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A Legal Newsletter for Municipalities.

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Inside this issue:

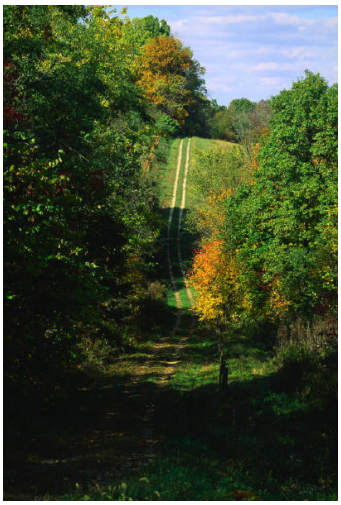
Conservation Easements as Mitigation for Development.

The New Hampshire Department of Environmental Services (DES) has for several years requested, or demanded, that developers who are destroying wetlands, mitigate the damage, and compensate the public by requiring the developer to permanently protect approximately 10x as many acres as are being eliminated. This can be done by out-right acquisition of land by a public or private body which has land preservation as a goal, OR, by acquisition of a conservation easement by such a body. Since often there is no suitable land on the site itself, DES has permitted lands or easements on land located elsewhere to be purchased by the developer and used for this purpose.

DES would like the mitigation parcels to be located within the same municipality, and in the same watershed, if possible.

At the same time, there are many landowners who are familiar with the concept of conservation easements, and who have land suitable for such easements, but who cannot afford to give them away.

Matches between the developer who must conserve some land, and a willing landowner accomplish two goals



at once.

The problem is making a match between the developer and the landowner. There is no recognized broker or agent or agency which has as a primary purpose putting these deals together. Much like private adoptions of infants, it is a matter of someone in the middle knowing what is going on in the community, and suggesting a match between the interested parties.

If you are a developer, a land owner, or a municipal official, you need to make your presence known to the other side. This is most effectively done by talking to the municipal conservation commission, and in some counties like Rockingham, the Conservation District, the local Land Trust if any, the local planning board, or employed staff planner, the Regional Planning Commission and the Cooperative Extension Service at UNH in Durham.

Getting the word out, and finding the appropriate match is the hard part. Doing the documents is relatively easy.

Charlie Tucker and Sharon Somers of this firm may be able to help steer you to the right people, no matter which role you would play in this kind of worthwhile effort and certainly can help you negotiate and draft the appropriate documents that will meet the standards of DES, and the needs of the landowner.

When is a Town Vote Not a Statement of Public Interest?

In the recent case Chester Rod & Gun Club v. Town of Chester, the New Hampshire Supreme Court held that the Zoning Ordinance is the relevant declaration of public interest to be examined rather than any specific vote at Town Meeting. In this case, the ZBA had been faced with two variance applications for competing Cell Towers – one on the Club's property and one on the Town's. A previous March Town Meeting had passed an article stating that all Cell Towers should be on Town owned land; and the ZBA relied on that article to grant the Town's application and deny the Club's. On appeal, the Trial Court reversed the ZBA and ordered that it grant the Club's variance.

In reversing the Trial Court in part, the Supreme Court stated what we as counselors to the ZBA's have long espoused: that the criteria of whether the variance is "contrary to the public interest" or would "injure the public rights of others" should be construed together with whether the variance "is consistent with the spirit of the ordinance". More importantly, the Supreme Court then held that to be contrary to the public interest or injurious of public rights, the variance "must unduly, and in a marked degree" conflict with the basic zoning objectives of the ordinance. In making such a determination, the ZBA should examine whether the variance would (a) alter the essential character of the locality or (b) threaten public health, safety or welfare.

However, the Supreme Court took the unusual step of reprimanding the lower court for improperly ordering the issuance of the variance. Instead, the Trial Court was instructed to remand the matter back to the ZBA for factual findings on all five prongs of the variance criteria. Thus, the applicant may or may not have obtained the relief sought and certainly has suffered a substantial delay in siting its tower (and this delay could be more extended if further appeals are taken).

If you have any particular questions on a given factual situation, please do not hesitate to call Attorneys Mike Donahue and Chris Boldt at our Portsmouth Office, (603) 766-1686 or Attorney Sharon Somers at our Exeter Office (603) 778-0686.

New Notice Requirements for Tax Sales and Tax Deeding.

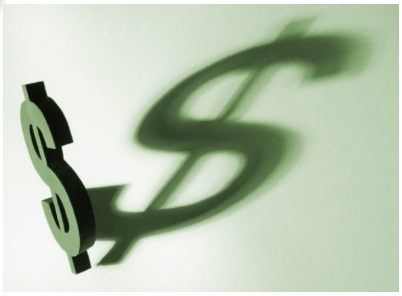
New Hampshire municipal officials are familiar with our two statutory processes for dealing with property taken for delinquent taxes: tax sales and tax deeds. Both processes require notice to the owner or former owner and to mortgagees and lien holders of record. Such notice is required by statute (RSA Chapter 80) and by the N.H. and U.S. Constitutions, pursuant to the "due process of law" clauses. Municipal officials have been challenged by the fact that the statutory system requires notice by certified mail (RSA 80:38-a and 80:38–b for tax sales and RSA 80:77 and 80:77-a for tax deeds) but is silent on the duty of the municipality if the notice is returned unclaimed. N.H. and federal case law have required that the municipality make efforts that are "reasonable under the circumstances" to provide notice that complies with Due Process, but exactly what municipalities should do under this circumstance has been unclear, up until now.

In Jones v. Flowers, 547 U.S. ____(April 26, 2006) the U.S. Supreme Court held that a state tax commissioner who received back unclaimed a certified mail notice of the tax sale of property is required by U.S. Constitutional Due Process guarantees to take additional reasonable steps to notify the property owner, if practicable to do so. In that case, the Supreme Court suggested that resending the notice by regular mail, posting the notice on the front door of the property or addressing a

New Notice Requirements Cont.

regular-mail notice to "occupant" would all be practicable and acceptable additional steps. Searching public records or the phone book is not necessary, and being able to prove actual notice is not required. Id. Although this case was decided in the context of a tax sale proceeding, the requirements would be equally applicable to the tax deeding process. This should clarify the process for municipal tax collectors. As the Supreme Court noted, "Successfully providing notice is often the most efficient way to collect unpaid taxes …" Jones v. Flowers, which is every municipality's goal.

For additional information or questions, please contact Attorney Katherine Miller.



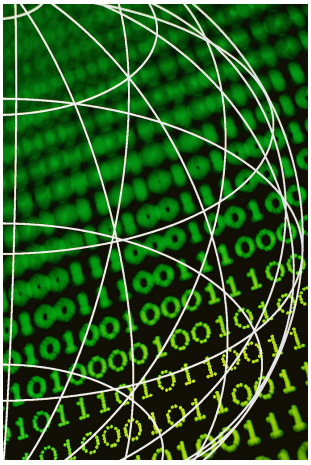
Right to Know Law in the Age of Electronic Communications.

The New Hampshire Legislature continues to wrestle

with the application of the Right-to-Know Law in the age of electronic communication. This year, HB 626 was submitted for review by the Legislature. The bill stemmed from the work of HB 606, the study committee formed in 2003. The term of the committee expired in 2005, but has been replaced with a permanent Right-to-Know Oversight Commission which is designed to provide an immediate response to issues without waiting for a legislative session to begin.

The drafters of the bill consciously drafted it to apply to broad concepts, and it is designed to apply with equal force to small towns and to the larger cities. This is an extraordinarily difficult task given the different manner in which these governing bodies operate; however, the drafters felt the need to make the legislation practical and operable for a three person board of selectmen as well as to a city council.

The key provisions of the legislation are as follows:1) it clarifies the concept of a public body and defines public meeting to be the convening of a quorum of a public body; 2) the key component of the new definition of "public meeting" is the notion of contemporaneous communication, so that telephone conferences are now included in the definition; 3) communications outside a meeting must now be disclosed, the thinking being that if policy issues are discussed but not decided outside the context of a convened meeting, that those discussions should be disclosed so that the public understands the basis of any decisions which flow from the discussions; further although the bill does not explicitly address the issue, discussions among a quorum which occur via e-mail could be con-



strued to fall under this category and thus e-mail correspondence could be required to be disclosed; 4) retention of records can be done in a paper or electronic form, and both forms of retention must be accessible to the public and adhere to the retention periods described in RSA 33-A; and 5) expands the notice requirements for public hearings to allow for posting of notices on a governing body's website, if one exists, and to require posting of emergency meetings as soon as practical and to use whatever further steps are "reasonably available" to advise the public of the emergency meeting.

As of the date of this writing, HB 626 is tabled in the Senate, which likely means that the bill in its current form is dead. It is anticipated that the Right to Know Oversight Commission will continue in future years with new versions of the legislation for consideration by the New Hampshire Legislature.

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

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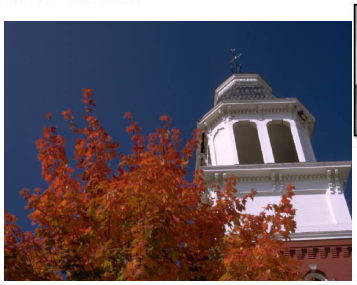

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