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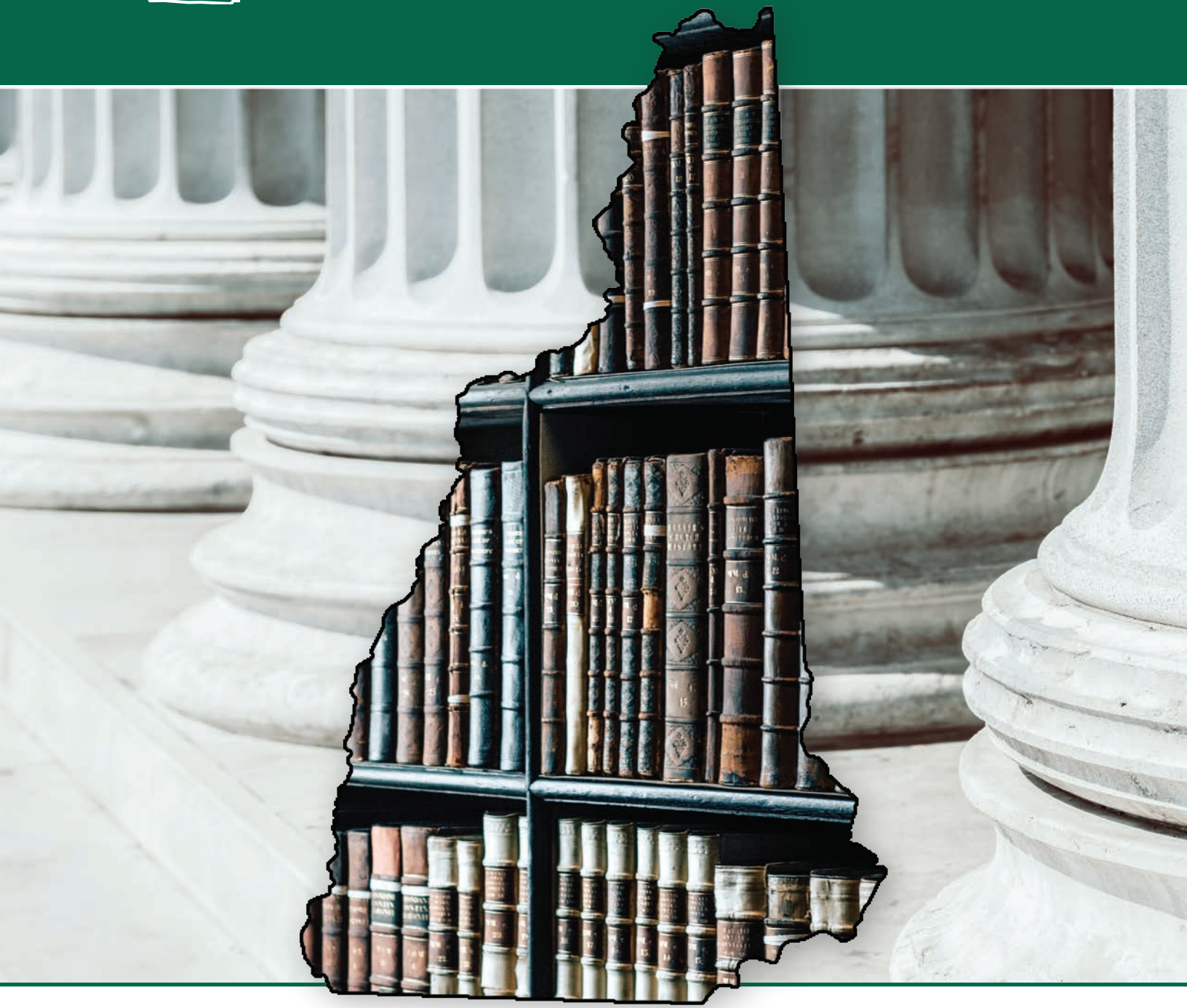
COURT UPDATE



A compilation of case summaries prepared by the New Hampshire Municipal Association for the period covering October 1, 2020 through September 30, 2021.

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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 court and superior court decisions of significance have been included. This year we have also included some recent decisions issued by the Housing Appeals Board. The cases in this book cover the period from October 1, 2020 to September 30, 2021. 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*.

ELECTIONS

American Federation of Teachers v. Gardner
Hillsborough County Superior – Northern District
Case No. 216-2020-CV-0570
October 2, 2020

The Secretary of State shall forward absentee voter registrations forms directly to applicants and can no longer refer voters to city or town clerks

The American Federation of Teachers (AFT) sued to strike down or modify laws governing the absentee voting process seeking a court order enjoining certain election statutes. Donald J. Trump for President, Inc. and the Republican National Committee intervened and joined the State of New Hampshire in moving to have any court action stayed until after the election is complete.

AFT challenged six specific areas of the absentee voting process. First, that the absentee voter registration forms should be made available directly by the Secretary of State's Office. Second, that the three-part voter registration verification process is unconstitutionally burdensome. Third, that making absentee voters provide postage for mailing applications and ballots burdens the right to vote. Fourth, that the deadline for delivery of absentee ballots by 5:00 p.m. on election day, except as provided in RSA 657:21-a and RSA 659:20-a, disenfranchises voters. Fifth, mandating that drop boxes where voters can deposit absentee voting materials must be staffed by properly trained election officials places a severe burden on the right to vote. Sixth, that the absentee registration process, documentation process and election day receipt deadline violate the equal protection clause of the New Hampshire Constitution.

The Superior Court declined to rule on or dismissed all of AFT's requests for relief except for the question of the Secretary of State's statutory obligation to provide an absentee voter registration form directly to an applicant. Currently, if a person contacts the Secretary of State seeking the absentee voter registration form, the Secretary of State's office will direct that person to apply to the city or town clerk. The Superior Court found that this was not consistent with the statutory mandate found in RSA 654:16 and RSA 654:18. Accordingly, the Court ordered the Secretary of State to promptly accommodate aspiring voters who contact his office for a registration form by developing a method to forward an absentee voter registration form directly to the applicant.

Practice Pointer: The Superior Court has not disturbed the deadline for delivery of absentee ballots as 5:00 p.m. on election day, except for ballots submitted by emergency services workers under RSA 657:21-a, and allowing voters to submit a ballot after the 5:00 p.m. deadline without having to enter the guardrail due to fear of COVID-19. RSA 659:20-a. The Court has also left undisturbed the voter registration verification process, and the necessity that an absentee ballot drop box be staffed by properly trained election officials.

HIGHWAYS

Lauren Shearer v. Ronald Raymond
New Hampshire Supreme Court
Case No. 2019-0688
January 13, 2021

An easement exists over a discontinued highway when the easement is reasonably necessary for access

In this dispute between private property owners the Court ruled that under common law an easement exists over a discontinued highway if the landowner demonstrates that the easement is reasonably necessary for ingress and egress to a landlocked parcel. Shearer purchased land accessible only over Bowker Road which had been laid out as a public highway in 1766, but was later discontinued in 1898. Bowker Road begins at a public highway and crosses over Raymond's property. At the entrance of Bowker Road, a gate has been maintained for 50 years. Raymond disputed that Shearer had any form of legal right or easement to use Bowker Road due to the discontinuance in 1898.

Under current statutory law, and since 1943, a right of access to otherwise landlocked property is preserved when a public highway that gives access to that property is discontinued. RSA 231:43, III. Since Bowker Road was discontinued prior to 1943 the Court was called upon to determine if under common law when a public highway is discontinued or abandoned whether the abutting landowner retains a private right of access.

The Court reasoned that the right of access to one's property is fundamental to property ownership. Due to the absence of a statutory right of access as first codified in 1943, the discontinuance of a highway could leave a landowner without reasonable means of access. Consequently, the Court ruled that an easement exists over a discontinued highway when the easement is reasonably necessary for access. To determine whether an easement is necessary the landlocked property owner does not need to show that there is no other means of access, only that any alternative access imposes measurable hardship that is unreasonable under the circumstances. Since this question was not addressed by the Trial Court, the dispute was remanded for a determination whether an easement over Bowker Road is reasonably necessary.

Practice Pointer: Although a private property dispute, the opinion catalogues important principles of property law incident to the creation, and discontinuance of public highways: (a) when a public highway is laid out the public acquires a right of access, (b) title to the strip of land under the public highway remains in the abutting landowner, (c) the owner of land abutting a public street has a private right of access over that street, (d) the private right of access enjoyed by the abutting land owner can be regulated but it cannot be taken away without compensation.

Krainewood Shores Assoc. v. Moultonborough
New Hampshire Supreme Court
Case No. 2019-0719
March 2, 2021

The 30-day time period for appealing a planning board decision is calculated starting with the day after the date of the decision.

After a planning board decision permitting development of a vacant lot as a condominium storage facility for boats, snowmobiles and motorcycles, two abutters appealed to the Superior Court. The date of the planning board decision was May 8, 2019. The appeal was filed in the Superior Court on June 8, 2019. The town and the permit holder moved to dismiss because under RSA 677:15, I the 30-day period to timely appeal started running on May 9, 2019 and expired on June 7, 2019, divesting the Superior Court of jurisdiction to hear the appeal. The plaintiff countered that considering language referenced in RSA 677:15 required counting the days allocated to timely appeal from the day following the day after the planning board decision. According to the plaintiffs, the 30-day period would have expired on June 8, but because June 8 was a Saturday, the period actually expired on Monday, June 10. See RSA 21:35, II. Therefore, they reason, their electronically-filed June 8 appeal was timely.

Because RSA 677:15, I states that the counting of calendar days is to be done in accordance with RSA 21:35, the plaintiffs argued that this required the commencement of counting the time period to begin on the day after the date of the planning board decision. Although the Supreme Court agreed this was a plausible argument, it agreed with the defendants that the language of the statute, and the legislative history required that the counting of the days to determine a timely planning board appeal commences on the day following the date of the decision.

Ronald Shattuck v. Town of Francestown
Housing Appeals Board
Case No. PBA-2021-01
Friday, May 7, 2021

Planning Board Decisions Based on Zoning Regulations Must be Founded on Objectively Clear Zoning Non-Conformities

Ronald and Melissa Shattuck (Applicants) sought approval from the Francestown Planning Board (Planning Board) for a lot line adjustment and subdivision that would create four new residential building lots. After a site visit and five public hearings the application was denied by the Planning Board. Employing the recently enacted provisions of RSA chapter 679 the Applicants appealed to the Housing Appeals Board (HAB). The HAB has jurisdiction to "affirm, reverse, or modify, in whole or in part, appeals of final decisions" by a planning board on subdivisions or site plans involving "questions of housing and housing development." RSA 679:5, I. In making its decision the HAB may award all remedies available in the Superior Courts in similar cases, including permission to develop the proposed housing. RSA 679:5, II.

In its decision the Planning Board cited one general and five specific reasons for its denial. As a preamble to its decision the Planning Board asserted that the Applicants' plan did not conform to the general purposes of the town's subdivision and zoning regulations. In addition the Planning Board cited the following specific reasons for its denial: (1) failure to comply with a subdivision regulation requiring identification and due regard for preservation and protection of existing features, (2) failure to provide building envelopes as discussed in the subdivision regulations, (3) failure to provide a sufficient sediment and erosion control plan, (4) failure to comply with zoning and subdivision regulations, the town's master plan, New Hampshire Statutes and applicable Federal laws, and (5) that no substantial benefit would result if the referenced local, state or federal regulations were deemed waived by an approval.

Overall, the HAB concluded the reasons stated by the Planning Board to deny the Applicants' plan were either unreasonable or legally deficient. The HAB concluded the certified record did not disclose objective zoning violations for the Applicant's subdivision. That any change to the property's existing conditions were carried out through the removal of standing timber in compliance with a Notice of Intent to Cut revealing no violation of RSA chapter 227. That the lack of designated building envelopes was not due to an omission by the Applicants and that there was no supporting engineering review requiring erosion and sedimentation controls. Finally, the HAB concluded there were no clearly identified regulatory deficiencies that supported the Planning Board's decision that no substantial public benefits would be granted by approving the plan.

In reversing the decision of the Planning Board, the HAB granted final approval of the Applicants' submitted subdivision plan. This decision of the HAB is subject to a Motion for Rehearing within 30 days of the decision. RSA 541:3.

Practice Pointer: If a planning board is to deny a plan due to non-compliance with the zoning ordinance, those must be objectively clear zoning non-conformities, and not generalized statements of a zoning ordinance's purpose. This permits the applicant to appeal any planning board zoning determination to the zoning board of adjustment and satisfies a municipality's obligation to provide assistance to landowners seeking approvals. Planning board members must endeavor to avoid inserting their subjective personal feelings into board decision making.

William Evans, Trustee v. Town of Pembroke
Housing Appeals Board
Case No. BSA-2021-02
June 30, 2021

Select Board decision denying reclassification of a Class VI Road as Class V vacated and remanded due to improper consideration of the impact of a residential project.

William Evans, Trustee (Applicant) sought approval from the Pembroke Select Board to reclassify a Class VI Road as Class V to facilitate the residential development of Applicant's abutting, 45-acre property. From 2019 to 2021 the Select Board reviewed and discussed the road reclassification, eventually denying the request on a 2-2 vote.

The Applicant appealed the denial of the road reclassification to the Housing Appeals Board (HAB). After reviewing the certified record, the HAB concluded that because a select board member who voted against the reclassification had weighed the impact of the proposed residential project contrary to the NH Supreme Court decision in *Green Crow Corp. v. Town of New Ipswich,* 157 N.H. 344 (2008) that this warranted vacating the Board's decision and remanding the matter back to the Board for a new hearing and decision.

In *Green Crow* the Court made clear that the legislature did not intend for a select board to use its authority to determine occasion for the layout or upgrade of a highway under RSA 231:8 as a vehicle for effectively conducting land use planning or zoning. Thus, a select board could not consider the anticipated impact associated with the development that might result from the upgrade of a road. Since that was what the HAB determined the Pembroke Select Board had done, the decision denying the reclassification was vacated and the Select Board was ordered to conduct a public hearing within 45 days in order to determine:

1) The road length being considered for reclassification to ensure clear application of the "occasion" criteria; and
2) the review of the occasion factors consistent with *Green Crow* which factors cannot include consideration of the proposed residential project.

Practice Pointer: This decision demonstrates that the HAB can exercise jurisdiction over a highway reclassification determination by a select board where that determination is a municipal permit "applicable to housing and housing developments." RSA 679:5, I (g). Select Board's must also take note that when it is asked to reclassify a road from Class VI to Class V, it is not appropriate to consider the anticipated impact associated with the development that might result from the upgrade of a road.

New Hampshire Alpha of SAE Trust v. Town of Hanover
New Hampshire Supreme Court
Case No. 2020-0034
May 25, 2021

A notice of violation can serve as the initiation of an enforcement action and also as the basis for an administrative appeal.

In the latest ruling from the long-running battle between the New Hampshire Alpha Chapter of Sigma Alpha Epsilon, Dartmouth College, and the Town of Hanover, the New Hampshire Supreme Court parsed the language of the statute conferring jurisdiction on the ZBA to determine that the ZBA had subject matter jurisdiction over SAE's appeal.

As background, in 2016, Dartmouth College notified the Sigma Alpha Epsilon fraternity that they are officially derecognized by Dartmouth College, and that effective March 15, 2016 as a consequence of its suspension by the national organization. Subsequently, Dartmouth notified the Hanover Planning & Zoning Office of the suspension.

The zoning administrator for the Town issued a "Notice of Zoning Violation" to SAE, informing SAE that the SAE facility is no longer being operated in conjunction with an institutional use and, therefore, is in violation of the zoning ordinance. That notice also informed SAE of the penalties for violating the zoning ordinance.

SAE appealed the notice to the ZBA, and subsequent appeals resulted in the New Hampshire Supreme Court issuing *New Hampshire Alpha of SAE Trust v. Town of Hanover*, 172 N.H. 69 (2019) (*SAE I*), which included a remand for further proceedings. While that case was pending before the ZBA, SAE challenged the ZBA's ability to have subject matter jurisdiction in a filing at the Superior Court. SAE alleged, in part: (1) the zoning administrator's notice commenced an informal enforcement proceeding against SAE; (2) SAE's challenge was to the zoning administrator's decision to institute an enforcement proceeding, not to the construction, application or interpretation of the ordinance; (3) the courts, and not the ZBA, have exclusive jurisdiction to adjudicate alleged violations of zoning ordinances.

On appeal, the New Hampshire Supreme Court held that the ZBA may hear and decide an administrative appeal of a notice of violation to the extent that it is alleged that the administrative officer committed an error involving the construction, interpretation or application of a zoning ordinance, but may not hear and decide issues arising from the notice of violation beyond contesting an officer's construction, interpretation or application of a zoning ordinance. In this case, SAE's appeal to the ZBA sought reversal of the zoning administrator's decision that SAE's property is in violation of the zoning ordinance by alleging that the zoning administrator erred in construing, interpreting or applying the terms of the ordinance. Therefore, the ZBA had subject matter jurisdiction because the issue was not an enforcement action, but merely the administrative official's interpretation of the zoning ordinance.

Practice Pointer: Municipalities must be aware that because a ZBA has limited jurisdiction, when they are using a notice of violation as both the initiation of an enforcement action and also as the basis for an administrative appeal, that it is possible for an aggrieved party to appeal that interpretation prior to any kind of court review of an enforcement action.

Seabrook Onestop, Inc. & a. v. Town of Seabrook & a.
New Hampshire Supreme Court
Case No. 2020-0251
September 16, 2021

Notice to abutter is required when abutter is "directly" not "diagonally" across a street; and planning board condition that approvals be obtained from all necessary approving bodies validates conditional approval.

A developer purchased a lot in a commercial zoning district along a Class V or better highway. The developer received site plan approval to develop a large shopping center on the lot. Several years later, the developer received subdivision approval to carve out a 1-acre lot from the remainder, and the necessary variances related to the dimensional requirements to offer that lot as retail space. Subsequently, the developer sought approval to amend the site plan to allow a gas station to be constructed. Gas stations are allowed uses in the commercial zone. The planning board granted conditional approval.

An interested party objected, resulting in the case coming before the New Hampshire Supreme Court. Its objections centered on four arguments: (1) the dimensional requirement variances were void; (2) using the lot for a gas station was outside the scope of those variances; (3) the planning board's conditional approval violated RSA 674:41; (4) the planning board did not consider the objector's concerns about traffic and well contamination.

The first argument pertained to notice to the objector of the ZBA hearing on granting the variances. The Court found that the statute was clear as to the meaning of the term "abutter," and "diagonally across the street" is not the same as "directly across the street." Further, as the variances were for dimensional requirements, not the use of the property. Therefore, the use of the lot as a gas station was not outside the scope of the variances.

The third argument pertaining to RSA 674:41 was resolved by the Court by pointing to the Planning Board's conditional approval, with a condition subsequent being "[a]ll approvals that are required from . . . any . . . party," presumably including the select board pursuant to RSA 674:41.

The fourth and final argument pertained to the conditions relating to traffic control and potential well contamination. The Court held that the planning board acted in accordance with its statutory obligations.

Practice Pointer: Planning boards would be wise to include a condition that all approvals that are required from any party be part of the conditional approval process in order to avoid arguments over unlawful approvals.

Sullyville, LLC v. Town of Carroll
New Hampshire Supreme Court
Case No. 2019-0240
April 8, 2021

Grandfathered rights can be waived for future purchasers by a filing at the registry of deeds, and failure by the municipality to take enforcement action does not eliminate this waiver.

Sullyville owns a parcel on which it operates a campsite. In 1979, the town adopted a zoning ordinance that prohibits the operation of campsites in residential (R-1) districts but allows them via special exception in residential-business districts (R-B). The parcel was subdivided by a prior owner. As the parcel passed through several owners over the years, one filed a "note" at the registry of deeds waiving the use of part of the parcel as a campsite.

Sullyville contended that the parcel had been operated as a campsite continuously since 1979 and, therefore, it had the right to continue doing so, and seek expansion of its use as such. The New Hampshire Supreme Court held that although the boundaries of the subdivision changed over the years, subsequent purchasers were put on notice of the "note" through purchase and sales agreements as well as via title searches. As the use as a campsite was nonconforming, the law of voluntary waiver of nonconforming use. Waiver occurs when the holder voluntarily or intentionally relinquishes a known right. When the owner of a nonconforming use voluntarily waives his or her right to continue it, it may not be continued or reestablished.

The Court next turned to Sullyville's municipal estoppel claim. The Court reiterated that in order for Sullyville to prevail on a municipal estoppel claim, it must show that: (1) the municipality, by the words or conduct of an authorized official, falsely represented or concealed a material fact with knowledge of the fact; (2) the plaintiff was ignorant of the truth of the matter; (3) the representation was made with the intention of inducing the plaintiff to rely upon it; and (4) the plaintiff reasonably relied upon the representation to the plaintiff's detriment. In this case, Sullyville failed to meet its burden as it was actually on notice about the issue with grandfathering due to the purchase and sales agreements that pointed out the "note" on file at the registry of deeds.

Last, the Court addressed the cross-claim brought by an abutter. The Court concluded that the actions brought by the abutter pursuant to RSA 676:15 are "personal actions" for the purpose of RSA 508:4, and are thus subject to the three-year limitations period, even though the relief sought was not merely monetary damages.

Practice Pointer: A better approach for municipalities is to seek to enforcement of a zoning ordinance violation after becoming aware of the violation rather than waiting for an application to expand upon a nonconforming use.

Christopher Andrews & Kelly Andrews v. Kearsarge Lighting Precinct
New Hampshire Superior Court
Case No. 212-2018-CV-00049
September 14, 2021

Owner-occupation requirements in local zoning ordinance can limit impact of short-term rentals on local real estate market.

The plaintiffs own two properties in the Kearsarge Lighting Precinct (KLP) that they use as short-term vacation rentals and have dumpsters outside. In September 2017, the Board of Commissioners held a public hearing on vacation property rentals and dumpster violations. KLP has a zoning ordinance provision requiring owner-occupation of residential properties that offer sleeping accommodations (Guest Provision), and a provision requiring that dumpsters meet setback requirements and be enclosed by a privacy fence (Dumpster Provision). Letters regarding the violations were sent to the owners of four subject properties, including the plaintiffs.

On appeal to the superior court, the plaintiff made a large number of arguments as to why either the underlying process had been unfair or the wrong result had been reached upon appeal to the Zoning Board of Adjustment (ZBA).

In the Superior Court, the plaintiffs made four arguments relating to procedural due process: (1) the ZBA members prejudged their appeal; (2) the ZBA violated their procedural due process rights by "rubber stamp[ing]" a draft opinion prepared by the ZBA's attorney on a matter with similar facts; (3) ZBA members acted outside the forum of a public hearing to decide the result of the appeal before the public deliberations; (4) ZBA failed to provide them a fair hearing on a motion for rehearing. The Court rejected all these arguments, finding that the plaintiffs failed to raise the issue of bias prior to the appeal to the Superior Court (thus waiving the claims) and finding that the ZBA stated on its record that it had reviewed the facts and applied them to the pertinent law during a public meeting (and not outside of it).

After rejecting the plaintiffs' procedural due process arguments, the Court turned to their substantive due process arguments. It determined that the plaintiffs were claiming that the Guest Provision was unconstitutional as applied to their situation, meaning the Court would apply the rational basis test. KLP would need to have a legitimate governmental purpose in barring short-term rentals in order for the Provision to be constitutional. The Court found that the articulated purpose of the Guest Provision is to preserve residential character of neighborhood, including seeing the neighborhood made up of residents rather than transients, and that the requirement that owners live in the properties would serve as check on guest behavior. Further, KLP could rationally choose to regulate apartment houses for longer-term tenants differently from short-term rentals of residential properties. Thus, the Court rejected the plaintiffs' substantive due process arguments.

The Court next turned to the plaintiffs' argument that the KLP zoning ordinance did not allow any rentals whatsoever unless owner occupied, meaning that long-term rentals would be barred, restricting the availability of affordable housing. In examining this argument, the Court found that the plaintiffs – representing short-term rental owners – lacked standing to bring this argument.

The Court then addressed the plaintiffs' arguments pertaining to "administrative gloss." "Administrative gloss" is placed upon a clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference. This requires more than a knowing failure to enforce a provision. A plaintiff must show that the municipality failed to enforce a provision against certain uses because it interpreted the provision as inapplicable to those uses. The Court found that, in this case, the plaintiffs did not show that KLP's Commissioners established a *de facto* policy of non-enforcement, but merely did not address or attempt to enforce the provisions until the instant action.

Similarly, the Court rejected the plaintiffs' claim of municipal waiver. Waiver requires an intention expressed in explicit language to forego a right or upon conduct under the circumstances justifying an interference of a relinquishment of it. Generally,

municipalities do not waive their rights to enforce ordinance because they failed to enforce those ordinances in the past. And, in this case, the municipality had simply not addressed or attempted to enforce the provisions until the instant action.

Nearly the same reasoning underlaid the Court's assessment of the plaintiffs' equal protection/selective enforcement arguments. To show that the town's enforcement was discriminatory, the plaintiffs had to demonstrate that the enforcement was arbitrary or without some reasonable justification, not just that it was historically lax. The Court found that there was no evidence that the KLP Commissioners had ever enforced the Guest Provision in the past. As such, there was ample evidence of widespread failure to enforce, but not failure to enforce against a particular class of property owners.

The Court also briefly addressed an argument on municipal estoppel, finding that no official from KLP made any representations to the plaintiffs regarding enforcement of the Guest Provision, thus precluding that claim. And, the Court addressed a prior non-conforming use claim and rejected it, finding that there was no evidence that there was prior non-conforming use on the record.

Last, the Court turned its attention to the plaintiffs' arguments about the Dumpster Provision. The plaintiffs alleged and KLP did not contest that they had dumpsters in place before the Dumpster Provision went into effect. However, the Court found that there was no evidence on the record that the dumpsters were used in the same manner at that time as they were for the short-term rentals, thus the plaintiffs had failed to establish that the dumpsters were protected under prior nonconforming use.

Practice Pointer: It is good practice for municipal governing bodies to review local zoning ordinances regularly and ensure that consistent, non-discriminatory code enforcement actions are taking place on a routine basis.

New Hampshire Center for Public Interest Journalism v. NH Dept. of Justice.
New Hampshire Supreme Court
Docket No. 2019-0279
October 30, 2020

The Exculpatory Evidence Schedule (a/k/a Laurie List) is not exempt from disclosure as a police personnel file under RSA 105:13-b, nor is it an exempt internal personnel practice, but it might be an exempt record because its disclosure would constitute an invasion of privacy

The NH Center for Public Interest Journalism, along with five newspapers and the ACLU sought access to the Exculpatory Evidence Schedule (EES) containing the names of police officers who have engaged in misconduct that reflects negatively on their credibility as witnesses. The plaintiffs argued that the list must be made public pursuant to the Right-to-Know Law, RSA chapter 91-A, and Part I, Article 8 of the New Hampshire Constitution.

Formerly known as the Laurie List, the EES is currently maintained by the Department of Justice (DOJ). Under the NH Supreme Court decision in *State v. Laurie*, 139 N.H. 325 (1995) prosecutors have a duty to disclose information that may be used to impeach police officer witnesses. Originally only maintained by county attorneys, the Laurie list was converted to the EES by the Attorney General in 2017 and now consists of a spreadsheet containing five columns of information: (1) officer's name; (2) department employing the officer; (3) date of incident; (4) date of notification; and (5) category or type of behavior that resulted in the officer being placed on the list.

On appeal from a decision in favor of disclosure by the Superior Court, the DOJ argued that RSA 105:13-b precludes disclosure of the EES because it is a record whose disclosure is prohibited by statute. The Supreme Court rejected that argument because the express focus of RSA 105:13-b is on information maintained in the personnel file of a specific policy officer. Because the EES is maintained by the DOJ, and the DOJ does not employ officers on the EES, the EES is not a personnel file within the meaning of RSA 105:13-b. The DOJ also argued that the EES is an internal personnel practice exempt from disclosure under the Court's decision in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993). However, since the Court overruled *Fenniman* in *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. ___, ___ (decided May 29, 2020) (slip op. at 9) and *Union Leader Corp. v. Town of Salem*, 173 N.H. ___, ___ (decided May 29, 2020) that argument was also rejected.

The case was returned to the Superior Court to determine under the customary balancing test whether disclosure of the EES would constitute an invasion of privacy.

Practice Pointer: Information about a police officer that is not kept by the officer's employer in the officer's personnel file is not protected from disclosure under RSA 105:13-b. The Exculpatory Evidence Schedule (a/k/a Laurie List) is not a record exempt from disclosure as an internal personnel practice. Disclosure of the EES must be evaluated by examining whether disclosure would be an invasion of privacy using the privacy balancing test.

Samuel Provenza v. Town of Canaan
Grafton County Superior
Case No. 215-2020-CV-155
December 2, 2020

Police Department internal affairs reports required to be disclosed under the Right-to-Know Law even when the underlying allegations of police officer misconduct are unfounded.

Provenza, a former police officer for the Town of Canaan, sought to prevent the public disclosure of an internal investigative report that had exonerated him from a claim of excessive force arising out of a traffic stop involving Crystal Eastman. Based on the recent NH Supreme Court decisions in *Union Leader v. Salem* and *Seacoast Newspapers v Portsmouth,* the Valley News sought access to the internal investigative report that had been previously refused by the Town. Upon making Provenza aware of the renewed request for the report, he filed suit seeking to enjoin the Town from releasing the report.

The Town had hired Municipal Resources, Inc. (MRI) to conduct an internal investigation to determine whether the level of force used by Provenza on Eastman was justified. Eastman had been acquitted of a resisting arrest charge but found guilty of disobeying a police officer. Provenza argued that his privacy interests in an unfounded internal affairs investigation outweighed the interests of the public for disclosure.

Using the privacy balancing test the Court first determined that Provenza's privacy interests in the disclosure of the MRI were minimal. In reaching that decision the Court ruled that information concerning purely private details about a person who happens to work for the government is very different from details concerning the individual's conduct in his capacity as a government employee. Because the MRI report did not reveal intimate details of Provenza's life, but rather Provenza's conduct as a government employee, his privacy interest in releasing that report was deemed minimal. Upon weighing the public interest in the release of the MRI report the Court concluded that there is a compelling public interest supporting that release that would enable the public to evaluate the integrity of the Canaan Police Department's internal affairs investigation of the incident. First, the public has the right to know that the police take their complaints seriously and that the investigation was "comprehensive and accurate." Second, the public similarly has the right to know whether the police officer in question was given a fair investigation which aligned with traditional notions of due process. Third, as is evidenced by the national conversation concerning policing in the United States, transparency at all levels of police conduct investigations is fundamentally important to ensure the public's confidence and trust in local police departments.

Provenza argued for a bright line rule that where an internal investigative report concludes that a complaint against an officer is unfounded or not sustained then the officer's privacy interests outweighs the public interest. The Superior Court rejected that argument and ruled that the MRI report, subject to redaction of the names of witnesses and minors, was subject to disclosure.

Practice Pointer: An internal investigative report about the conduct of a police officer during the performance of his official duties would likely be subject to disclosure under the Right-to-Know Law, even if the allegations that brought about the investigation are unfounded. However, an internal investigative report about the conduct of a police officer in his personal affairs, and not during the performance of his official duties, may entail a sufficient privacy interest under RSA 91-A:5, IV to justify not disclosing an internal affairs investigation report.

New London Hospital v. Town of Newport
New Hampshire Supreme Court
Case No. 2019-0616
February 9, 2021

A late filed claim for a charitable exemption under RSA 72:23-c not supported by a contemporaneous claim of accident, mistake or misfortune properly denied by town

The Newport Health Center (Hospital) located in the Town of Newport was denied a charitable property tax exemption by the select board due to the late filing of the required annual exemption form. Under RSA 72:23-c every religious, educational and charitable organization must annually file with the select board or assessors, before April 15th, BTLA Form A-9 listing all real estate claimed to be exempt. The Hospital filed its annual exemption form on May 19, 2016. At a select board meeting on August 29, 2016 the board voted to deny the claim "because the application for the exemption was untimely and because the level of charity care provided by the hospital is very small and it is a fee for service operation." The Hospital appealed the denial to the Superior Court.

On appeal to the Superior Court and then to the NH Supreme Court, the Hospital argued that even though it had admittedly not timely filed its annual application for a charitable exemption, it should nonetheless be granted because it could demonstrate accident, mistake or misfortune even though that excuse was not presented to the select board. Both the Superior and Supreme Court's rejected those arguments.

The Hospital argued that as applied to its charitable exemption application the strict adherence to the April 15th deadline was an overly-technical construction inconsistent with the statute's overall purpose. The Court concluded that strict adherence to the legislature's deadline for charitable exemption applications does not contravene the statute's purpose, as that deadline assists local government by providing a timely, accurate and comprehensive list of a community's taxable property. Because the Hospital did not claim accident, mistake or misfortune when it initially submitted its untimely Form A-9 to the select board, it was deemed to have waived that exception to the statutory deadline. NHC also tried to amend its appeal in the Superior Court by arguing Newport was improperly discriminating against it due an administrative policy of notifying particular entities, not including the Hospital of approaching deadlines for tax exemptions. The Supreme Court agreed with the trial court that this would add and entirely new cause of action and unfairly prejudice the town.

Practice Pointer: Under RSA 72:23-c every religious, educational and charitable organization must annually file with the select board or assessors, before April 15th, BTLA Form A-9 listing all real estate claimed to be exempt. An untimely Form A-9 can only be accepted if the charitable organization demonstrates to the select board it was prevented from doing so due to accident, mistake or misfortune. Caution should be exercised by municipalities who use administrative policies to send notices to some but not all charitable organizations of the annual deadline.

Appeal of City of Keene
New Hampshire Supreme Court
Case No. 2020-0473
September 16, 2021

Proving disproportionality requires a taxpayer to establish its aggregate valuation is a higher percentage of fair market value than property in the municipality generally.

PSNH, an electric utility company, sought abatements of taxes assessed against it located in the city. The city denied the abatements. PSNH appealed to the Board of Tax and Land Appeals (BTLA), with both parties stipulating to the aggregate assessment of PSNH's property, including an office building.

The BTLA compared the stipulated aggregate assessment with the City's expert's opinion of aggregate fair market value of PSNH's property and concluded that the City over-assessed PSNH. However, the City's expert – and, subsequently, the BTLA – excluded the office building from its valuation of PSNH's property

On appeal the New Hampshire Supreme Court, agreed with the town that the BTLA's calculations were unjust and unreasonable. As such, the Court remanded the case with the instruction that the aggregate fair market value should include the fair market value of the office building.

Practice Pointer: When providing expert testimony to a judicial body on valuation, ensure that the expert will include all relevant valuations.

Appeal of Town of Chester & a.
New Hampshire Supreme Court
Case No. 2020-0475
September 16, 2021

Equalization ratios may be applied to fair market value assessments of electric utility property to determine appropriate abatement.

PSNH, an electric utility company, sought abatements of taxes assessed against it for "electric utility property" –transmission and distribution (T&D) assets as well as transmission easements and the use of public rights-of-way (PROW) – located in the respective towns. The towns denied the abatements. PSNH appealed to the Board of Tax and Land Appeals (BTLA).

At the BTLA, each party submitted expert testimony on assessed value of the utility property, each largely concluding that the assessed value reflected the fair market value of the property. The BTLA then calculated the "equalized market value" based on application of the towns' equalization ratios to the fair market value of the utility property. In comparing the equalized market value to the aggregate assessed value for each municipality for each tax year, the BTLA concluded that an assessment was unreasonable and granted an abatement when it determined that the difference between the equalized market value and the aggregate assessed value was greater than five percent.

On appeal to the New Hampshire Supreme Court, the towns argued that the BTLA erred by equalizing the aggregate fair market value of PSNH's taxable property without first excluding the value of PSNH's land interests, resulting in application of the equalization ratios to already-proportionate property values, creating inaccurate calculations.

The Court disagreed stating that the test in a tax abatement proceeding is whether the municipality assessed the taxpayer's property at a higher percentage of fair market value than the percentage at which property is generally assessed in the municipality. In this case, the experts for parties calculated that the assessed value equaled the fair market value. As such, where the general level of assessment in the municipality is less than the fair market value, the taxpayer may demonstrate that the municipality's assessment of that property was disproportionate. Here, that occurred. Therefore, PSNH's abatement was granted.

Practice Pointer: In taxing electric utility property, municipalities must be careful to ensure that they are taxing those utility assets on an equalized market value basis.

TABLE OF CASES

NEW HAMPSHIRE MUNICIPAL ASSOCIATION

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