

# **LAND USE REGULATION**

Fall 2024

Professor Milne  
Preliminary Syllabus  
(August 1, 2024)

## **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: Thursdays, 3:15 p.m. to 4:15 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 D), 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](http://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, 29-30, 70-73)

In Canvas Module “Cases,” read (1) National Federation of Independent Business v. Sebelius and (2) Clay v. Morgan County

#### *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?

How do you assess the implications of *Clay v. Morgan County* for the authority of local authorities to engage in land use regulation?

**Dissecting a modern zoning ordinance**

Hanover Zoning Ordinance (Suppl. pp. 101-229 (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, 69)

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

*Questions:*

Please find the Hanover Zoning Maps on the Hanover website, [www.hanovernh.org](http://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?

Can you convert the loft over your garage in a rental dwelling unit if you own a house in the Single Residence District?

Can someone build a residence in the Connecticut River floodplain?

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, 675:8-675:9 (Suppl. pp. 14-15, 44-45, 75)

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. 23-26, 30, 73-75)

Read Hanover, NH, Sustainability Master Plan's home page,

<https://hanovernhmasterplan.com/> and read Chapters 1, 2, 3 and 8 at

<https://hanovernhmasterplan.com/documents.html>.

#### *Questions:*

Based on the chapters you have read, does the Hanover Sustainability Master Plan create a sound basis for growth management?

Does it adequately address climate change? Affordable housing?

Does it discuss whether the local land use regulations need to be revised to achieve the Master Plan's goals?

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

### **Comprehensive planning and its legal relevance—Part 2**

Text pp. 200-201 (notes 2 through 4), 203-212 (through first paragraph of note 2), 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 Pipeline* 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. 91-96, 234-241 (through note 4)

NH Statute §§ 673:14, 674:43 through 674:44, 675:6 (Suppl. pp. 19, 52-54, 73-74)

In the Canvas Module “Cases,” read (1) *Trustees of Dartmouth College v. Town of Hanover* and (2) *Mojalaki Holdings v. City of Franklin*.

### *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. 230 et seq.) 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/or as a matter of law?

Do you agree with the result in *Mojalaki Holdings v. City of Franklin* as a matter of law and/or policy?

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, 47-51, 73-74, 76-80, 87-91)

Hanover Subdivision Regulations (Suppl. pp. 266 et seq.) (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?

**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

Hanover Subdivision Regulations, Articles 8 and 13

Assignment posted on Canvas “Open Space Subdivision” in the Hanover Case Studies module.

*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 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?

### **Techniques for managing the costs of growth**

Text pp. 139-141, 157-165

NH Statute §674:21.V (Suppl. pp. 32-34)

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?

### **Judicial and political review of local land use decisions**

Text pp. 73-78 (revisited), 113-116 (revisited), 229-233, 252-261 (through note 8), 282-283 (skip note 3), 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, 73, 76, 94-95, 96-99)

#### *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. 96-99)?

## **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

In Canvas Module “Cases,” read Lingle v. Chevron

#### **The evolution of regulatory takings law—Part 2**

In Canvas Module “Cases,” read Murr v. Wisconsin

#### *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," (1) revisit *Lingle v. Chevron USA*, (2) read *CRS, Sheetz v. County of El Dorado*, and (3) read portions of *Sheetz v. County of El Dorado* (Opinion Syllabus, pp. 1-3, and Kavanaugh concurrence)

#### *Questions:*

What is the test for when an exaction is unconstitutional?

In what circumstances does this test apply?

### **Review Session**

Assignment to be distributed.

## **V. Selected Growth Control Issues with a Focus on the Interrelated Issues of Affordable Housing, Climate Change and Biodiversity**

### **Protecting access to affordable housing**

Text, pp. 685-694, 706-720

Suppl. (as required to answer questions)

In the Canvas Module, "Cases," read portions of *City of Grants Pass v. Johnson* (Opinion Syllabus, pp. 1-5, Justice Sotomayor's dissent, pp. 45-49).

#### *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?

How can local land use regulations address homelessness?

### **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. 30-31, 35-37)

#### *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?



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

Will climate change considerations influence the use of these growth control techniques? Will affordable housing considerations influence their use?

### **Addressing Climate Change**

Read the Overview of the Fifth National Climate Assessment (November 2023), available at <https://nca2023.globalchange.gov/>

In the Canvas Module “Other Techniques,” read Ohenhen et al., *Disappearing Cities*, 627 *Nature* 108 (March 6, 2024), pp. 108-115.

Read 983-988.

#### *Questions:*

What climate change goals do you think can be best addressed at the local level? The goals nationally applicable or regionally variable?

How would you use the land use regulatory techniques we’ve studied to address climate change mitigation and adaptation?

What legal barriers stand in the way of achieving the land use results you think are necessary to address climate change?

How would the “void for vagueness” principle affect the way you would design local land use measures?

Are techniques that address climate change consistent with providing affordable housing?

### **Protecting open space and environmentally sensitive land through TDRs and conservation easements in an era of climate change and housing shortages**

Text pp. 829-832

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? Is protection important in light of climate change?

Do conservation easements and TDRs reduce greenhouse gas emissions?

Enhance climate change adaptation? Limit affordable housing?

### **Imposing statewide requirements—Vermont’s Act 250**

Text pp. 497-498 (starting with note 1 on page 497 and up to note 3 on page 498)

In Canvas Module “Other Techniques,” read *Vermont Natural Resources Board Act 250 Guide*, pp. 2-15

In Canvas Module “Cases,” read *In re B&M Realty*

In Canvas Module, “Other Techniques,” read *VT Act 47 Summary* (focusing on the Act 250 provisions)

Read <https://vtdigger.org/2024/06/17/with-veto-override-act-250-reform-bill-becomes-law/>.

*Questions:*

Does Act 250 stop sprawl?

Does it address climate change? Biodiversity? Affordable housing?

Does it effectively coordinate state and local land use policies?

## **VI. Conclusion**

### **Who should decide? What Challenges Lie Ahead?**

Text pp. 547-556 (up to note 2), 558 note 5.

*Question:*

What are your top three recommendations about how to improve local land use regulation in light of the challenges we currently face and might expect in the future?