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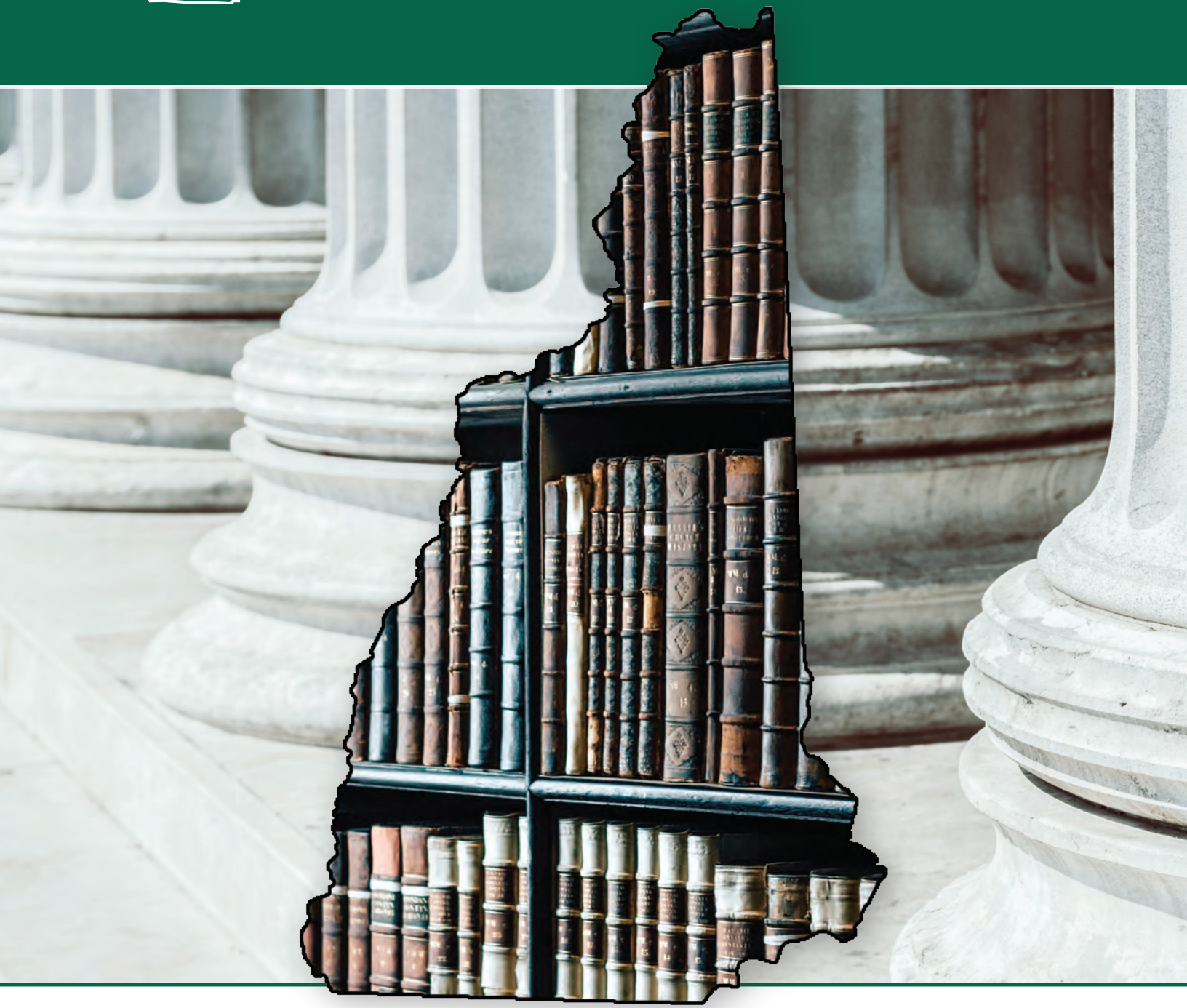
COURT UPDATE



A compilation of case summaries prepared by the New Hampshire Municipal Association for the period covering October 1, 2021 through September 30, 2022.

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INTRODUCTION

The Court Update is a compilation of case summaries that appeared on the New Hampshire Municipal Association's (NHMA) website during the past year and are presented here as instructional material for municipal officials. Summaries have been compiled primarily from New Hampshire Supreme Court slip opinions; U.S. Supreme Court, federal, superior court and Housing Appeals Board decisions of significance have also been included. The cases in this book cover the period from October 1, 2021 to September 30, 2022. Procedural aspects not germane to the central holding of a case have been left out.

Commentary is intended for municipal officials and is meant simply as a starting point in the local decision-making process. Nothing included in these summaries should be construed as legal advice on pending controversies or as a substitute for consultation with your municipal attorney.

NHMA's Legal Services attorneys are available to answer inquiries and provide general legal assistance to elected and appointed officials from member towns and cities. Attorneys can be reached by phone at 603.224.7447, or by email at *legalinquiries@nhmunicipal.org*.

EMPLOYMENT

John Doe v. Attorney General
New Hampshire Supreme Court
Case No. 2020-0447
July 21, 2022

RSA 105:13-b does not give the court authority to review an officer's personnel file and make a determination as to whether or not it contains exculpatory evidence outside of the context of a specific criminal case.

John Doe was employed as a patrol officer and was investigated by the police department for denying that he wrote in permanent marker on a department rain jacket. This ultimately led to his name being placed on the Exculpatory Evidence Schedule. Doe submitted two requests to remove his name from the EES to the Attorney General's Office and both requests were denied due to the lack of an order or other determination overturning the original finding of misconduct against him.

Doe argued that under RSA 105:13-b, the court could conduct an *in camera* review of his personnel file to determine if it contained exculpatory evidence. The court looked to RSA 105:13-b and the three situations addressed within that statute. First, if the personnel file of an officer contains exculpatory evidence, and the officer appears as a witness in a criminal trial, the prosecution must disclose that information. Second, if there is uncertainty as to whether or not the personnel file contains exculpatory evidence, the file is to be turned over to the court for *in camera* review. Finally, if there is non-exculpatory evidence in a personnel file that may nonetheless be relevant to the case, the statute prohibits the opening of the file unless the trial court makes a specific finding that probable cause exits to believe that the file contains evidence relevant to the particular criminal case. None of these inquiries are conducted outside the scope of a particular criminal case.

Doe argued that the courts have already found that RSA 105:13-b can apply outside the context of a criminal case. However, the case relied on by Doe assumed, without deciding, for the purposes of an appeal that RSA 105:13-b could possibly apply outside of the context of a criminal case for the purposes of addressing whether the EES was, itself, information exempt from RSA 91-A. In coming to that decision, the court never actually determined whether RSA 105:13-b was available outside of a particular criminal case. In reading the statute as a whole, the court concluded that RSA 105:13-b does not authorize the trial court to review the contents of an officer's personnel file outside the scope of a particular criminal case.

Practice Pointer: The provisions of RSA 105:13-b should be interpreted to apply only in the narrow context of an officer testifying as a witness in a criminal matter. A court cannot review an officer's personnel file under this section and provide an opinion as to the existence, or nonexistence, of exculpatory evidence for the purpose of removal from the EES.

FIRST AMMENDMENT

City of Austin v. Reagan National
United States Supreme Court
Docket No. 20–1029
April 21, 2022

Municipalities can adopt sign codes that impose more stringent regulations or prohibitions for off-premise signs as opposed to on-premise signs.

Two outdoor advertising companies challenged a provision of the City of Austin sign code that prohibited changes to a grandfathered billboard because it was an off-premise sign. The City had modified its sign code to define an off-premise sign to mean "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed." The City Code prohibited the construction of any new off-premise signs, but allowed pre-existing off-premise signs to remain as grandfathered uses. However, grandfathered signs could not be modified to change the method or technology used to convey a message. When Reagan National Advertising of Austin sought to digitize some of its grandfathered, off-premise billboards the City denied those applications. Reagan National filed suit claiming the code's prohibition on digitizing off-premise signs but not on-premise signs violated the First Amendment.

The Supreme Court had to resolve whether the Austin sign code provision was content neutral in its application to the Reagan National billboard. Under prior First Amendment rulings, anytime a sign code requires the government to read and interpret the content of a sign, a much more stringent level of legal scrutiny applies that in many instances renders the sign code provision unconstitutional under the First Amendment. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). However, in this instance the Court concluded that the challenged sign code only requires reading a billboard to determine whether it directs the reader to the property on which it stands or to some other, offsite location. Since the Austin sign code did not discriminate based on the topic discussed or the idea or message expressed it did not trigger a level of legal scrutiny that would have voided the regulation. Instead, the Court applied intermediate scrutiny and thereby ruled the Austin sign was facially content neutral. The Court did remand the case back to the lower courts to determine whether there was a constitutionally impermissible purpose or justification that underpins Austin's facially content-neutral restriction that may be content based.

Practice Pointer: Municipalities can adopt sign codes that impose more stringent regulations or prohibitions for off-premise signs as opposed to on-premise signs. A sign code can define an off-premise sign as one advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed. A sign code that bans off premise signs should provide protection for pre-existing, non-conforming off-premise signs under RSA 674:19.

Houston Community College v. Wilson
United States Supreme Court
Docket No. 20–804
March 24, 2022

Public bodies can censure fellow board members for conduct that is detrimental to the best interests of the public body

David Wilson, a member of the Board of Trustees of the Houston Community College System was censured by the Board for conduct that was not consistent with the best interests of the College. The Board also imposed certain penalties by barring Wilson from election to Board positions, making him ineligible for reimbursement for College related travel, restricting access to funds available for community affairs and recommending training related to governance and ethics. Wilson sued the College claiming the Board's censure violated the First Amendment. However, only the actual words of censure were considered by the Supreme Court when addressing his First Amendment claims

As a general matter the Supreme Court observed that the First Amendment prohibits government from subjecting individuals to retaliatory actions after the fact for having engaged in protected speech. A plaintiff pursuing a First Amendment retaliation claim must show that the government took an adverse action in response to her speech that would not have been taken absent the retaliatory motive. The Court concluded that the verbal censure did not prevent Mr. Wilson from doing his job, and it did not deny him any privilege of office, and Wilson acknowledged the censure was not defamatory. Considering those circumstances, the Board's censure did not materially deter Mr. Wilson from exercising his own right to speak, and therefore did not offend the First Amendment. In making this decision the Court provided the following overview of the freedom of speech and public service by elected representatives:

> In this country, we expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers—and to continue exercising their free speech rights when the criticism comes. As this Court has put it, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement" that it was adopted in part to "protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U. S. 214, 218 (1966). When individuals "consent to be a candidate for a public office conferred by the election of the people," they necessarily "pu[t] [their] character in issue, so far as it may respect [their] fitness and qualifications for the office."

Practice Pointer: Public bodies can censure fellow board members for conduct that is detrimental to the best interests of the public body, and such verbal censures would not violate the First Amendment, provided the censure did not deny a privilege of office, and did not prevent the censured member from doing their job as an elected or appointed official.

Shurtleff v. City of Boston
United States Supreme Court
Docket No. 20–1800
May 2, 2022

When expressing official points of view local government can control the content of signs and flags displayed on municipal property under a written policy

Through this decision the U.S. Supreme Court has defined the difference between unconstitutional viewpoint discrimination and permissible control of the content of speech when government speaks for itself.

For many years the City of Boston allowed private groups to raise a flag of their choosing at a flagpole near the entrance of Boston City Hall. This was permitted when a private group was hosting an event or other commemoration in the City Hall Plaza. The City did not have a written policy limiting the use of the flagpole based on the content of the flag. Between 2005 and 2017 the City approved 50 unique flags raised at 284 ceremonies. In 2017 Camp Constitution sought permission to raise the Christian Flag (a red cross on a blue field against a white background) to commemorate the civic and social contributions of the Christian community. The City denied the request based on the concern that flying the flag would violate the Establishment of Religion clause of the First Amendment.

When government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it can choose what to say and what not to say. Thus, local government can select what points of view it wishes to promote and not run afoul of the First Amendment. However, when government does not speak for itself it may not exclude speech as that constitutes impermissible viewpoint discrimination.

Examining the private flag flying history at Boston City Hall Plaza, and whether the public would view that activity as government speech, the Court concluded that the lack of any effort by the City to control and shape the messages meant this was not government speech but instead exclusion of a religious viewpoint in violation of the First Amendment. The Court did cite with approval a City of San Jose written policy that city flag poles are not intended to serve as a forum of free expression by the public and provided a list of approved flags that may be flown as an expression of the City's official sentiments.

Practice Pointer: Municipalities can adopt policies that controls the content of signs and flags that are displayed at government venues. First, a written policy should be developed that makes clear that the government venue is not intended to serve as a forum of free expression by the public, rather any sign or flag displayed is an expression of the sentiments of local government. Thus, where signs are allowed to be displayed on municipal property, those signs could be limited to community non-profit organizations that are promoting civic events. Similarly, if flags are allowed to be flown on a municipal flag pole, a list of approved flags could be provided.

Appeal Of Chichester Commons, LLC
New Hampshire Supreme Court
Docket No. 2021-0476
September 2, 2022

Past waivers granted by the planning board do not compel the board to continue to grant such waivers in the future when the circumstances of the proposal have changed

The petitioner owned a parcel of property located in the town's commercial village district. In 2015, the petitioner sought to build an elderly housing facility on the parcel of land spanning 2.3 acres. The town zoning ordinance had a density requirement larger than 2.3 acres for a project such as this. The petitioner requested a waiver of the town's density requirement from the planning board (such authority granted to the planning board as an innovative land use control) in 2015 and it was granted. However, the petitioner never went through with the project.

In 2018 the petitioner altered the design for the project from elderly housing to an affordable housing complex. The petitioner again requested a waiver of the density requirement. The town granted the waiver and approved the site plan. The petitioner again did not move forward with the project.

In 2020 the petitioner proposed a third project. This project was similar to the 2015 project in that it was for elderly housing. However, the overall design was different, and the lot size had changed as the petitioner combined another lot making the total acreage 5.5 acres. The petitioner filed a request to amend the site plan approval which was approved in 2018 for the affordable housing project. The planning board ruled that the petitioner's application was incomplete because this was not an amendment but a new proposal and required a new application. Thereafter, the petitioner filed a new application. However, this time around the town's zoning ordinance was different than the ordinance in effect back in 2015 and 2018. The board denied the application stating that the petitioner failed to demonstrate that the request for a waiver satisfied one of five waiver requirements. The petitioner appealed to the Housing Appeals Board and his appeal was denied.

The Supreme Court first considered the petitioners argument that the 2015 waiver did not expire. However, the court ruled that the petitioner's current proposal is not the same as its 2015 proposal as much about the project has changed since then. The town's ordinance required that the board consider the impact of the currently proposed project in light of any changes since the 2015 waiver was granted.

The petitioner next argued that the subsequent-application doctrine in *Fisher v. City of Dover* applied here. The court ruled that the subsequent-application doctrine does not compel boards to grant successive waivers of zoning requirements. *Fisher* did not apply to circumstances where the board had previously granted an application, only where it had previously denied one. Therefore, the 2015 waiver does not apply to the current version of the petitioner's project and does not compel the board to grant a new request.

Practice Pointer: If an applicant fails to move forward with a project that was granted a waiver or variance, they are not automatically entitled to same or a similar waiver years later if the project has changed or the zoning ordinances are different.

Avanru Development v. Town of Swanzey
New Hampshire Supreme Court
Case No. 2021-0015
August 16, 2022

Special exceptions declare certain uses to be essentially desirable provided the proposed use cannot be incompatible with uses permitted by right

This appeal from a decision of the Zoning Board of Adjustment for the Town of Swanzey addressed whether the ZBA unreasonably denied a special exception for a proposed 76-unit multi-family dwelling on a parcel in the town's business district. The Superior Court vacated the ZBA decision and remanded for further proceedings and the Supreme Court affirmed that decision.

Due to a tie vote by the four members of the Supreme Court who participated in this decision, only one issue involving the interpretation of the Swanzey Zoning Ordinance received the benefit of the Court's interpretive construction. Among the reasons why the zoning ordinance permitted the granting of a special exception for a multi-dwelling use in the business district was whether such an approval would not reduce the value of any property within the district, nor be injurious, obnoxious, or offensive to the neighborhood. The Superior Court concluded that the ZBA erroneously relied upon public comments opposing the project improperly basing its decision on aesthetics, and by judging the application solely on its popularity.

The Supreme Court agreed with the Superior Court that the Ordinance required the ZBA to identify the "unique problems" a multi-family dwelling use may present if constructed in its proposed location within the business district. However, the ZBA did not identify or address any unique problems that may be inherent in, or associated with, the multi-family dwelling use. Absent consideration of issues associated with this proposed use in the business district, the ZBA could not properly determine whether Avanru had established that the proposed project would not reduce the value of any property within the district, nor otherwise be injurious, obnoxious, or offensive to the neighborhood. Because it was undisputed that the exact same structure could be built by right if the use were a hotel or nursing home, the ZBA erred by not analyzing the implications of the use on the business district, but instead focused on aesthetic issues.

Practice Pointer: Special exception provisions that permit additional uses in certain zoning districts in effect declare such special exception uses to be essentially desirable subject to a determination that the proposed location must be considered in light of special restrictions or conditions tailored to fit the unique problems which the use may present. The proposed special exception use in some places or in some respects might be incompatible with the uses permitted as of right in the particular district.

Brady Sullivan Prospect Hill v. City of Lebanon
Housing Appeals Board
Case No. PBA-2021-06
September 28, 2021

Housing Appeals Board requires planning board to revisit decision on good cause to extend project commencement and completion deadlines under RSA 674:39, IV

Brady Sullivan was the successor in interest of a two-phase planned residential subdivision development first approved in 2005. By 2010, when Brady Sullivan purchased the property, Phase I of the project was partially complete. In 2014 the Planning Board amended deadlines for active and substantial development and substantial completion of improvements as provided in RSA 674:39, III. These deadlines were again modified by the Planning Board in 2014, 2016 and 2018. The last extension required active and substantial development by December 10, 2020, and substantial completion of improvements by December 10, 2023.

On March 23, 2020, the City sent an e-mail reminding the Brady Sullivan that the active and substantial development deadline of December 10, 2020 and provided a list of the conditions of approval that still had to be satisfied prior to commencing any site work for Phase II. Despite this warning, Brady Sullivan did not achieve active and substantial development by December 10, 2020, and the City declared the project in default on January 6, 2021. Brady Sullivan sought a further extension that was denied by the Planning Board on March 8, 2021.

On appeal to the Housing Appeals Board (HAB) the issue was whether the Planning Board denial of the Brady Sullivan's request to extend the time for substantial completion of Phase II was illegal or unreasonable. Focusing on whether, as stated in RSA 674:39, IV, there was "good cause" to grant further time extensions the HAB ruled that the prior granting of an extension request should not be a factor in determining whether to grant the current extension request. The HAB also concluded that changes to city regulations since 2005 that would necessitate significant revision of the Phase II plan was a factor that merits consideration. In addition, a relevant factor in judging "good cause" would include what limitations were faced by Brady Sullivan with carrying out development during the COVID-19 pandemic. Moreover, the significant time and energy invested by Brady Sullivan to clean up the completion of work left undone by the original developer also merited consideration as a factor on the question of good cause.

Ultimately the HAB remanded the decision on good cause to grant an extension under RSA 674:39, IV back to the Planning Board and in so doing the HAB ordered the Board to reconsider its decision, requiring that the review focus on "good cause" in the following manner: a) the fact that the Applicant has previously requested and received plan extensions under RSA 674:39 shall not be factored into any decision, b) prior facts which remain relevant to the current request may be considered; c) Other relevant factors for consideration can include, but are not limited to:

1) The Applicant's ability to have commenced substantial completion of improvements and active and substantial development of the project in light of existing business conditions including the impact of the COVID-19 pandemic; and,

2) The current overall municipal impact, if any, resulting from the Applicant's failure to commence construction of Phase II during the previous extension.

Practice Pointer: When judging "good cause" to extend commencement and completion deadlines established by a planning board under RSA 674:39, IV, the following factors merit consideration: 1) how regulatory changes since the original approval would necessitate significant revisions to approved plans; 2) the applicant's ability to commence active and substantial development considering the existing business conditions. The fact that the Applicant has previously requested and received plan extensions should not be factored into any decision making.

GMR Holdings v. Lincoln
United States District Court, District of New Hampshire
Case No. 21-cv-117-SM, Opinion No. 2021 DNH 173
November 8, 2021

Cell tower placement permitted where there is a cellular coverage gap and no feasible alternative sites

AT&T retained GMR Holdings, to locate and develop a wireless telecommunications site in Lincoln, New Hampshire. As part of the process of locating a suitable site on which to construct the necessary wireless facilities, GMR prepared a radio frequency ("RF") report which showed that much of Lincoln is without reliable wireless service. Based on the report, GMR looked for a technologically suitable site that was within the two (of seven) zones where wireless facilities were permitted. GMR identified five suitable locations.

Two of the five locations were owned by those unwilling to lease their sites for a wireless facility. One was a residential property, and another was a motel. Both were rejected by GMR on the basis of their current use. The fifth and final site was at a landscaping business and had two suitable locations for the facility. One was atop a 20' high knoll on which grew several mature trees. The other was where GMR proposed to build the facility on the basis that Lincoln's zoning ordinance encouraged wireless facilities to avoid cutting mature trees (and was not notably opposed by the abutting neighbor).

As the proposed location would require a 120' (rather than allowed 100') tower and structures would be within 125% of the "fall zone" of the tower, a conditional use permit for the extra 20' and a waiver of the "fall zone" requirement were necessary under Lincoln's zoning ordinance. After a hearing and a balloon test (whereby balloons were used to determine the proposed tower's visibility from nearby landmarks), the planning board rejected GMR's application.

GMR filed suit with the Federal District Court, alleging that the Town's denial of the authorizations necessary to construct the wireless communications facility amounted to an effective prohibition of personal wireless service facilities in the area and that the planning board's decision was not supported by substantial evidence – all in violation of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B).

In analyzing the case, the Court noted that the Telecommunications Act provides, in part, that "the regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services." To prevail on a claim of "effective prohibition" claim, a claimant must establish: (1) that there is a gap in cellular service coverage in the area of the proposed tower; and (2) that there are no feasible alternatives to the site proposed to, and rejected by, the Planning Board.

As all parties agreed that there was a gap in cellular coverage for AT&T in Lincoln, the only issue was whether there were feasible alternatives to the proposed site. In examining the town's defense, the Court rejected the claim that state or federal lands were available as feasible alternatives because both had requirements related to proving that no suitable private land was available. Further, in examining the alternative locations, the Court found that there were two sites based on the overlay of the RF map and the zoning map: on the knoll or off the knoll. Both would require compromise – both required a waiver of the "fall zone" requirement, and placement on the knoll would result in the destruction of a number of mature trees and be more visible whereas placement off the knoll would require a conditional use permit for a tower that was 20' taller than if it was on the knoll. Ultimately, the Court found that the planning board's rejection of GMR's application was in violation of the Telecommunications Act and ordered that the planning board issue all necessary permits to allow GMR to construct the tower.

Practice Pointer: Municipalities should be aware that the federal Telecommunications Act governs placement of cell towers and where, as here, a gap in coverage exists for a particular carrier, the overlay map comprised of the RF map and zoning map showing permissible areas for a tower will likely determine where a cell tower will be allowed to be located.

Stergiou v. City of Dover
New Hampshire Supreme Court
Case No. 2021-0139
July 21, 2022

The court gave clarity as to what constitutes a final approval vs. a conditional approval by a Planning Board by determining whether or not conditions associated with the approval process are conditions precedent or conditions subsequent.

In 2019, a developer applied for permission to construct a mixed-use development project in the City of Dover. The Planning Board issued an approval with instructions for the developer to provide the board with copies of the site plan in various formats within 90 days. The developer failed to meet this requirement and failed to ask for an extension. The developer then asked for "re-approval" in 2020 and it was granted with conditions that varied slightly from the original conditions. Abutters then filed a petition seeking to appeal the "re-approval." The trial court concluded the conditions imposed in the 2019 were conditions precedent and thus the decision was not a final decision appealable under RSA 677:15. The court also concluded that because it appeared to be undisputed that those conditions were not satisfied prior to the 2020 approval, the 2019 approval never became final.

The appellant arguments hinged on whether the planning board's conditions were conditions precedent or conditions subsequent. This is important because "only a final approval is a decision of the planning board from which an aggrieved party may appeal under" RSA 677:15, I. *Sklar Realty v. Town of Merrimack,* 125 N.H. 321, 327 (1984). "A conditional approval imposing only conditions subsequent constitutes a final decision appealable under RSA 677:15, I." *Saunders v. Town of Kingston,* 160 N.H. 560, 564 (2010).

Conditions precedent contemplate additional action on the part of the municipality and thus cannot constitute final approval. RSA 676:3, I states that if the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval. It is statutorily required that the board explicitly identify whether its approval imposes conditions necessary to obtain final approval.

The court looked to the decisions of the planning board in this case and concluded that the conditions imposed in both the 2019 approval and the 2020 "re-approval" were substantially similar. Therefore, when looking at the 2019 approval the court concluded that the Planning Board intended this approval as the board's final decision on the site plan and thus the conditions were conditions subsequent.

The court next addressed which approval started the 30-day clock for the abutters to appeal. If it is the 2019 approval, the time has expired. The City's site plan regulations stated that approvals remain valid for 5 years. In this case, the "re-approval" was done because the developer failed to get the site plan copies to the board within 90 days. The court ruled that this failure to get copies did not invalidate the entire approval as the remedy provided was simply to seek an extension and had no effect on the overall approval or the 5-year time period. Consequently, the 2020 "re-approval" process by the board was an invalid operation and everything centered on the original 2019 approval. Since the 2019 approval was the original and final approval date, the time for an appeal had expired.

Practice Pointer: When granting land use board approvals with conditions, be clear whether those are conditions precedent or conditions subsequent. If a board intends to make final approval conditioned on the fulfillment of certain conditions precedent, be clear that the failure to comply with those conditions means there is no final approval.

Town of Lincoln v. Joseph Chenard
New Hampshire Supreme Court
Case No. 2020-0316
January 19, 2022

Under RSA 236:112 Property Inundated with Junk is a "Junk Yard" Even if the Owner is Not Selling Junk.

The defendant, Joseph Chenard, appealed a ruling that he was operating a junk yard in violation of RSA 236:114. The defendant owns four lots located in the town's "general use" zoning district which allows junk yards by special exception. The defendant's properties were littered with junk, scrap metal, and broken cars. The defendant did not have a license to operate a junk yard business, nor did he have special exception from the town.

The town filed suit arguing that the defendant was operating a junk yard without proper authority and sought penalties and attorney's fees. The court found the defendant to be in violation of RSA 236:114 and ordered him to resolve the violation or face a $50 per day fee. The court did not award attorney's fees to the town.

The defendant appealed the court's decision arguing that the trial court erred by applying the junkyard statute to the defendant's non-business personal property, and that the wrong statute was applied. The town appealed the denial of attorney's fees.

The court first looked to RSA 236 to define the nature and purpose of a junk yard. RSA 236:112 defines a junk yard as "a place for storing and keeping, or storing and selling, trading, or otherwise transferring old or scrap…". RSA 236:111 states that the express purpose of the subdivision on junk yards is to "conserve and safeguard the public safety, health, morals and welfare . . . the maintenance of junk yards is a useful and necessary business." The defendant argues that because the definition in RSA 236:112 refers to a junk yard as a business, his properties do not qualify as he was only storing personal property and was not engaged in the sale or transfer of any of the junk.

The court disagreed stating that RSA 236:112 plainly states that a junk yard is defined not just by a place of selling junk but also storing and keeping junk. The court further defined the word "business" to conclude that it can encompass junk yards not operated as a commercial business. Finally, the court noted that the statute even carves out an exemption from the definition of junk yard under RSA 236:111-a for "noncommercial antique motor vehicle restoration activities".

The defendant next argued that the trial court failed to identify which of his four lots constituted a junk yard. The court disagreed and stated that the trial court took a view of each of his four lots which included his home lot and three adjacent lots located across the street. Because the court viewed each of the lots and described them as each containing a significant amount of personal property, it was reasonable to conclude that all four lots fell into the definition of junk yard.

Finally, the defendant argued that the court applied the wrong statute because his land was within New Hampshire's limited access highway system for I-93 and therefore RSA 236:90-:110 were the correct statutes to apply. The court found that pursuant to RSA 236:111-a, a town has authority to regulate all junk yards in the town that fall within the definition of junk yard in RSA 236:112, I including those that are located adjacent to the interstate and turnpike system, but which are not an establishment or place of business.

The court then addressed the town's appeal for attorney's fees. The town argued that because the court found that the defendant was running a junk yard as defined by RSA chapter 236, even though he wasn't engaged in the selling of junk, the defendant was in violation of the town's zoning ordinance and therefore attorney's fees should be awarded. The court found that the town's zoning ordinance did not explicitly adopt the wording of RSA 236:112 and therefore turned to the dictionary definition of junk yard. The dictionary defined a junk yard as a yard used to keep usually resalable junk. The court determined that "usually resalable" should be interpreted to mean that there must be some indication that the junk was being sold for it to qualify. Since the defendant was only storing personal property, it did not qualify as a junk yard for these purposes and therefore was not in violation of the town's zoning ordinance.

Practice Pointer: Municipalities should take special note to amend their own zoning ordinances to specifically adopt the statutory definition of a junk yard under RSA 236:112 if they want to seek an award of attorney's fees for a violation of the local zoning ordinance under RSA 676:17, II.

Town of Hudson and Hudson School District SAU 81 v. Hudson Budget Committee
Hillsborough Superior Court, South
Case No. 2022-CV-00203
August 15, 2022

"Ex-Officio" members of a budget committee cannot be prevented from voting on Committee matters.

The Hudson Budget Committee passed a bylaw provision that excludes the two "ex-officio" members from voting. The provision read, "votes will be limited to the nine elected or duly appointed members-at-large." The Committee was informed by the towns legal counsel that this provision was contrary to applicable law but they refused to change it. The Committee argued that RSA 32:15 is ambiguous and does not require the ex-officio member to be permitted to vote. The Committee also argued that allowing the ex-officio members to serve on their other respective boards as well as the Committee violated RSA 669:7.

Looking at the plain language of the statute, RSA 32:15 defines the ex-officio individuals as "members" of the committee, and by definition a member has all the same powers as any other member. In addition, the statute goes on to limit the role of the ex-officio members by restricting their ability to serve as at-large members or as chair of the Committee. If the legislature desired further restriction, such as an inability to vote, they would have said so.

As for RSA 669:7, this statute explicitly states that members of the select board or school board may not serve as **at-large** members of the Budget Committee. This mirrors the language of RSA 32:15.

The court concluded that this by-law was invalid and needed to be rescinded. Any votes that took place while the ex-officio members were excluded were also deemed invalid and needed to be redone.

Practice Pointer: The term "ex-officio" simply means that a person holds a role or position by virtue of holding another role or position. In the context of local government, the term is used to describe a member of a public body who is statutorily required to be a part of that public body due to their position on the select board or some other entity. This designation has nothing to do with their ability to participate, their authority as full members of the budget committee or their voting ability. They are not simply "advisors" or "representatives" of the other public body, and they are full voting members just like any other member.

RIGHT-TO-KNOW LAW

ACLU v. City of Concord
New Hampshire Supreme Court
Case No. 2020-0036
December 7, 2021

Government need only establish that disclosure of a law enforcement record might risk circumvention of the law; in the right circumstances trial court review of Right-to-Know record disclosure can occur in an ex-parte in camera hearing.

The City of Concord adopted a budget that contained a police department line item for "Convert Communications Equipment." When asked to disclose the nature of the equipment the City Manager only revealed it was not body cameras or drones but refused to answer the question. Both the ACLU and the Concord Monitor submitted Right-to-Know Law requests seeking any information describing the equipment, and all contract agreements between the City and the vendor. The City responded by providing a redacted version of a License and Service agreement. Those redactions included the name of the vendor, the type of information gathered by the vendor and how the vendor uses the information. The City asserted that the redactions were necessary because the agreement contained confidential information about surveillance technology that was an exempt law enforcement record. Both the ACLU and the Concord Monitor sued under the Right-to-Know law to gain access to the redacted information.

The Superior Court granted a request by the City to conduct an *ex parte in camera* hearing to review the withheld details about the covert communications equipment. The trial court then ruled that the redacted information was exempt from disclosure under FOIA standard (A) interfere with enforcement proceedings, (E) disclosure of law enforcement techniques and procedures and (F) could reasonably be expected to endanger the life or physical safety of any individual.

The Supreme Court ruled that in cases involving the *Murray v. NH Div. State Police*, 154 N.H. 579 (2006) exemptions for law enforcement records, a trial court may exercise its discretion to hold an *ex parte in camera* hearing — but only after it has required the government to make as complete and detailed a public disclosure justifying exemption as possible, and determined that the disclosure nonetheless fails to provide a sufficient basis for it to make a decision. Importantly, the Court also ruled that when judging whether disclosure of a law enforcement record would result in circumvention of the law under Exemption E the government must only establish that disclosure might create a risk of circumvention of the law. The Court did require disclosure of a nondisclosure agreement between the vendor and the City, but otherwise upheld the decision of the Superior Court.

Practice Pointer: When defending the non-disclosure of information deemed likely to lead to the circumvention of the law, be prepared to provide a sufficient level of detail so the requesting party, and a reviewing court, receives enough information to justify the exemption. Conclusory statements will not be sufficient, as some detail that does not reveal the truly confidential specifics is required.

Provenza v. Town of Canaan
New Hampshire Supreme Court
Case No. 2020-0563
April 22, 2022

The State Supreme Court essentially affirmed the Superior Court's opinion that an investigative report into a police officer's conduct is subject to the privacy interest v. public interest balancing test, and the public has a compelling interest in knowing how departments handle allegations of police misconduct.

Officer Provenza was involved in an arrest where the town later received a complaint alleging excessive force against the officer. The Town of Canaan hired an independent investigative firm to look into the encounter and determine if any misconduct occurred. Valley News filed a Right-to-Know request seeking disclosure of the report. The Town denied the request, citing the "internal personnel practices" exemption set forth in RSA 91-A:5, IV.

The Superior Court ruled that the report was subject to disclosure under the Right-to-Know law under the precedents set forth in *Union Leader v. Town of Salem* and *Seacoast Newspapers v. City of Portsmouth*. The Court applied the privacy interest v. public interest balancing test to the report and concluded that there was a compelling enough public interest to warrant disclosure. Provenza appealed.

The Supreme Court took up several arguments made by Provenza on appeal. First, Provenza argued that under RSA 105:13-b there is an exception to the Right-to-Know Law that should apply to the investigative report. The Court ruled that by its express terms, RSA 105:13-b pertains only to information maintained in a police officer's personnel file. The Court reasoned that had the legislature intended this exception to apply more broadly to "personnel information" they would have said so. There was nothing in the record to suggest that the report was contained in or is part of Provenza's personnel file. Therefore, because the case lacked evidence to establish that the report was physically in a "personnel file" the Court declined to address this issue any further.

Instead, the Court focused its analysis on Provenza's assertion that release of the report violated his privacy interests under RSA 91-A:5, IV. The Court found that Provenza's privacy interest was minimal as the report did not reveal intimate details of his life, but rather information relating to his conduct as a government employee while performing his official duties and interaction with members of the public. Additionally, there was a compelling public interest in knowing how the department investigated claims of misconduct against an officer. Under this previously established balancing test, the report was subject to disclosure under RSA 91-A.

Practice Pointer: The Court declined to properly analyze what role RSA 105:13-b plays when it comes to exempting documents from a Right-to-Know request. Instead, the Court reaffirmed the fact that documents relating to internal investigations of police officers remain subject to the privacy vs. public interest balancing test, and when the focus of an investigation involves a person's actions "while performing their official duties", any privacy interest will be minimal.

TAXATION

Merrimack Premium Outlets v. Town of Merrimack
New Hampshire Supreme Court
Case No. 2020-0358
October 1, 2021

In order to reassess the value of taxable property there must be a change in the market value; discovery of an extreme underassessment is insufficient

After conducting a town wide revaluation of all taxable property in 2016, the town assessed the shopping mall owned by the Plaintiff at $86,549,400. Later that same year, the town learned that the property had been used as collateral for a loan in 2013 at a value of $220,000,000. Based on that information, the town reassessed the property for the 2017 tax year for $154,149,500. The Plaintiff appealed, arguing that no changes to the property or affecting the property had occurred that would legally support a reassessment under RSA 75:8.

The Court ruled that, based upon the plain language of RSA 75:8, I, some "change" to the subject property is a prerequisite to a municipality's legal authority to adjust property values under RSA 75:8, I. The Court explained that the discovery of an extreme under-assessment of a property does not constitute a legal change under the statute. Reading RSA 75:8 as a whole and in conjunction with RSA 75:1, the Court concluded that adjustment to an assessment pursuant to RSA 75:8, I, requires an actual change in the property's market value. Merely obtaining information about a property does not constitute a change as contemplated by RSA 75:8.

The Court also rejected the town's argument that by not adjusting the value of the property based on the loan collateral information would be violation of the oath and attestation required by the select board under RSA 75:7 that all assessed taxes were appraised to the best their knowledge at full value. The Court concluded that the oath in RSA 75:7 that "all taxable property was appraised to the best of our knowledge and belief at its full value" must be read as certifying the accuracy of the last legally authorized appraisal or adjustment at the time it was made. RSA 75:7

Practice Pointer: A change in the assessed value of property is permissible under RSA 75:8 where: (a) the property underwent a material physical change, (b) change in ownership, (c) undergone zoning changes, (d) undergone changes to exemptions, credits or abatements, (e) undergone subdivision, boundary line adjustments, or mergers; or (f) undergone other changes affecting value. The discovery of an extreme underassessment is not a change in value. RSA 75:8, I was subsequently amended by the Legislature, effective August 6, 2022 to provide that the assessors or selectmen shall adjust assessments to correct any errors in existing appraisals

Shaw's Supermarkets v. Town of Windham
New Hampshire Supreme Court
Case No. 2020-0275
October 20, 2021

Under RSA 76:17, a "person aggrieved" by a tax assessment has standing to challenge that assessment. "Person aggrieved" is defined as the individual or entity who actually paid the taxes, especially if there is a contractual relationship involved which requires them to pay on behalf of the actual owner of the property.

Shaw's Supermarket leased a piece of property where one of their supermarkets was located. As part of the lease agreement, Shaw's was required to pay the real estate taxes for the leased property. The agreement also stated that upon Shaw's request, the Owner of the property shall commence any proceeding for abatement of any assessment for Real Estate Taxes, or permit Shaw's to do so in its own name. In April of 2017, Shaw's paid the real estate taxes to the town and then filed for abatement. The town moved to dismiss arguing that Shaw's lacked standing to request a tax abatement on property it did not own. The trial court denied this motion. After trial, the court granted Shaw's request for abatement and the town appealed.

On appeal the Town argued that Shaw's does not have a taxable interest in the property and thus lacks standing. The court ruled that RSA 76:17 provides that any person aggrieved by the selectboard's neglect or refusal to abate a tax in accordance with the statute may appeal the decision to the Superior Court. In this context, the "person aggrieved" is the person who paid the tax. In this case, Shaw's paid the taxes on behalf of the Owner per the terms of their lease agreement. This made Shaw's the aggrieved party and gave it standing to challenge the assessment.

To succeed on its abatement claim, Shaw's had the burden of proving by a preponderance of the evidence that it is paying more than its proportional share of taxes. However, the Town failed to provide their own expert to combat Shaw's expert testimony and did not adequately challenge the conclusions of Shaw's expert. Questions of credibility are for the trial judge and the court concluded that a reasonable person could have come to the same conclusions as the trial court given the evidence put before it.

Practice Pointer: When a select board receives an application for abatement of taxes, they should entertain that request if the party making the request can be considered a "person aggrieved". This can be interpreted broadly, but if they are the party who actually paid the taxes they should be treated as having standing, especially if payment of taxes was part of their lease agreement with the owner.

TABLE OF CASES

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