and protection of existing features. The Town suggests that to not allow the Planning Board to look at the land prior to the timbering in order to effectuate and determine a buffer would “...render the interpretation of the regulation meaningless.” The Housing Appeals Board does not concur with this interpretation, especially since there is no definition or requirement for a buffer in the Subdivision Regulations.² Without such a definition or criteria, a buffer is not reasonable. Regardless, the plan approved by the Housing Appeals Board does contain proposed buffering, which was placed on the plan by Meridian Land Services at the specific request of the Planning Board.

In addition, the Housing Appeals Board chooses not to apply the words “existing features” in a manner that denotes the status of the land prior to the subdivision application being filed. To do otherwise leads the parties along an indeterminate path attempting to define the word “existing” as something other than its customary definition.³ As noted, and repeated here, the Applicant filed all appropriate requests to timber the property, and there were no local or state violations associated with that activity.

¹ Although initially discussed when the proposal first came before the Planning Board, there was no record of the Planning Board requiring the Applicant to use an open-space development subdivision design. This was an option the Planning Board elected not to use. Had it done so, zoning buffer requirements could have been imposed. Under Section 5.4 of the Town of Frankestown’s Zoning Ordinance, entitled “Applicability and Procedures” of OSD [Open Space Development], paragraph (a), “[T]he Planning Board may require an applicant to use an Open Space Development subdivision design if the property possesses one or more of the following special features:”

a) (5) “Unique, natural, cultural, and/historic features, in particular those identified in a Natural Resource Inventory of Frankestown, the Frankestown Master Plan, or other criteria, as identified by the Conservation Commission.”

² It is important to remember that “buffers” were not forgotten by the framers of the Town of Frankestown regulatory scheme. As pointed out in the Housing Appeals Board 07 May 2021 order, buffers, while not mentioned or defined in the Subdivision Regulations, are referenced in and part of the Town of Frankestown Open Space Development Ordinance. *See also*, Certified Record at 289-299.

³ “Existing (*adjective*): used to refer to something that exists now.” “Existing.” *Cambridge Dictionary*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/existing>.

The Town believes that the Housing Appeals Board “misunderstood the Planning Board’s position and improperly found that, because the Zoning Ordinance dimensional requirements were met, the Planning Board was limited in its review.” Nowhere did the Housing Appeals Board in its 07 May 2021 order (Order #2021-005) state that the “Planning Board was limited in its review, because the project met the Zoning Ordinance dimensional requirements.”

The point made by the Housing Appeals Board was this: if the project met the provisions of the Zoning Ordinance, any subdivision denial based on “zoning” was unreasonable and unlawful. In addition, if a zoning provision is being violated, appropriate steps may be taken by an applicant to appeal to the Zoning Board of Adjustment in an effort to waive those ordinance requirements.

The Town then states that the Planning Board did not “cite the Zoning Ordinance for the purpose of identifying a zoning violation.” This is not supported by the Certified Record. In fact, in the Town’s *Motion for Rehearing* on page three (3), Planning Board Member Sara Pyle states, “In my opinion, this plan as presented does not meet requirements of the subdivision regulations, does not conform to the zoning ordinance and does not follow the guidance afforded to this board by the Francestown Master Plan.” (CR at 16). (emphasis added). Additionally, paragraph four (4) of the Planning Board’s *Notice of Decision* suggests the Applicant was not in conformance with the Zoning Ordinance. (CR at 43).

The Town's rehearing request also infers that the Applicant's subdivision application was not consistent with the Town's Master Plan. While the Town's Master Plan can be a helpful resource, it is not an ordinance or regulation. In fact, it is a guide to be used by the Town to establish and refine its zoning and planning regulations. Under RSA 674:18, a zoning ordinance cannot be established by the local legislative body until the "...planning board has adopted the mandatory sections of the master plan as described in RSA 674:2, I and II." *Id.* RSA 674:2, I defines the purpose of a master plan; it can "...aid the board in designing ordinances that result in preserving and enhancing the unique quality of life and culture of New Hampshire...." *Id.* (emphasis added). The Town, in support of its denial of the Applicant's four-lot subdivision application, repeatedly refers to non-compliance with the Town's Master Plan. The provisions of the Master Plan which are properly adopted and contained in the Town's Zoning Ordinance and Planning Regulations must be complied with—not broad statements or restrictions created by the Planning Board.⁴

In addition to the prior-referenced buffer, the Planning Board felt the proposed four-lot subdivision failed to:

- 1) Maintain the rural character of the town;
- 2) Address the community's future needs; and,
- 3) Address the current and future fitness of the land for development purposes.

⁴ In *Rancourt v. Town of Barnstead*, 129 N.H. 45 (1986), the Supreme Court stated its position on the direct application of Master Plan provisions:

"In this case, if the board were allowed to apply the master plan directly, it would give greater legal status to the master plan than the legislature intended in RSA chapter 674. RSA 674:1 to :5 require a planning board to adopt a master plan but do not require the local legislative body to approve the plan. RSA 674:3. When a local legislative body enacts ordinances to regulate or control the timing of development, the public receives concrete guidelines. The enactments are subject to public and judicial scrutiny, and may be struck down if unlawful or unconstitutional. When a planning board purports to apply its limited growth recommendations on an *ad hoc* basis in place of limited growth legislation, it circumvents the requisite legislative process. We cannot countenance this practice." (emphasis added).

A review of the Certified Record discloses no planning regulation or zoning ordinance criteria for an applicant to follow in order to “comply” with the foregoing. First, what is the definition of “rural character” as applied to the four-lot subdivision? It is not defined in either the Zoning Ordinance or Subdivision Regulations. The Town has definitions of minimum lot size, road frontage, setbacks, wetland and slope requirements, and Single Family Residential dwellings are allowed by the Town’s Zoning Ordinance and the Town’s Master Plan. Thus, what factors must an applicant follow to maintain “rural character” in this zone?

Likewise, the “Community’s Future Needs” is not defined by a regulation or ordinance. While stated in the Planning Board’s *Notice of Decision*, (CR at 44), there was never an itemization provided to the Applicant to satisfy this Planning Board mandated prong. Briefly returning to the Town’s Master Plan, it is a vehicle to provide comment and direction about the “Community’s Future Needs;” however, that does not translate into a subdivision requirement until actually defined and properly approved as a zoning ordinance or planning regulation.

Finally, “current and future fitness of the land for development purposes” was another undefined concept that triggered subdivision plan denial. Based on the Planning Board’s concerns about the prior-referenced tree-cutting, are future developments barred until all the trees grow back? What regulation or ordinance notifies an applicant of this precondition?⁵ While these concepts may have merit, there needs to be clear, understandable criteria to allow an applicant to comply with same when preparing a proposed subdivision. The Town of Frankestown has not developed such an itemization.

⁵ See, *Trustees of Dartmouth College v. Town of Hanover*, 198 A.3d, 911 (N.H. 2018).

The Town cites *Richmond Co. v. City of Concord*, 149 N.H. 312 (2003) as support for its position. In *Richmond*, the proposed site plan (actual construction as opposed to the subdivision plan before the Housing Appeals Board) was considered "...incompatible with the existing architectural and historic character of the area...." *Id.* While a Planning Board can rely in part "...upon its own judgment and experience..." the board's decision must be based upon more than the personal opinion of its members. *Id.*, citing, *Durant v. Town of Dunbarton*, 121 N.H. 352 (1981). In *Richmond*, ordinance criteria existed for the applicant to follow which could be included as part of the proposal before the Concord Planning Board.⁶ In fact, there was evidence from an architect "...explaining the importance of the historic buildings and surrounding property." *Id.* Unlike this case in *Richmond*, the Planning Board and the applicant had a basic roadmap to follow.

The next point emphasized by the Town is "the board found that 'the subdivision is inconsistent with the current and future needs of the town as it fails to protect the viewshed and maintain the character of neighborhood.'" (CR at 44). The Certified Record contains no facts supporting this position, and discloses no itemization of criteria or standards in either the Zoning Ordinance or the Subdivision Regulations so that an applicant can prepare a plan which adequately "protect[s] the viewshed and maintain[s] the character of the neighborhood."

Finally, the Town suggests in its *Motion for Rehearing* that the Housing Appeals Board should not have found that the proposed subdivision plan met section 5(H)(H.1) of the Subdivision Regulations. No violations were identified after further review. It should be noted that a number of the criteria in that section relate to actual development, which, if violated, could result in a revocation of Planning Board approval.⁷

⁶ Concord had a city ordinance providing requirements and guidance for "architectural merit."

⁷ See, RSA 676:4-A. This statute allows for the revocation of a recorded approval if the work fails to conform to the statements, plans, or specifications upon which the approval was based.

Taken together, the Town's request to rehear this matter constitutes a repetition of its prior arguments and does not warrant a rehearing. The Housing Appeals Board order dated 07 May 2021 (Order #2021-005) suspended by its interim order dated 11 June 2021 is "UNSUSPENDED" and REINSTATED forthwith.

**HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:**

Elizabeth Menard
Elizabeth Menard, Clerk

Date: July 1, 2021

Voting Sheets

**Senate Election Law
& Municipal Affairs Committee
EXECUTIVE SESSION RECORD
2022 Session**

Bill HB 1307

Hearing date: 4/18/22

Executive Session date: 4/25/22

Motion of: ITL Vote: 5-0

Committee Member	Present	Made by	Second	Yes	No
Sen. Gray, Chair	X	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Birdsell, Vice Chair	X	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Ward	X	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Soucy	X	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Perkins-Kwoka	X	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Motion of: Consent Vote: 5-0

Committee Member	Present	Made by	Second	Yes	No
Sen. Gray, Chair	X	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Birdsell, Vice Chair	X	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Ward	X	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Soucy	X	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Perkins-Kwoka	X	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Motion of: _____ Vote: _____

Committee Member	Present	Made by	Second	Yes	No
Sen. Gray, Chair	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Birdsell, Vice Chair	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Ward	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Soucy	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Perkins-Kwoka	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Reported out by: Sen. PK

Notes: _____

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE
FOR THE CONSENT CALENDAR

Monday, April 25, 2022

THE COMMITTEE ON Election Law and Municipal Affairs

to which was referred **HB 1307**

AN ACT

modifying the authority and duties of the housing
appeals board.

Having considered the same, the committee recommends that the Bill

IS INEXPEDIENT TO LEGISLATE

BY A VOTE OF: 5-0

Senator Rebecca Perkins Kwoka
For the Committee

This bill would modify the authority and duties of the Housing Appeals Board by reducing the scope of its jurisdiction. Currently, the Housing Appeals Board can hear appeals of local decisions on housing and housing development. Considering the housing crisis New Hampshire is in, and the delays that come with appeals in the Superior Court, the Committee determined that it was inappropriate to make modifications to the authority of the Housing Appeals Board at this time.

Tricia Melillo 271-3077

General Court of New Hampshire - Bill Status System

Docket of HB1307

Docket Abbreviations

Bill Title: modifying the authority and duties of the housing appeals board.*Official Docket of HB1307.:*

Date	Body	Description
11/19/2021	H	Introduced 01/05/2022 and referred to Municipal and County Government
2/7/2022	H	Public Hearing: 02/07/2022 11:30 a.m. LOB301-303
2/28/2022	H	Executive Session: 02/28/2022 9:00 a.m. LOB301-303
3/10/2022	H	Majority Committee Report: Ought to Pass (Vote 13-3; RC)
3/10/2022	H	Minority Committee Report: Inexpedient to Legislate
3/17/2022	H	Ought to Pass: MA VV 03/17/2022 HJ 8
3/22/2022	S	Introduced 03/17/2022 and Referred to Election Law and Municipal Affairs; SJ 6
4/6/2022	S	Hearing: 04/18/2022, Room 100, SH, 01:45 pm; SC 15
4/27/2022	S	Committee Report: Inexpedient to Legislate; Vote 5-0; CC; 05/05/2022; SC 18
5/5/2022	S	Inexpedient to Legislate, MA, VV === BILL KILLED ===; 05/05/2022; SJ 11

NH House

NH Senate

Other Referrals

