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US Supreme Court Clarifies 1st Amendment Rights of Municipal Employees.

In Garcetti et al. v. Ceballos, __ U.S. __ (No. 04-473, Decided May 30, 2006), a divided United States Supreme Court held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for 1st Amendment purposes and the Constitution does not insulate their communications from employer discipline. Mr. Ceballos was a supervising deputy district attorney, who had been asked by defense counsel to review an allegedly inaccurate affidavit underlying a search warrant. Mr. Ceballos determined that the affidavit made serious misrepresentations, relayed his findings to supervisors and prepared a memo recommending dismissal of the case. Nevertheless, the prosecution proceeded; and, during a defense hearing challenging the warrant, Mr. Ceballos testified to the Court, which rejected the challenge. Mr. Ceballos was subsequently reassigned within the DA's Office, which he claimed was retaliation in violation of his 1st and 14th Amendment rights. He originally brought a grievance proceeding (which was denied), followed by a Section 1983 action.

Recognizing the prior decisions of Pickering and Connick, the majority of the Supreme Court noted that "public employees do not surrender all their 1st Amendment rights by reason of their



employment. Rather, the 1st Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." Moreover, the Court restated its two-prong test for protecting public employee speech: (1) was the employee speaking as a citizen on a matter of public concern; and if so, then (2) did the government entity have an adequate justification for treating the employee differently from any other member of the public. The Court

noted that a "government entity has broader discretion to restrict speech when it acts in its role as employer, but the restriction it imposes must be directed at speech that has some potential to affect the entity's operation." Part of the Court's rationale was that without some "significant degree of control over their employee's words and actions...there would be little chance of the efficient provision of public services." Additionally, the Court wished to avoid displacing "managerial discretion by judicial supervision". In its conclusion, however, the Court expressly rejected the dissent's suggestion that employers can restrict employees' rights by creating excessive job descriptions. Thus, the U.S. Supreme Court clarified that a constitutional cause of action does not lie behind every statement that a public employee makes in the course of doing his or her job.

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

Municipal Estoppel

Municipal estoppel is a doctrine which litigants have employed against municipalities with varying degrees of success. To prevail against a municipality in a claim of municipal estoppel, a claimant must establish (1) a false representation or concealment of material facts made by the municipality with knowledge of those facts, (2) the party to whom the representation was made must have been ignorant of the truth of the matter, (3) the representation must have been made with the intention of inducing the other party to rely upon it, and (4) the other party must have been induced to rely upon the representation to his/her injury. *Aranosian v. City of Portsmouth*, 136 N.H. 57, 59 (1992).

Two recent New Hampshire Supreme Court cases indicate the evolving nature of this doctrine. The first case is *Thomas v. Town of Hooksett*, ___ N.H. ___ (2006). In *Thomas*, the landowner had been granted a site plan approval. His site plan approval was challenged,

and while the challenge was ongoing, the Zoning Ordinance had been amended to prohibit the landowner's proposed use. The landowner consulted the Code Enforcement Officer and a member of the Planning Board. Both individuals informed him that if he obtained a Building Permit within one year of the Court ruling in his favor, and if he began active and substantial development within six months thereafter, his site plan approval would not be rescinded. Based on that assurance, the landowner obtained a Building Permit within one year and was to begin active and substantial development within six months thereafter. The Town then revoked the landowner's Building Permit because he failed to initiate active and substantial development within one year of the Court's decision.

The landowner appealed, claiming that the Town was estopped from taking an alternate position from that expressed by the Code Enforcement Officer and the Planning Board member. The Supreme

Court disagreed, stating that RSA 674:39 clearly sets forth the landowner's responsibility to begin active and substantial development within one year of approval, which in this case was deemed to be the date of the Court's previous decision on the landowner's site plan approval. In light of this statute and the failure of the landowner to account for the operation of the statute, the landowner's reliance upon the Town officials' statements was unreasonable. Thus, the landowner could not satisfy his burden under the fourth element of municipal estoppel, or the reasonable reliance prong.

In *Hounsell v. North Conway Water Precinct*, ___ N.H. ___ (2006), the Court once again declined to apply municipal estoppel against the North Conway Water Precinct ("the Precinct"). In this case, the petitioners were attempting to argue that the Precinct's release of previous investigative reports concerning employee behavior estopped the Precinct from releasing a third report. In *Hounsell*, the Court seems to create a fifth element

to municipal estoppel. In addition to the four traditional elements set forth above, the Court also place a burden upon the petitioner to establish that "the public interest in preventing the government from capriciously dealing with its citizens outweighs the risk, posed by estoppel, of undermining important government interests." *Hounsell*. "[T]he law does not favor [the doctrine of municipal estoppel's] application against municipalities. This is especially true when a valuable public interest may be jeopardized by applying the doctrine of estoppel against the municipality." *Id.* While these recent cases afford municipalities some protection against municipal estoppel claims, municipalities should still be cautious in transactions with the public so as to discourage the filing of such claims at all. For additional information or questions, please contact Attorneys Christopher Hilson and Sharon Somers.

Voters Approve Eminent Domain Amendment to NH Constitution

On Election Day, voters approved an amendment to the New Hampshire Constitution designed to impose additional limitations on the taking of private property by eminent domain. The amendment provides: "No part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property."

The amendment is clearly a legislative response to the U.S. Supreme Court's decision last year in *Kelo v. City of New London*, 125 S.Ct. 2655 (2005). The question is: what impact -- if any -- will the amendment have on the existing law of eminent domain?

In *Kelo*, the US Supreme Court upheld the taking of land by the City of New London, Connecticut, for the purpose of carrying out a comprehensive economic develop-

ment plan designed to revitalize the City's economy, notwithstanding that the City planned to lease or transfer some of the condemned parcels to private entities.

The US Supreme Court, however, emphasized that nothing in its opinion would preclude a state from imposing stricter standards for condemnation than those required by the U.S. Constitution. In fact, New Hampshire courts have long interpreted



Eminent Domain Cont.

the NH Constitution in a manner that affords greater protection to private landowners than that required under the Fifth Amendment.

Under current law, the NH Constitution limits the exercise of eminent domain to circumstances in which the municipality can demonstrate: (1) a public purpose; and (2) a probable net benefit to the public after balancing the public benefits against the burdens and social costs on all property owners affected by the pro-

posed taking.

Whether a particular condemnation proposal involves a "public use" of the property or whether it involves "private development or private use of the property" remains a question of law for the courts.

In Merrill v. City of Manchester, the NH Supreme Court ruled that open land, "as long as it poses no threat of actual harm to the community, may be condemned for development purposes only

if it is to be put to a use which directly benefits the public, such as for a school, a playground, or a utility line, and not to a use which has only an incidental public benefit, such as for the private industrial park contemplated in the instant case." The outcome would doubtless be the same under the new constitutional amendment.

For additional information or questions, please contact Attorney Haden Gerrish.



Accommodating Physical Disabilities through Variances.

News reports show that the New Hampshire population is aging quickly, either because long time residents are aging in place, or because seniors are moving to New Hampshire from other states. This increasing elderly population brings with it the possibility that some residents will have physical disabilities at some stage of their lives. Additionally, other New Hampshire residents who are not in the senior category may have physical disabilities. These disabilities can call for adaptations to home or business environments for issues such as parking and one story living space, and such needs are often at odds with local zoning regulations.

When this conflict takes place, then the analysis performed by the zoning board of adjustment must be fundamentally different from that in which a person does not have a recognized disability. Both state and federal law govern

how the analysis should be performed and provide a solution to aid applicants, local planners and zoning boards of adjustment in reconciling any conflict. Under RSA 674:33 (V), when a person or persons have a recognized physical disability, and when reasonable accommodations are nec-



essary to allow the person or persons to reside or use the premises, the "hardship" element of the variance criteria can be waived, provided that the variance granted is in harmony with the general purpose and intent of the zoning ordinance. The statute also authorizes the zoning board of adjustment to provide "... in a finding included in the variance that the variance will

continue only as long as the particular person has a continuing need to use the premises." RSA 674:33 (V).

Further, under federal law, and as referenced in Trovato v. City of Manchester, 992 F. Supp. 493 (D.N.H. 1997), the Fair Housing Amendments of 1988 Act (42 U.S.C.A. §3604) and Title II of the American with Disabilities Act (42 U.S.C.A. §12131-12134) requires that a municipality must make reasonable accommodations from a strict implementation of the zoning ordinance if a) the applicant using or residing at the subject property suffers from a disability; b) reasonable accommodation is necessary, based on the applicant's demonstration that "... but for the accommodation, they will be denied an equal opportunity to enjoy the housing of their choice" Trovato at 495; and c) and if no evidence is shown to indicate that granting the applicant reasonable accommoda-

tion will fundamentally alter or subvert the purpose of the zoning ordinance.

Each application before the zoning board of adjustment will need to be analyzed on a case by case basis, and the "reasonable accommodation" referenced in the above statute needs to be reviewed based on the facts of each case. That said, planners and zoning boards should be mindful of the obligations imposed on them by these statutes, and perhaps more importantly, should utilize these statutes to assist in reconciling individual needs with the need of the community to maintain a strong set of zoning regulations.

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

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