Municipalis.SM

A Legal Newsletter for Municipalities.

DTC LAWYERS - DONAHUE, TUCKER & CIANDELLA, PLLC

ATTORNEYS DTC AT LAW

A Professional Limited Liability Company

Volume 4, Issue 1 / March 2007

Exeter Office:
Water Street Professional Building
225 Water Street,
PO Box 630
Exeter, NH 03833
(603) 778-0686

Portsmouth Office:
Kearsarge House,
104 Congress St., Suite 304
Portsmouth, NH 03801
(603) 766-1686

www.dtclawyers.com

To **Subscribe** to future issues of the newsletter, Muncipalis, visit our website at www.dtclawyers.com and send us an email.

Inside this issue:

Update on the Hardship Test for a Use Variance.

The latest case addressing the hardship test for a use variance is Community Resources for Justice, Inc. v. City of Manchester, 2006-609 (January 24, 2007). This case further clarifies the ruling in Rancourt v. City of Manchester, 149 NH 51 (2003) by indicating that the hardship test requires a showing that the property in question is somehow different than other lots in the subject zoning district. Here, the applicant was an organization that operates "halfway houses" under contract with the Federal Bureau of Prisons. The applicant proposed to operate a halfway house in the central business district. The City indicated that a use variance was required stating that the proposed use was a "correctional facility" and that such use was not allowed in any district within the City. While the Manchester ZBA denied the variance, the trial court found that evidence had been presented to satisfy the hardship criteria. However, the Supreme Court sided with the City and found that there was no evidence of special conditions of the land in question which distinguished it from the area in general. In particular, the Court stated that the cited evidence of availability of public transportation and city services was true of other lots in the area so that the subject property was not unique. It seems the Court maybe moving back to the concept of hardship "inherent in the land" and unique to the property that was an often stated requirement prior to the *Simplex* decision.

The applicant also claimed that even if the hardship criteria was not met, that the approval of the variance should stand based on two arguments: 1) the City's adoption of the ordinance exceeded their authority under RSA 674:16 because it does not support the general welfare and 2) the ordinance as applied is an unconstitutional ban of correctional facilities by the City of Manchester. Included within the constitutional claim was the argument that the ban violated state and federal rights to equal protection. The Court noted that under New Hampshire law, the right to use and enjoy property is an important substantive right and equal protection constitutional claims presented on this issue must be subject to an "intermediate scrutiny test". The Court indicated that this test will require a showing by the government that the challenged legislation is substantially related to an important governmental objective, and such a showing may not consist merely of justifications created after litigation is filed and/or overbroad generalizations. The Court remanded the case back to the trial court for further proceedings on the constitutional claim.

The Court's handling of the constitutional challenge underscores the need for municipalities to carefully craft zoning ordinances to anticipate potential constitutional challenges and to ensure that there is a clear link between the ordinance and important governmental objectives.

For additional information or questions, please contact Attorney Sharon Somers.

Tax Deeding Tune-Up for Municipalities.

Municipalities in New Hampshire face challenges in complying with the myriad requirements for tax deeding. One frustrated municipal official said to me: "Whoever wrote RSA Chapter 80 should have their law license revoked!" On top of an already complicated statutory process, there is a layer of common law (i.e. case law) and Constitutional requirements. If an owner loses real property through a tax deed, the municipality must comply with "due process of law." What does this mean as a practical matter? It means that tax collectors should comply strictly with the requirements of RSA 80:77, Notice to Current Owner, and RSA 80:77-a, Notice to Mortgagees, and then do more.

Not only must the tax collector send a notice to the current owner by certified mail, return receipt requested, but, if the letter is not accepted by the owner, the tax collector must follow up with additional steps to ensure notice, such as: 1) Sending the notice again by regular mail; 2) Posting the notice on the property; 3) Checking other municipal records for a more current address, and sending the notice again; and 4) The rule is that the municipality must do what is "reasonable under the circumstances" to notify the former owner.

Likewise, municipalities are well served to notify all those who have recorded liens on the property in the last 35 years, not just mortgagees. Many older liens, attachments and mortgages are no longer enforceable, but it takes little time or effort to send the notice, and if it results in the payment of back taxes, that is good.

Both of these strategies are a small expense and effort,

and they can buy peace of mind, whether municipalities wish to retain the tax deeded property or sell it. For additional information or questions, please contact Attorney Katherine Miller.

Negotiating the First Collective Bargaining Agreement.

A municipality negotiating its first collective bargaining agreement with a newly certified bargaining unit faces an intimidating challenge. This first contract is the most important in terms of contract language. The terms negotiated in this first contract will affect the employment relationship for many years to come. It is paramount that management establish satisfactory key provisions in this first contract governing such issues as management rights and grievance procedures.

Establishing ground rules at the first collective bargaining meeting can help ensure a fairly smooth and productive negotiating process. Often these grounds rules, agreed to by both sides, establish such items as identifying the chief spokesperson; the number of people on each negotiating team; location of meetings and frequency and times of meetings; who may and may not be present in the negotiating sessions; time lines for submission of initial proposals; limitations on public disclosure of the content of negotiating sessions; and the provision that nothing shall become effective until a contract is ratified by both sides.

A favorable management contract will provide a basic framework of essential contract provisions. These include a well drafted management rights article; a "zipper clause"; grievance procedures; and articles that provide management with the ability to address employee performance issues, downsizing,

Collective Bargaining Cont.

workload, and drafting of job descriptions and assignment of job responsibilities.

The management rights article will establish a baseline of what falls within management's prerogative, delineating this from the rest of the contract and those areas that are part of the union's rights and those matters which are subject to bargaining. The management article will provide a future basis for management to supports its actions should the union at a later date assert that an action is a matter subject to mandatory collective bargaining. In the absence of another contract provision to the contrary, the management rights provision may provide the basis to claim that management has the right to act unilaterally in a particular matter.

A zipper clause is useful in that it can make it clear that the parties to the agreement did not anticipate that there will be any residual duty to bargain during the life of the agreement over anything. It can also assist in making it clear that all past practices that existed prior to the agreement have been replaced by the agreement, and thus precluding the need to litigate over what a past practice was and whether it presently governs.

Negotiating the first collective bargaining agreement with a newly certified bargaining unit is an important task that can have lasting effects for a municipality.

For additional information or questions, please contact Attorney Douglas M. Mansfield.

Declaratory Judgment and the Planning Board's Exercise of Administrative Discretion.

In the case of Property Portfolio Group, LLC v. Town of Derry, __ N.H. __ (Docket No. 2005-867, Issued December 21, 2006), the Supreme Court upheld the lower court's dismissal of PPG's Declaratory Judgment and Injunction action, where PPG had not appealed the Planning Board's action for five (5) months. The Board had determined that the owner's application to convert a former fire station into a restaurant could proceed under the less stringent "site plan determination" regulations rather than the more stringent "site plan review" as allowed by the Town's Land Development Control Regulations. The Board further approved the site plan with a condition that landscape buffer details be provided for certain abutting residential uses.

The Court rejected PPG's argument that the Board had not issued a final approval because of the condition. In analyzing the issue in a somewhat summary fashion without reference to RSA 676:4, the Court restated the distinction between "conditions precedent", which contemplate additional action on the part of the town, and "conditions subsequent", which do not delay approval. In this case, since the condition was not required to be fulfilled before any renovation commenced, the Court found that it was a "condition subsequent".

The Court further rejected PPG's contention that it could bring a Declaratory Judgment action even though it did not comply with the thirty-day appeal period of RSA 677:15, I. The Court noted that it had previously held that a Declaratory Judgment action could be brought "to challenge the validity of a zoning ordinance" after the expiration of the appeal period as an exception to the usual requirement of exhaustion of administrative remedies; but the Court has "not, however, expanded this line of cases to challenges of planning board decisions". Assuming without deciding, that a planning board decision could be belatedly challenged, the Court still found that PPG's action would be prohibited since it had not raise a "question of law, but rather contested the planning board's exercise of administrative discretion."

This decision will likely cause late appealing parties to creatively craft Declaratory Judgment actions to include a survivable "question of law"; and we may well see the Court revisit this issue in response to such efforts.

For additional information or questions, please contact Attorney Christopher L.. Boldt.

.

DTC LAWYERS - DONAHUE, TUCKER & CIANDELLA,

225 Water Street
Exeter, New Hampshire 03833

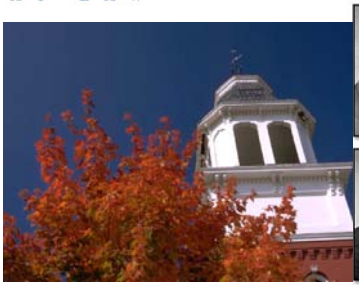
Advertising

*For more information contact one of the following attorneys in our **municipal practice group**:*

We're on the web at www.DTCLawyers.com

DTC Municipal Practice Group

ATTORNEYS DTC AT LAW



Established in 1985, Donahue, Tucker and Ciandella, PLLC is a full-service law firm with 15 attorneys and offices in Exeter and Portsmouth, New Hampshire. ©2007 Donahue, Tucker & Ciandella, PLLC.

Attorney Robert D. Ciandella
Email: rciandella@dtclawyers.com
Tel: (603)778-0686 Ext. 503

Attorney Michael J. Donahue
Email: mdonahue@dtclawyers.com
Tel: (603)778-0686 Ext. 501

Attorney Robert A. Battles
Email: rbattles@dtclawyers.com
Tel: (603)776-1691

Attorney Christopher L. Boldt
Email: cboldt@dtclawyers.com
Tel: (603)778-0686 Ext. 530

Attorney Douglas M. Mansfield
Email: dmansfield@dtclawyers.com
Tel: (603)778-0686 Ext. 519

Attorney Haden P. Gerrish
Email: hgerrish@dtclawyers.com
Tel:(603)778-0686 Ext. 523

Attorney John J. Ratigan
Email: jratigan@dtclawyers.com
Tel: (603)778-0686 Ext. 505

Attorney Charles F. Tucker
Email: ctucker@dtclawyers.com
Tel: (603)778-0686 Ext. 502

Attorney Robert Derosier
Email: rderosier@dtclawyers.com
Tel:(603)778-0686 Ext. 516

Attorney Sharon Cuddy Somers
Email: ssomers@dtclawyers.com
Tel: (603)778-0686 Ext. 508

Attorney Katherine B. Miller
Email: kmiller@dtclawyers.com
Tel:(603)778-0686 Ext. 509

Attorney Christopher T. Hilson
Email: chilson@dtclawyers.com
Tel:(603)778-0686 Ext. 509

For back issues of this newsletter please go to our website at www.dtclawyers.com.