2016 SB 146 – Accessory Dwelling Units (ADUs)

This legislation was motivated partly by studies conducted in 2014 by the NH Center for Public Policy Studies on *Housing Needs and Preferences in New Hampshire*. The studies identified a serious mismatch between the existing housing stock in the state and the needs and desires of our changing population. Although we have a preponderance of large single family homes, both younger and older people increasingly want smaller and more "urban" homes. The creation of ADUs will help people to age in place, and it will create a greater supply of housing for the young professionals we want to live here.

SB 146 will require municipal zoning ordinances to allow, in all districts that permit single-family residences, one *attached* ADU by right, special exception, or conditional use permit. If the ordinance is silent on the matter, attached ADUs will be deemed allowed in any single-family home. At its discretion, a municipality may allow detached ADUs.

A local zoning ordinance's dimensional standards for single-family homes will also apply to the combination of the primary dwelling unit and the ADU – this means no added lot size, no increased setbacks or road frontage, and no greater standards for lot coverage or other space limitations.

OBLIGATIONS AND OPTIONS UNDER SB 146

An accessory dwelling unit must

- Be an independent living unit (sleeping, cooking, eating, sanitation)
- Have an interior door between it and the principal dwelling unit
- Have adequate water supply and sewage disposal

A municipality may

- Control for appearance to maintain the "look and feel" of a single-family home (e.g., architecture, driveways, off-street parking, etc.)
- Require owner occupancy of one of the units, but it can't say which one
- Require demonstration that a unit is the owner's primary dwelling unit
- Regulate the number of occupants per bedroom, consistent with HUD standards
- Continue to limit the number of unrelated individuals within a single unit
- Establish minimum and maximum ADU sizes (but see below)

A municipality must not

- Require an ADU to be smaller than 750 s.f. (but the owner may make it smaller)
- Require a familial relationship between occupants of the principal unit and an ADU
- Require an ADU to have only one bedroom
- Require additional lot area or other dimensional standards for an ADU (but it may require additional lot area for a *detached* ADU)
- Require separate water or septic systems for the principal unit and an ADU
- Require interior doors between the principal unit and an ADU to remain unlocked

The Legislature has passed SB 146 and the Governor will soon sign it. The bill's effective date will be June 1, 2017, giving municipalities extra time to amend their zoning ordinances.

Municipal Sign Ordinances after *Reed v. Town of Gilbert*

Because the Town of Gilbert sign code placed stricter limits on temporary events signs but more freely allowed ideological and political signs—despite the fact that all three sign types have the same effect on traffic safety and community aesthetics—the code failed the narrow tailoring requirement of strict scrutiny.

As a result of *Reed*, a sign code that makes *any* distinctions based on the message of the speech is content based. Only after determining whether a sign code is neutral on its face would a court inquire as to whether the law is neutral in its justification.

Municipalities should review their sign codes carefully, with an eye toward whether the code is truly content neutral. If the sign code contains some potential areas of content bias—for example, if the code contains different regulations for political signs, construction signs, real estate signs, or others—consider amending the code to remove these distinctions.

In cases where a sign code update might take time, local planners and lawyers should coach enforcement staff not to enforce distinctions which might cause problems.

Check to be sure your sign code has all of the "required" elements of a sign code.

- The code should contain a purpose statement that, at the very minimum, references traffic safety and aesthetics as purposes for sign regulation.
- The code should contain a message substitution clause that allows the copy on any sign to be substituted with noncommercial copy.
- The code should contain a severability clause to increase the likelihood that the code will be upheld in litigation, even if certain provisions of the code are not upheld.
- In preparing the purpose statement, it is always best to link regulatory purposes to data, both quantitative and qualitative. For example, linking a regulatory purpose statement to goals of the local master plan, such as community beautification, increases the likelihood that the code will survive a challenge.
- If traffic safety is one of the purposes of the sign code (it should be), consult studies on signage and traffic safety to draw the connection between sign clutter and vehicle accidents.

In conducting the review of the sign code recommended above, planners and lawyers should look to whether the code contains any of the sign categories that most frequently lead to litigation. For example, if the code creates categories for political signs, ideological or religious signs, real estate signs, construction signs, temporary event signs, or even holiday lights, it is likely that the code is at greater risk of legal challenge. As a general rule, the more complicated a sign code is—i.e., the more categories of signs the code has—the higher the risk of a legal challenge.

Sign Code Guidance from the Court (Alito's Concurrence):

A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny.

The requirements of your ordinance may distinguish among signs based on any content-neutral criteria. Here are some specific standards the Court might uphold:

- Rules regulating the size of signs.
- Rules regulating the locations in which signs may be freestanding signs and those attached to buildings.
- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules that distinguish between the placement of signs on private and public property.
- Rules distinguishing between the placement of signs on commercial and residential property.
- Rules distinguishing between on-premises and off-premises signs.
- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on signs advertising a one-time event.

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Possible Sign Code Changes:

Increase the overall allotment of temporary signs to accommodate the maximum demand for such signage at any one time, and allow that amount of temporary signs. A regulation that singles out off-premises signs that does not apply to a particular topic, idea, or viewpoint is probably valid because it regulates the locations of commercial signs generally, without imposing special burdens on any particular speaker or class of speakers.

Define government signs and Traffic Control Devices as signs, but specifically authorize them in all districts. Provide a base allotment of signs, and allow additional signs in relation to activities or events. Every property has a designated amount of square feet of signage that they can use for any temporary signs on their property, year round. For example: [x] square feet per parcel, in a residentially-zoned area, with a limit on the size of signs and perhaps with spacing of signs from one another. All properties get additional noncommercial signs at certain times, such as before an election or tied to issuance of special event permit. They key is to tie the additional sign allowance to the use of the property, rather than the content of the sign. Consider the following:

- Allow an extra sign on property that is currently for sale or rent, or within the two weeks following issuance of a new occupational license (real estate or grand opening signs).
- Allow an extra sign of the proper dimensions for a lot that includes a drive-through window, or a gas station, or a theater (drive thru, gas station price, and theater signs).
- Allowing additional sign when special event permit is active for property (special event signs). Key: not requiring that the additional signage be used for the purpose the sign opportunity is designed for, or to communicate only the content related to that opportunity.
- Grant an exemption allowing an extra sign on property that is currently for sale or rent.
- Grant exemptions allowing an extra sign (<10 sq. ft., < 48 inches in height, and <six feet from a curb cut), for a lot that includes a drive-through window.

Every parcel shall be entitled to one sign <36 sq. inches in surface area to be placed in any of the following locations: On the front of every building, residence, or structure; on each side of an authorized United States Postal Service mailbox; on one post which measures no more than 48 inches in height and 4 inches in width.

Provide a content-neutral application process: Citizens can apply, by postcard or perhaps online, for seven-day sign permits, and receive a receipt and a sticker to put on the sign that bears a date seven days after issuance, and the municipality's name. The sticker must be put on the sign so that enforcement officers can determine whether it's expired. Because the expiration date is tied to the date of issuance, there is no risk of content-discrimination. The sticker itself would be considered government speech.