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"It is wiser to find out than suppose." Mark Twain

Inside this issue:

The Public Right of Way and Pole Licenses.

The public right-of-way is an important element of the municipal infrastructure. In this century, and in the unfolding information economy, the ability of a municipality to manage and utilize its rights-of-way corresponds to economic development and enables municipalities to perform vital public functions.

We have been involved in a working group organized by the New Hampshire Municipal Association which is exploring the emerging issue of how municipalities may reserve space on the poles for public purposes. The municipal space issue is looming; the issue of taxing use of the right-of-way is here now. The same process controls both issues: amending pole licenses based on the public good. That process should be used now by municipalities to amend pole licenses to require payment of taxes from licensees utilizing the public right-of-way.

Based on the holding of the New Hampshire Supreme Court in the series of cases involving Verizon New England and the City of Rochester and based upon the mandatory language of RSA 72:23, municipalities in New Hampshire must assess real estate taxes for nongovernmental use of municipal property within the public right-of-way. This outlines the steps needed to universally amend all licenses for use of the rights of way to require payment of properly assessed taxes. One of the key features of the Rochester holdings is that the amendment process can be undertaken globally; all existing pole licenses can be amended by a single act taken by the governing body of the municipality. The amendment process must be completed by **31 March 2005** for the licensee to be subject to tax in 2005.

The process for amending the licenses is straight forward and involves 5 basic steps. These steps are: 1) inventory and review of existing pole licenses to determine the identity of licensees; 2) a petition signed by the Manager or Administrator or another interested resident is delivered to the governing body of the municipality, either the Board of Selectmen or the City Council; 3) the governing body receives the petition and schedules a hearing on the petition, allowing time for service and posting pursuant to RSA 43:2 (approximately 3 weeks from the receipt of the petition); 4) service of the notice of hearing and the petition is made on all current license holders either in person or by mail. Service should be made 16 clear days before the hearing date to allow 14 "clear days notice; and 5) a hearing on the petition to amend pole licenses is held and the governing body votes on granting the petition and thereby amends globally existing pole licenses. The property to be taxed is then added to the taxable property in the Town and a copy of the petition is forwarded to the assessor. For more information, contact Attorney Robert D. Ciandella.

Privacy in the Workplace.

New Hampshire does not provide a statutory, general right to privacy. The right to privacy in New Hampshire rather comes from the common law. This common law general right to privacy extends to four general areas of protection: it prohibits (1) intrusion into one's physical and mental solitude; (2) the publication of private facts; (3) publicity that sheds a false light; and (4) misappropriation of one's name or likeness. As an employer in New Hampshire such protections should be taken into (cont.)

Privacy in the Workplace continued...

consideration when managing employees.

Additionally New Hampshire affords specific statutory privacy protections in dealing with electronic communications such as telephone use and under a newly amended surveillance statute. The New Hampshire wiretapping statute prohibits any person from intentionally intercepting, endeavoring to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral or electronics communication. The monitoring of telephone conversations, absent an exception, is prohibited. These exceptions include, (1) the consent of all parties to the communication; and (2) telephone service provided by the employer in the ordinary course of business (such monitoring cannot include private calls). Before conducting any monitoring, an attorney should be consulted to ensure legal compliance.

In 2004, New Hampshire

passed a newly amended statute making it a misdemeanor to invade the privacy of others by photographing or recording people in a place where they might reasonably expect privacy. This new law went into effect on June 11, 2004 but due to ambiguities in the law, its full scope and applicability is yet to be determined. The law sets forth various parameters dealing with the scope of surveillance that may be conducted outside of private places and what areas constitute private places. Employers are well advised to carefully limit surveillance of employees and not engage in surveillance in areas such as bathrooms and locker rooms where employees' expectations of privacy are high.

For further information on this or other employment/ labor matter please contact Attorney Douglas Mansfield.

Conservation Easements.

This firm is often called upon to assist municipalities with conservation easement issues. Although conservation easements are relatively new to some municipalities, these instruments have been around for decades. The New Hampshire statute authorizing, and in some cases legitimizing existing conservation easements, was passed by the Legislature in 1973. This firm has participated in the negotiating and drafting of dozens of conservation easements on behalf of municipalities, property owners and private conservation organizations such as local Land Trusts.

Typically, a conservation easement has three parties: (1) a private landowner, (2) a municipality, typically acting by and through its conservation commission, and (3) a private open space holding entity, such as The Society for the Protection of New Hampshire Forests or a Land Trust. One of these entities, typically the private landowner, continues to own the property. Another party, being either the municipality acting by and through its conservation commission or the private open space holding entity, holds the easement, and the third party, be it again the municipality acting by and through its conservation commission or the private open space holding entity, holds what is known as an "executory interest". This means if the primary easement holding entity fails to protect the property, the other entity can step in and enforce the provisions of the easement.

A typical conservation easement permits the landowner to continue to farm or conduct forestry practices on the land while assuring that the land will not be developed and in most cases, not be used as a gravel pit into the indefinite future. To the extent a municipality believes that open land provides value to the municipality, a conservation easement is often a less expensive way to preserve land than outright acquisition.

As noted, several lawyers in this firm are conversant with conservation easements and, as regular municipal counsel or as special counsel, willing and able to assist municipalities in negotiating this process. For more information, contact Attorney Charles F. Tucker.

Boccia in Brief: Dealing with Area Variances

Although forecast by the concurring opinion in Bacon v. Town of Enfield, the New Hampshire Supreme Court officially "changed the rules" by recognizing a distinction between "use" and "area" type variances in Boccia v. City of Portsmouth, Docket No. 2003-493 (Issued 5/25/04). Boccia dealt with six set-back and buffer "area" variances in connection with the development of a 100-room hotel.

In reversing and remanding this case to Superior Court for a third time, the Supreme Court recognized that Simplex established a less

restrictive standard for proving unnecessary hardship; but the Court noted that such test does not distinguish between "use" and "non-use" or "area" variances. To define this distinction, the Court stated that a "use" variance would allow the applicant to undertake a use which the zoning ordinance prohibits, while: "A non-use variance [would authorize] deviations from restrictions which relate to a permitted use … that is, restrictions on the bulk of buildings, or relating to their height, size, and extent of lot coverage, or minimum habitable area therein, or on the placement of buildings and structures on the lot with respect to the required yards. Variances made necessary by the physical characteristics of the lot itself are non-use variances of a kind commonly termed 'area variances'."

Since Simplex was decided in the context of a use variance, the Court determined that Simplex's hardship test was inappropriate for an area variance. Accordingly, the Court created two new hardship factors for an area variance: "(1) whether an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property; and (2) whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance. The second factor includes consideration of whether the variance is necessary to avoid an undue financial burden on the owner. (citations to Bacon, New York and Pennsylvania cases and treatise omitted)."

In considering the first factor, the Court noted that a landowner need not show that without the variance, the land will be valueless; and the Court determined that the record supported a finding that the variances were needed to enable a 100-room hotel as designed. Regarding the second factor, the Court noted that the issue was "whether there is a reasonably feasible method or methods of effectuating the proposed use without the need for variances" and

"whether an area variance is required to avoid an undue financial burden on the landowner." While adverse effect must be more than mere inconvenience, a landowner need not show that without the variance the land would be rendered valueless or incapable of producing a reasonable return. Accordingly, boards and courts must examine the financial burden on the landowner, including the relative expense of available alternatives.

These variables could be viewed as more favorable to an applicant. An applicant should always be able to meet the first Boccia hardship prong, i.e., that the

variance is needed to enable the proposed use of the property given the special conditions of the property. The "wildcard" will be the second prong of whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue.

Remember that, regardless of which standard is applied for determination of whether unnecessary hardship exists, hardship is but one of five elements necessary for an applicant to prove in order to obtain the variance. One can safely assume that more

attention will be paid to the other four elements in future variance hearings and court proceedings.

For a more expansive version of this article, as well as a single page "cheat sheet" of the "five prong" variance test under both Simplex and Boccia, please see our web-site at dtclawyers.com. For more information on this or related matters, contact Attorney Christopher L. Boldt.

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