Land Use Law Update:

New Hampshire Supreme Court Cases

Local Government Center's 2011 Municipal Law Lecture Series

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INTRODUCTION:

The purpose of these materials is to give Selectmen, Planning Board and ZBA Members and Staff a summary of the fifty plus land use/board related opinions issued by the New Hampshire Supreme Court since Fall 2007 (the last time I presented this lecture for the LGC). As with all legal issues, the actual of facts of any given case will control how any Court will decide that case. Accordingly, these materials, including any "practice points" that I may offer, contain my interpretation of these cases, which are not necessarily those of other practitioners in the field. If my Firm and I do not currently represent your municipality, I am not intending to give you any legal advice and strongly urge you to seek the advice of your own Municipal Attorney before proceeding on any given matter.

You will note that many cases could easily be placed in more than one category. I have attempted to categorize each case within the primary subject area of the opinion lay or within the area of the most important/novel point(s). I have also included in each heading any other "topics" which I felt were of material import in the decision.

I have included bracketed page numbers at the end of each bullet for easily reference; but, since the bulk of the audience for these materials will be non-lawyers, I have dispensed with following proper "Blue Book" citation formats.

Finally, I am very grateful to my associate at DTC, Keriann Roman, Esq., and my colleague in Windham, Tim Corwin, Esq., for their help in summarizing several of the cases contained in these materials. Many creative insights contained herein are frequently theirs; while any errors are solely mine.

I. SUBDIVISION AND SITE PLAN REVIEW

A. Doyle v. Town of Gilmanton, 155 N.H. 733 (2007) – Interpretation of Subdivision Regulations

- The Supreme Court reversed the Trial Court's determination that the Planning Board erred in finding that Owners' proposed lots did not meet the minimum building site size requirement. [734]
- Owners sought 3 building lots out of 62.5 acres: Lot 1 with 3.5 acres and existing house; Lot 2 with 6.5 acres; and Lot 3 with remaining 52 acres, covered extensively by wetlands. Subdivision regulations required each proposed building site to include a minimum of 30,000 contiguous square feet of suitable soil. [734]
- The Supreme Court noted without comment that the Planning Board went into non-public session to discuss its attorney's written opinion on minimum building site size requirement; and Owners sought disclosure of that written opinion and argued that the Board violated RSA 91-A by holding the non-public session. The Trial Court determined that the opinion should not be disclosed but that 91-A had been violated. [734]

- The Supreme Court noted that interpretation of subdivision regulations is question of law which it reviews *de novo* with the key issues being the definition of "building site" and whether area within setbacks could be included in calculating the minimum required contiguous square footage. The subdivision regulations defined "building site" as "that portion of a lot, tract or parcel of land upon which a single building is placed" and required all plats conform not only with the subdivision regulations but also with "any other pertinent State or local laws, regulations or ordinances." The zoning ordinance both required and defined setbacks in such a way as to contain "no structures." [735-736]
- The Court found that setbacks were excluded from the definition of "building site" such that areas covered by setbacks could not be included when calculating the minimum site size requirement. [737]
- The Supreme Court rejected the Trial Court's determination that the regulation was both "absurd" and served "no legitimate land use purpose" and found that Trial Court's focus upon footprint of typical home was misplaced. After reviewing various provisions of RSA 674:36, II, the Supreme Court concluded that "requiring a minimum lot size serves a legitimate land use purpose." [737 - 738]

B. Auger v. Town of Strafford, 156 N.H. 64 (2007) (I) – Waiver of Subdivision Regulations; Yield Plan; Procedural Due Process

- The Supreme Court affirmed in part, reversed in part, vacated in part and remanded the Trial Court's and Planning Board's approval of a proposed conservation development subdivision ("CDS") and yield plan. [65]
- The Property was a 65-acre lot containing "a broad expanse of wetlands." The zoning ordinance defined a CDS as a "method of subdivision design that provides for the protection of natural, environmental and historic land features by permitting variation in lot sizes and housing placement" and allowed reduced lot sizes with portions of tracts set aside as permanently unbuildable. CDS was also required to meet certain specific requirements as well as "all other zoning and subdivision requirements." [65 - 66]
- One such requirement was a yield plan showing the number of houses that could be built in a conventional development meeting all applicable State and local requirements. A yield plan was required "to show all wetlands and proposed disturbances in sufficient enough detail so that the impact can be assessed by the board." Further, the yield plan must minimize the total proposed wetlands disturbance, which, in most cases, was required to be less than 20,000 square feet of wetlands impact. [66]
- Developer's CDS contained 17 building lots serviced by a cul-de-sac and 31.8 acres of open space burdened by a permanent conservation easement. Its yield plan contained 18 lots serviced by a loop road and showed less than 20,000 square feet of wetlands impact. [66]

- Abutters appealed the Planning Board's approval of yield plan and CDS; and the Trial Court substantially affirmed the Board, remanding only a wetlands issue. [66]
- The Supreme Court noted its standard of review is to treat the Trial Court's decision with deference and to uphold the decision unless it is unsupported by the evidence or legally erroneous. The Court also noted that the Trial Court's review of Planning Board decisions is equally limited, with an obligation to treat factual findings as *prima facia* lawful and reasonable, such that the Trial Court cannot set aside a Board decision absent unreasonableness or an identified error of law. [66]
- The Supreme Court agreed with Abutters that the Board erred in waiving the requirement that there be no more than ten lots on a dead-end street, where the regulations permitted the Board to approve a plan that "substantially" conformed to the regulations where "strict conformity to these regulations would cause undue hardship or injustice to the owner of the land" and "the spirit of these regulations and public convenience and welfare will not be adversely affected." [67]
- The Court held that there was no evidence that the loop road configuration would cause undue hardship or injustice. The record showed that the sole reason that the Board decided to waive the 10-lot requirement was that it preferred the cul-de-sac design rather than any finding of undue hardship or injustice caused by the loop road. [67]
- The Court also addressed a number of additional issues that would likely arise on remand. The Court held that Abutters had failed to develop their argument on any procedural due process violation associated with Board's failure to review the environmental impact of the CDS upon a nearby lake. [67 – 68]
- The Court also rejected Abutters' argument that procedural due process rights were violated because Board member voted on the CDS even though he missed two of multiple hearings. The Court noted that "the Constitution does not [necessarily] require that all members of an administrative board must take part in every decision, or that the failure of one participating member to attend one hearing vitiates the entire process." [68]
- On Developer's cross appeal on the wetlands impact issue, the Supreme Court found that the yield plan did not contain sufficient evidence that it complied with requirement to show all wetlands and proposed disturbances in sufficient detail and to show that proposed disturbance would be minimized in accordance with DES requirements; and the Court reversed approval of yield plan and remanded matter back to Planning Board [69]
- The Supreme Court also agreed with Abutters approving yield plan was in error because it depicted a right-of-way of less than 50 feet since subdivision regulations defined right-of-way as "[a] strip of land occupied or intended to be occupied by a street," and that "all street construction except private roads serving no more than three lots shall conform to the dimensions shown on the typical section," which in turn required a 50-foot right-of-way. Again, there was no evidence of undue hardship or injustice to support any implied waiver of the requirement such that the Board erred in approving it. [70 – 71]

C. Derry Senior Development, LLC v. Town of Derry, 157 N.H. 441 (2008) – Impact of State Agency Standards and Permits

- The Supreme Court reversed and remanded the Trial Court's and Planning Board denial of Site Plan approval since the record revealed no evidence suggesting proposed septic system would not adequately protect all water supplies. [443]
- Applicant proposed an adult community development on 60 acres and had obtained NH DES approval for proposed sewage disposal system. [443]
- Site plan regulations referred to DES on-site sewage disposal standards and did not impose more stringent local standards. Nevertheless, the Town's DPW opposed approval citing concerns with sewage system design. [445]
- The Planning Board denied approval because Applicant refused to alter plans as requested by DPW; and the Trial Court affirmed. [446]
- The Supreme Court reversed since the Planning Board had not enacted more stringent standards for septic systems than those set forth in administrative rules and the DES approval creates a "presumption" that project adequately protects public interest in assuring proper sewage disposal. [449]
- The record showed no additional evidence that the proposal would have negative effect upon health and safety of town residents; and the Court found that concerns of Board were vague and that the record lacked evidence of identifiable danger to abutting properties. [450]
- "Although the board is entitled to rely upon its own judgment and experience in action upon applications for site plan review, the board may not deny approval on an *ad hoc* basis because of vague concerns….Further, the board's decision must be based upon more than the mere personal opinion of its members….Where, as here, another agency's approval creates a presumption that the proposal protects the public interest, the record must show specific facts justifying rejection of the agency's determination; that is, concrete evidence indicating that following the agency's determination in the particular circumstances would pose a real threat to the public interest." [451 – 452]
- The Court held that if there are special conditions in the municipality which justify standards that are higher than the minimums sets in State administrative rules, Planning Board must adopt those standards in Site Plan Review regulations in accordance with statutory procedure. [452]

D. Dovaro 12 Atlantic v. Town of Hampton, 158 N.H. 222 (2009) – Condo Conversion; Off-site Parking; Non-conforming Use

- The Supreme Court affirmed consolidated orders from the Trial Court concerning a condominium conversion project.
- Owner's lot contained two seasonal buildings – one with 6 apartments and a second 3 bedroom cottage. The use was nonconforming because the lot had too few parking spaces for each dwelling unit. Renters typically leased parking spaces off-site. [224]

- Owner sought to convert the apartments into year-round condominium units; and the Planning Board denied the application on the grounds that converting units would perpetuate a public nuisance with respect to parking ingress and egress and jeopardize public safety because of the difficulty with emergency access. [224 - 225]
- The Trial Court initially partially reversed the Planning Board since the nonconforming use must be permitted to continue regardless of the form of ownership; and the Trial Court ordered the Board to grant the application "without the parking spaces it deem[ed] offensive." [225]
- Owner submitted a revised application with reconfigured the parking; but the Board still found 4 of the proposed 8 stacked parking spaces offensive. As a condition of approval, Board required the condominium association to secure offsite parking for the other units in perpetuity. [225]
- On a second appeal, the Trial Court upheld the Board's decision to eliminate 4 parking spaces but reversed the decision to require the association to secure perpetual offsite parking. [225]
- The Supreme Court ruled that since the tenants and not Owner had secured offsite parking, the Board could not claim that offsite parking was part of Owner's nonconforming use. [226]
- The Court also disagreed with the Board's contention that the Trial Court's upholding the decision to retain 4 onsite parking spaces and eliminate the remaining onsite spaces "stripped" Owner's preexisting nonconforming use. Rather, the Supreme Court ruled that this decision brought Owner's lot into compliance with part of the new parking requirements and would prohibit Owner from reverting to parking spaces that lack sufficient ingress and egress; but it did not require Owner to change his preexisting use of the lot to conform with the rest of parking requirements. [227]
- The Supreme Court also held that change of ownership from rental units to condos does not extinguish the nonconforming status of use of the property and that conversion from seasonal apartments to year-round condominium units was not a substantial change in a preexisting nonconforming use. [229]

E. Ferson – Lake, LLC v. City of Nashua, 159 N.H. 524 (2009) – Site Plan Review; Impact of State Rules and Regulations

- The Supreme Court affirmed the Trial Court's and Planning Board's denial of a site plan for an elderly housing development due to Developer's failure to comply with NH Admin. Rule Hum 302.03 as then required by the City Code. [525]
- Developer contended that its letter to the Board stating that the project "would comply with all applicable rules and regulations of the human rights commission if required by the commission" complied with the City Code requirement that the "applicant shall certify at the time of an application before the Planning Board that a development will comply with all applicable rules and regulations established by the NH Human Rights Commission…if required by the Commission, that every development shall provide significant facilities and

services specifically designed to meet the physical and social needs of older persons, or if the provision of such facilities and services is not practical, that such housing is necessary to provide important housing opportunities for older persons…." [526 – 527]

- The Board held that the letter was "an empty promise" and insufficient since the plan did not show that the project would comply with the applicable rules and regulations when constructed. [527]
- The Court held that Board was entitled to inquire into whether the plan would actually comply with HRC rules and regulations "as part of its function to review site plan applications." [528]

F. Pike Industries v. Woodward, 160 N.H. 259 (2010) – Interpretation of Ordinance; Nonconforming Use; Abandonment

- The Supreme Court affirmed in part and reversed in part the Trial Court's reversal of the ZBA's decision that Pike had abandoned its nonconforming use. [260]
- Although Pike had maintained the plant and performed other actions tied to the plant at a cost of over $24,000, the plant had not produced asphalt for almost 2 years before a site plan application filed to replace the asphalt batch plant with a concrete batch plant. [260-261]
- The zoning ordinance provided "[w]henever a non-conforming use has been discontinued for more than one year for any reason, such non-conforming use shall not thereafter be re-established, and the future use of the property shall be in conformity with the provisions of this Ordinance." [261]
- The Supreme Court reviews the interpretation of a zoning ordinance *de novo* but does not look beyond the clear language of the ordinance to determine legislative intent. [262]
- In this case, the Court determined that the language was clear and unambiguous so that neither the "spirit of the ordinance" nor Pike's subjective intent were relevant; rather the only issue was whether Pike actually discontinued its non-conforming use. [263]
- The Supreme Court agreed that the batch plant was like a store, which had to be stocked, maintained, advertised, etc., but which could not guarantee any sales so that the Court held that Pike did not discontinue the use. [263]
- The Court reversed the Trial Court's remand to the ZBA on the issue of determining Pike's intent to abandon since the language of the ordinance stated "for any reason". [264]

PRACTICE POINTS:

- The Court will look to the express language of the regulations and ordinances and require Planning Boards to follow the procedures stated therein.
- State permits may create a presumption of compliance with public interest so that if a municipality wishes to impose a higher standard, it must do so expressly within its ordinances and regulations.

II. APPEALS OF ADMINISTRATIVE DECISIONS

A. Churchill Realty Trust v. City of Dover ZBA, 156 N.H. 667 (2008) – Impact of Municipal Boundary on Land Use under RSA 674:53

- The Supreme Court reversed the Trial Court and the ZBA's determination that Dover's Zoning Ordinance prohibited a building permit for construction to take place solely in Rollinsford, albeit with sole access, sewer and utilities coming through Dover. [669]
- The Court analyzed RSA 674:53 in detail and held that while the Applicant was not allowed to treat the municipal boundary line as a lot line (because of the access/utility issue), the plain language of the statute and general rules of municipal jurisdiction prohibit the imposition of Dover's density regulations on Rollinsford land (which had no such density regulations). [671-672]
- The Court determined that the terms of RSA 674:53, III "evinces an intent to subject uses, buildings and structures lying within a municipality solely to the regulations and ordinances of that municipality, except where land or improvements have been 'borrowed' pursuant to subparagraph (b)." [673]
- Additionally, the terms of 674:53, IV "limits the adjoining municipality's review to access-related issues". [675]

B. McNamara v. Hersh, 157 N.H. 72 (2008) – Appeal of Administrative Decision and Declaratory Judgment Act

- The Supreme Court affirmed the Trial Court's dismissal of Declaratory Judgment action brought to challenge the legitimacy of a building permit issued 18 months prior to filing suit and where the construction had started 10 months prior. [73]
- The Court rejected Abutters' argument that they did not have to follow the statutory scheme of RSA 674:33, 676:5 and 677:3 since their challenge raised "only a question of law". [74]
- While the Court recognized that exhaustion of administrative remedies need not occur when the Declaratory Judgment action raises a question that was "particularly suited to judicial rather than administrative treatment and no other adequate remedy" was available, e.g. when constitutionality or validity of an ordinance was in question or when the agency in question lacked authority to act. [74]
- In this case, the question concerned whether the building permit complied with the ordinance; and as such, the Court held that it was not a question particularly suited to judicial treatment but rather was one within the power of the ZBA to correct. [76]
- Since the appeal of the building permit had not been brought within a reasonable time, the Court held that there was no error by the Trial Court in dismissing the petition. [76]

C. Naser v. Town of Deering ZBA, 157 N.H. 322 (2008) – Appeal of Administrative Decision; Yield Plan; Variance

- The Supreme Court affirmed in part, reversed in part and remanded the Trial Court's and ZBA's decision denying variance and finding open space subdivision application did not comply with Zoning Ordinance since yield plan used approximately fifty acres previously burdened by conservation easement given to Town. [323]
- The Planning Board had determined that this usage was improper. Developer appealed that decision to the ZBA and applied for a variance to allow usage in the yield plan. [323]
- Concerning yield plan issue, the Supreme Court looked to the zoning ordinance's definitions of "buildable area" and "yield plan": respectively, "the area of a site that does not include slopes of 25% or more, submerged areas, utility right-of-ways, wetlands and their buffers" and "a plan submitted …showing a feasible conventional subdivision under the requirements of the specific zoning district…."; and the Court held that under these definitions, the yield plan showing development of lots within the Conservation Easement Area were neither "feasible" nor "realistic" since such land could not be developed. [324 – 326]
- However, in examining the denial of the variance, the Supreme Court noted that the ZBA found that Developer failed to meet all but "diminution in value" criteria and that the Trial Court focused only upon the "public interest" and "spirit of the ordinance" criteria. Relying heavily on Malachy Glen, the Supreme Court looked to the objectives listed under the relevant portion of zoning ordinance, which included conservation of agricultural and forestlands, maintenance of rural character, assurance of permanent open space and encouragement of less sprawling development. [326 – 328]
- Since Developer sought approval of 14 lots on the remaining 27 acres, the Court stated that "we fail to see how permitting the plaintiff to use the conservation land in this manner would 'unduly, and in a marked degree conflict with the ordinance." *citing*, Malachy Glen, 155 N.H. at 105 (quotations omitted; emphasis added); and the Court held "as a matter of law, that this in no way conflicts with the ordinance's basic zoning objectives to conserve and preserve open space." [328]
- The Supreme Court thus reversed the Trial Court's decision on the variance and remanded for consideration of the unnecessary hardship and substantial justice criteria. [328]
- Note two additional points of import in this case: (1) the Supreme Court effectively merged the "public interest" and "spirit of the ordinance" criteria into one discussion and implicitly found that these two prongs had been met (since they were not the subject of the remand); and (2) the Court did not state whether this was a "use" or "area" variance. This first point could be viewed as the continuation of a trend started with Chester Rod & Gun Club.

- Indeed, in one "3JX" decision (i.e., one decided by a panel of three justices and thereby not considered "binding precedence") Justices Dalianis, Duggan and Galway remanded a case back to the ZBA in part because the Board found that the request did not conflict with the public interest so that it "could not, as a matter of law, also find that the variance is contrary to the spirit of the ordinance." Zannini v. Town of Atkinson, (Docket No. 2006-0806; Issued July 20, 2007).

D. Ouellette v. Town of Kingston, 157 N.H. 604 (2008) – Appeal of Administrative Decision

- The Supreme Court affirmed the Trial Court and ZBA concerning a building permit to construct 36,000 sq. ft. supermarket within the Historic and Residential Districts when the Historic District Commission had denied its certificate of approval. [605]
- Historic District Regulations permitted "retail stores principally designed to serve shoppers from their community" and charged the Commission to consider façade, noise, traffic, consistency with adjoining buildings and uses, and whether the proposal will "detract from the character and quiet dignity of the Kingston Historic District." [606]
- Developer appealed HDC ruling to the ZBA, which held a public hearing, considered new evidence, and made specific findings to allow the construction. [607]
- The Supreme Court agreed with the ZBA's conduct of a *de novo* hearing since the HDC was considered an "administrative officer" under RSA 676:5; and the Court rejected Abutters' argument that ZBA should defer to HDC unless there is "clear error". [608 – 609]
- The Court recognized that statutes do not include the phrase "*de novo*", but read RSA 674:33, II to create the "functional equivalent" since it conferred on ZBAs "all powers of the administrative official from whom the appeal is taken". [609 – 610]
- The Court further analyzed the regulations (itself using a "*de novo*" review) and rejected Abutters' claim that only "small businesses" were allowed. Instead, the proposal had to show that it was not "inconsistent with the character of the District" and that it was "principally designed to serve shoppers from their community." [612]
- Based on the record and the "limited review" the Court can give to ZBA factual findings, the Court held that there was evidence to support the findings and that such were not legally erroneous. [615]

E. Kelsey v. Town of Hanover, 157 N.H. 632 (2008) – Appeal of Administrative Decision, Due Process and Assistance to Citizens

- The Supreme Court affirmed the Trial Court's decision upholding ZBA's dismissal of Abutters appeal of a granted zoning permit as untimely. [633]

- The Town issued Owners the Permit to raze an existing house and build a new home in April 2006. [633]
- Abutters met with the Town's zoning administrator in fall of 2005 and May 2006 about Owners' project. [633]
- In October 2006, Owners began construction on the new home and the Petitioners filed an appeal with the ZBA challenging the issuance of the permit. [633]
- The Town took the position that the appeal was untimely and Abutters responded that they had relied upon the Zoning Administrator's representations that they would be notified directly of the progress of the applicants' project. [634]
- The ZBA dismissed the appeal for lack of jurisdiction due to it being untimely. [634]
- The Trial Court upheld the ZBA's decision and the Abutter's appealed. [634]
- The Supreme Court noted that RSA 676:5, I provides that appeals to the ZBA must be taken within a "reasonable time" and the Town's Zoning Ordinance defines this time as 15 days and provides for posting "in at least one public place" to give notice. [634]
- Abutters argued due process "bars the strict application of the 15-day appeal period" and that they relied on Zoning Administrator's statement that she would contact them with further developments on the application. [635]
- The Court recognized that "[i]t is well settled that an elementary and fundamental requirement of due process is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." [635]
- The Court held that there was insufficient evidence that the Administrator ever made the statements for Abutters to rely upon, but that Abutters were aware of the application and were provided due process through public posting procedure. [636-38]
- The Court further held that the Town did not violate its duty to provide assistance under NH Const. Part I, Art. I, because the Zoning Administrator did not ignore concerns or questions and did not refuse or fail to offer assistance on inquiries from Abutters. [639]

F. Guy v. Town of Temple, 157 N.H. 642 (2008) – Junkyard & Appeal of Administrative Decision

- The Supreme Court reversed and remanded the Trial Court and ZBA's determinations that a nonconforming junkyard operating since before adoption of the zoning ordinance had to submit application to the Selectmen for license pursuant to that Ordinance. [649 - 650]
- The Supreme Court stated that "unlike zoning which is 'primarily concerned with uniformity of land use and stability of community growth,' licensing regulations are generally concerned with proper operation or with limitation or distribution or outright suppression of operation," and that failure to obtain a license designed to regulate an activity will not adversely affect the previously determined

nonconforming status of the land upon which such activity is being conducted." [652]

- The Court noted that it is possible that a licensing scheme could be so closely aligned with zoning regulations as to be deemed equivalent of land use ordinance so that failure to comply with its terms might rise to level of abandonment of a pre-existing nonconforming use. [653]
- The Court then analyzed RSA 236:111-129 and concluded that, because the law governing licensing of established junkyards was a pure licensing scheme which has no impact on uniformity of land use and stability of community growth, "[Owner's] failure to obtain a license does not divest his junkyard of its status as a nonconforming use." [655]
- Concerning whether the Owner expanded his nonconforming use, an activity not permitted under the zoning ordinance, the Court found that the ZBA failed to make any findings of fact so that the Court was unable to determine whether such action occurred. Therefore, a remand was needed. [656]
- Finally, regarding the Owner's contention that he was entitled to a license from Selectmen by virtue of ZBA's decision "grandfathering" his junkyard, the Court noted that "[n]onconforming use status does not confer upon its holder an unfettered right to operate in circumvention of licensing laws", i.e., the Owner still had to comply with provisions of RSA 236:123 and pay the fee. [657]

G. Huard v. Town of Pelham, 159 N.H. 567 (2009) – Appeal of Administrative Decision; "Expired" Variance; Stipulation

- The Supreme Court affirmed the Trial Court's orders in favor of the Town concerning Owner's desire to use property for transmission repair shop when the prior variance had allowed repairs of "carburetors, fuel pumps, alternators, etc." [569]
- In August 2006, the Town CEO issued a letter to Owner that prior variance had expired for non-use for one year or longer pursuant to provision of the zoning ordinance. Owner did not appeal that decision but did apply for a new variance in September 2006, which was denied; and Owner did not appeal that decision either. Rather, Owner filed suit for injunction and declaratory judgment in May 2007 since the March Town Meeting had voted to repeal the ordinance provision concerning expiration of variances. [569 – 570]
- As a result of that suit, the Town and Owner entered into a stipulation allowing Owner to use the property for transmission repairs "pending a final order or other resolution of the Petition" and scheduling the CEO to make an administrative decision on whether the original variance could be construed to allow the desired use. The stipulation also recognized that abutters would get notice of the CEO decision and could appeal that decision to the ZBA. [570]
- The CEO decided the original variance remained in force and allowed for transmission repairs; and Abutters appealed to the ZBA, which ruled that the variance had expired many years ago and could not be revived merely by a subsequent change in the ordinance. [570 – 571]

- The Supreme Court analyzed the stipulation and held that the ZBA did not violate its terms. [571 – 572]
- The Court also treated the Town's Motion for Summary Judgment as a Motion to Dismiss for Owner's failure to exhaust administrative remedies by not appealing the denial of the second variance or the CEO's original decision. [572]
- The Court rejected Owner's claim that the Town committed an unconstitutional taking of his property since there was not sufficient evidence of limitations that were "so restrictive as to be economically impracticable, resulting in substantial reduction in value of property and preventing private owner from enjoying worthwhile rights or benefits in property." [573 – 574]
- "Expiration of a use variance is not equivalent to the prohibition of all normal private development." [575]

H. Collden Corp. v. Town of Wolfeboro, 159 N.H. 747 (2010) – Timing of Appeal of Planning Board Decision; Municipal Estoppel

- The Supreme Court affirmed the Trial Court's dismissal of a Declaratory Judgment action against the Planning Board decision that conditions subsequent of subdivision approval had not been completed with an extended deadline [748]
- The Planning Board voted on July 14, 2004 but Developer did not file suit until December 2007; and the Trial Court dismissed the action, including a claim for municipal estoppel, for lack of "subject matter jurisdiction" under RSA 677:15. [748]
- The Supreme Court held that RSA 677:15 applied and that the 2004 vote was a "final decision subject to the time restrictions of RSA 677:15, I." [749 – 750]
- The Court also agreed with the Trial Court that the municipal estoppel claim was essentially an appeal of the Planning Board's decision and an effort to circumvent RSA 677:15. [752]

I. Sutton v. Town of Gilford, 160 N.H. 43 (2010) – Appeal of Administrative Decision; Municipal Estoppel; Lot Merger

- The Supreme Court reversed in part and affirmed in part the Trial Court's multiple orders in Abutter's suit for injunction, declaratory judgment and mandamus concerning whether two lots existed or had been properly merged on Governor's Island. [46]
- Owner had originally been told by the Director of Planning that the prior merger had been illegal, but prior to issuance of the building permit, the Director notified Owner of contact with Town Counsel and the error of the prior advice so that only one lot existed. Owner appealed that decision to the ZBA; and in the midst of that proceeding, Owner and the Selectmen entered into settlement agreement that

recognized the existence of two lots – in part because of prior assessment as separate tax lots. [47 - 48]

- After Abutter filed suit on merger and other issues, Owner obtained a building permit for construction of a new home and garage on one lot and later obtained from the CEO an amended permit which removed a "litigation warning". Owner notified Abutter's son by email of amended permit; and Abutter did not appeal that permit to the ZBA. [49]
- The Trial Court ultimately ruled that merger had occurred, that the Town was not estopped from treating property as one lot, that subdivision would be required to obtain two lots, and that the desired construction of new house and garage pursuant to the amended permit was allowed. [50]
- The Supreme Court held that doctrine of exhaustion of administrative remedies and RSA 674:33, 676:5 and 677:3 barred Abutter's request for injunction against construction authorized by the amended permit, but did not bar the request for Declaratory Judgment that Owner owns only one lot. [51 – 52]
- Citing to McNamara v. Hersh, 157 N.H. 72, 76 (2008), the Court held that "the question of whether a building permit complies with the ordinance is not a question that is particularly suited to judicial treatment or resolution, but is one that is routinely addressed by the local zoning board." [52]
- The Court analyzed prior case law to uphold the Trial Court's determination that merger had occurred [but note Attorney Frost's materials on subsequent legislation that that amended RSA 674:39-a to remove involuntary merger]. In so doing, the Court noted that this was same property involved in Governor's Island Club v. Town of Gilford, 124 N.H. 126 (1983) [and Court then states "abrogated by" Simplex Technologies v. Town of Newington, 145 N.H. 727 (2001) - "abrogate" means "to abolish by authoritative action" or "to treat as non-existent" so there is open question on whether the old Governor's Island case is still good law.] [55]
- On this merger issue, the Court also analyzed the zoning ordinance's exemption to merger for "lawful and preexisting principal uses"; and held that the prior structures on the "second" lot were not a single family residence but rather were accessory – having been labeled at times "guest house", "garage and storage" or "existing camp". [57]
- The Court stated four criteria for municipal estoppel: (1) false representation or concealment of material facts made with knowledge of those facts; (2) party to whom representation was made must be ignorant of the truth of the matter; (3) representation was made with intention of inducing other party to rely upon it; and (4) other party must have been induced to rely upon the representation to their injury. Additionally, that reliance must be reasonable. [59]
- The Court held that it was unreasonable for Owner to rely on the Director of Planning's statement of merger law "no longer on the books" in light of Owner's knowledge of 1983 Governor's Island decision and the language of the zoning ordinance. [59]

- Additionally, the Court held that Abutter is not bound to the terms of the settlement agreement since she was not a party to it so that her Declaratory Judgment action was properly heard by Trial Court. [59 – 60]

J. Atwater v. Town of Plainfield, 160 N.H. 503 (2010) – (II) Timing of Appeal of Planning Board Decision

- In this second appeal to Supreme Court following remand of the 2007 decision, the Supreme Court affirmed the Trial Court's dismissal of Abutters' appeal of ZBA decision for lack of jurisdiction. [504]
- The Planning Board had issued conditional approval to Developer on August 9 and final approval on August 23.
- Abutters appealed the Board's decision to grant site plan approval to both the ZBA (on September 6th), and to the Superior Court (on September 5th – this was the subject of the 2007 case). [504]
- The ZBA denied the appeal on September 25th on the basis that it was untimely because it was not filed within 15 days of the conditional approval on August 9th. [504]
- Abutters again appealed to the Superior Court arguing that the appeal period began on August 23rd, the date of the final approval, and that "the Town should be estopped from claiming anything other than a thirty-day appeal period because the town administrator and zoning administrator had advised them that their appeal would be timely if it were filed within thirty days." [506]
- The Supreme Court reviewed RSA 677:15, I and RSA 676:5 and explained that these statutes provide two separate appeal processes from Planning Board decisions. [508]
- RSA 676:5 applies to appeals of Planning Board decisions which address zoning issues, which must be brought to the ZBA; while RSA 677:15 applies to appeals of Board decisions to the Superior Court when the decisions do not involve zoning issues. [509]
- The Court held that a Board decision on a zoning issue "is ripe and appealable to the ZBA as soon as the decision is made." [509]
- The Court noted that RSA 677:15 petitions to the Court are ripe when the Board has voted to approve or disapprove the application and must be made within 30 days of such according to the terms of the statute. [509]
- The Court stated: "Nothing in the plain language of RSA 677:15, I, or RSA 676:5, III requires that the planning board first complete its consideration of the planning issues involved in a site plan review, or that the applicant satisfy the conditions imposed on a site plan application prior to the zoning board considering the zoning issues on appeal." [510]
- The Court determined that the appeal period began to run on August 9 because "[w]hile the planning board imposed a condition precedent on final approval of the overall site plan, the condition did not implicate any issue appealable to the ZBA." [511]

- The Court concluded that Abutters' appeal to ZBA was therefore late because it was filed beyond 15 day deadline set forth in the Town Ordinance. [514]

K. Saunders v. Town of Kingston, 160 N.H. 560 (2010) – Appeal of Planning Board Decision; Law of the Case

- The Supreme Court affirmed the Trial Court's dismissal of appeal of the ZBA's decision authorizing a supermarket on a parcel within the Rural Residential District but whose frontage and access was via the Historic District. [561 – 562]
- A prior appeal concerning the same matter is found in Ouellette v. Town of Kingston, 157 N.H. 604 (2008), above. [562]
- The Planning Board's conditional approval of the site plan was appealed to the ZBA for various alleged violations of the zoning ordinance; and the ZBA denied that appeal. [562]
- The Supreme Court rejected the Abutters' contention that the appeal was not ripe since the Planning Board's approval was conditional rather than final, since, in this case, the Planning Board's interpretations of the zoning ordinance were final "when made" for purposes of bringing an appeal of administrative decision. [563]
- The Court also affirmed the application of "the law of the case" doctrine to prevent the Abutters' from switching their position as to which was the more restrictive regulation from that taken in the prior case since that prior case determined which zoning regulations applied to the property, the Abutters were parties to that prior case, and the current matter was a successive stage of the prior case. [566]
- The Court further agreed with the Applicant that Abutters' vague and unsupported allegations of "a broad list of Zoning Ordinance violations" was not sufficiently specific under RSA 677:4 such that the Court held that Abutters failed to meet their burden to justify consideration of the claims. [568]

PRACTICE POINTS:

- Appeals of Administrative Decisions cover a wide variety of topics and are very fact specific.
- These appeals frequently include some claim of "municipal estoppel" which the Court narrowly construe – usually with an element of whether the municipal official had authority to make the statement and whether the applicant was reasonable in relying upon that statement (whether there was authority or not).
- Declaratory Judgment claims are not available to claimants who have missed the timeline imposed by the ZBA rules, the zoning ordinance and/or case law, unless the claim attacks the ordinance itself or is one "particularly suited to judicial treatment but rather [than] one within the power of the ZBA to correct."

III. VARIANCES

A. Naser v. Town of Deering ZBA, 157 N.H. 322 (2008) – Appeal of Administrative Decision; Yield Plan; Variance

- See discussion above under "Appeal of Administrative Decisions".

B. Nine A, LLC v. Town of Chesterfield, 157 N.H. 361 (2008) – Variance & Nonconforming Building

- The Supreme Court upheld denial of both area and use variances for a lakefront development on 86 acre parcel bifurcated by Route 9A with 6 lakefront acres in the Town's Lake Overlay District (which allowed single family dwellings only and imposed 2 acre minimum lot size and building and impermeable coverage limitations) and 80 acres in the Residential District (which allowed duplexes and cluster developments). Developer sought various area and use variances to develop the 6 acres into either seven single family lots (with the 80 acres remaining undeveloped) or a condominium cluster development of seven detached homes (together with three duplexes on 24 of the 80 acres). In either case, Developer argued that it was benefiting the area by removing the vacant, non-conforming 90,000 square foot rehabilitation facility on the 6 acre parcel. [362 – 363]
- The Supreme Court agreed that the number of pre-existing, nonconforming lots around the lake were not a basis for bypassing Zoning Ordinance requirements. [365]
- The Court stated that the spirit of the ordinance was to "limit density and address issues of over-development and overcrowding on the lake", relied heavily upon its decision in Malachy Glen, and stated that the factors of "alter the essential character of the locality" or "threaten public health, safety or welfare" are not exclusive. [366 – 367]
- In combining its analysis of the "public interest" and "spirit of the ordinance" criteria, the Court addressed Developer's argument that its replacement of a nonconforming use with a "less intensive, more conforming use" is consistent with the public interest and spirit of the ordinance: "We recognize that there may be situations where sufficient evidence exists for a zoning board to find that the spirit of the ordinance is not violated when a party seeks to replace a nonconforming use with another nonconforming use that would not substantially enlarge or extend the present use." However, this was not such a case. [367]
- The Court also noted, with an erroneous reading that Malachy Glen did not involve a change in the ordinance, that the Town had the ability to change its ordinance to take the current character of the neighborhood into account, including the unique natural resource of the lake. [367]

C. Daniels v. Town of Londonderry, 157 N.H. 519 (2008) – Telecommunications Act & Variance

- The Supreme Court upheld the grant of use and area variances for the construction of a cell tower on 13 acre parcel in agricultural-residential zone. The number of public hearings included testimony from Applicant's attorney, project manager, site acquisition specialist, two radio frequency engineers (as well as the ZBA's own radio frequency engineer) concerning the necessity of the tower to fill a gap in coverage, as well as two competing property appraisers. Thereafter, the ZBA granted the three variances with conditions including placement of the tower on the site, placement of the driveway, and maintenance of the existing tree canopy. [522]
- The Court noted that that the ZBA correctly treated the Telecommunications Act of 1996 ("TCA") as an "umbrella" that preempted local law under certain circumstances but which still required the application of the five variance criteria. [523 – 524]
- In addressing unnecessary hardship, the Court commented that Applicant had shown that hardship resulted from specific conditions of the property since it was this property that filled the significant gap in coverage: "that there are no feasible alternatives to the proposed site may also make it unique." [527]
- Additionally, the Court found no error in the Trial Court's failure to explicitly address each of the Simplex factors concerning the use variance in its order in light of the "generalized conclusions applicable to these factors" in addition to Trial Court's general discussion of the evidence presented. [528]
- Concerning "diminution in value", the Court held that the ZBA is "not bound to accept the conclusion" of the tower company's site specific impact study or of any witness [but the Court did not specifically address its contrary ruling in Malachy Glen where the uncontroverted evidence of the expert was ignored by the Board to its peril]. Rather, the Court looked at the "substantial evidence" on property values tendered in the form of numerous studies, testimony of at least one expert, "the lack of abatement requests", and the members' own knowledge of the area and personal observations to uphold the decision. [528 – 529]
- Finally, the Court summarily addressed the remaining criteria relying heavily on the fact that this tower would fill the existing coverage gap. [529]

D. Farrar v. City of Keene, 158 N.H. 684 (2009) – Variance

- The Supreme Court reversed in part and affirmed in part the Trial Court and ZBA, which granted both use and area variances to allow for mixed residential and office usage of an historic 7000 sq. ft. single family home located on a 0.44 acre lot in the City's Office District which abutted the Central Business District. A use variance was needed since the District allowed both multi-family and commercial offices, but did not clearly allow mixed use; and an area variance was needed to address the lower number of on-site parking spaces based on that configuration.

The ordinance would have required 23, the Applicant wanted only 10, and the ZBA granted the variance with a requirement of 14 spaces being created. [687]

- The Trial Court affirmed the area variance but vacated the use variance based on a finding that Applicant had failed to submit sufficient evidence only on the first prong of the Simplex unnecessary hardship criteria – that the zoning restriction as applied interferes with the applicant's reasonable use of the property considering its unique setting in the environment. Applicant and the City appealed contending that the Trial Court had overlooked evidence – particularly the large size of the house and the lot size compared with the number of available parking spaces and the usual layout of the District – and that Trial Court did not give sufficient deference to the ZBA and its members' personal knowledge. Abutters argued that Applicant's financial hardship of retaining property as a single family residence was personal, unrelated to any unique characteristic of the property, and unsupported by any "actual proof". [687 – 688]
- In addressing the first prong of the Simplex unnecessary hardship criteria, the Supreme Court noted that this issue was "the critical inquiry" for determining whether such hardship exists; and the Court pointed to the Harrington v. Warner, 152 N.H. 74, 77 (2005) for several "non-dispositive factors: first, whether the zoning restriction as applied interferes with the owner's reasonable use of the property; second, whether the hardship is the result of the unique setting of the property; and third, whether the proposed use would alter the essential character of the neighborhood. [688]
- The Court reviewed the evidence, including size of the lot, size of the house, allowed uses in District, and the fact that adjacent historic homes had been turned into professional offices with their commensurate higher traffic volume than the proposed use, and held that "the ZBA could reasonably find that although the property could be converted into office space consistent with the ordinance, the zoning restriction still interferes with [the applicant]'s reasonable use of the property as his residence." [689]
- The Court noted that Applicant's minimal evidence of reasonable return on his investment was sufficient since that issue was only one of the nondispositive factors for the ZBA to consider. [690]
- The Court acknowledged that this was a "close case" and that in such instances "where some evidence in the record supports the ZBA's decision, the superior court must afford deference to the ZBA" whose members have knowledge and understanding of the area. [690]
- In addressing the second prong of Simplex unnecessary hardship test, the Supreme Court affirmed the Trial Court's reasoning that the criteria had been met since the desired mixed use was allowed in adjoining district and the variance would not alter composition of the neighborhood. [690 – 691]
- As to third prong – that the variance would not injure the public or private rights of others – the Supreme Court again noted that "this prong of the unnecessary hardship test is coextensive with the first and third criteria for a use variance" – namely that the variance would not be contrary to the public interest and the variance is consistent with the spirit of the ordinance. [691]

- Concerning "public interest" and "spirit of the ordinance" criteria, the Court looked to the purpose statement in the zoning ordinance for the Office District, which included references to "low intensity" uses and serving as buffer between higher density commercial areas and lower density residential areas. The Court upheld the Trial Court's finding that the proposed use would be of lower intensity than a full-office use allowed in the District, that such office use would have more traffic, and that Abutters' concerns were over a commercial use of the property. [691 - 692]
- The Court addressed the "substantial justice" criteria and cited the Malachy Glen for the standard that "any loss to the individual that is not outweighed by a gain to the general public is an injustice." In this case, the factors considered to support a finding that substantial justice would be done by the granting of the variance included: (i) the use would not alter character of the neighborhood, injure the rights of others or undermine public interest; (ii) Applicant currently resided at the property and wished to remain; (iii) Applicant had made substantial renovations to the historic structure; (iv) structure would not be economically sustained as a single family residence; (v) residential appearance of the building would not change; (vi) adjoining buildings are currently offices; and (vii) if the property was used entirely as offices, traffic and intensity of usage would be greater. [692]
- Finally, concerning "no diminution in value", the Court found the ZBA's determination was reasonable based in part on the last three items above. [693]

E. Huard v. Town of Pelham, 159 N.H. 567 (2009) – Appeal of Administrative Decision; "Expired" Variance; Stipulation

- See discussion above under "Appeal of Administrative Decisions".

F. 1808 Corp. v. Town of New Ipswich, 161 N.H. 772 (2011) – Scope of Prior Variance; Appeal of Planning Board Decision to ZBA; Special Exception

- The Supreme Court affirmed the Trial Court, ZBA and Planning Board concerning a requirement that Applicant gain ZBA approval for expansion of office space previously approved via the variance and special exception process. [773 – 774]
- Applicant's original presentation included representations of square footage of office area although variance and special exception approvals did not expressly reflect the same. [774]
- Applicant sought site plan approval to expand office space and argued that such was a "reasonable expansion of a non-conforming use" which did not need ZBA approval. The Planning Board disagreed; and in an appeal of administrative decision, the ZBA affirmed the Planning Board. [774]

- The Supreme Court noted that "the scope of a variance is dependent upon the representations of the applicant and the intent of the language in the variance at the time it was issued" and that such is a question of fact for the ZBA. [775]
- The Court agreed with the ZBA's determination that the doctrine of expansion of non-conforming use did not apply to this situation since the original approval granted a special exception and "an area variance, not a use variance". [777]

PRACTICE POINTS:

- While the statutory standard for variances changed on January 1, 2010, the Court has yet to address that new standard – in part due to the economy and the length of time it takes cases to make their way through ZBAs and the Courts.
- Prior case law will still impact the 4 "non-hardship" criteria (and may possibly the 5th "unnecessary hardship" criterion as well due to the use of certain terms such as "reasonable"). Stay tuned for further "clarifications" from the Court
- Attached as "Appendix A" is a two page "cheat sheet" of the 5 criteria and current case law – some of which predates the cases summarized here.

IV. EQUITABLE WAIVERS

A. Taylor v. Town of Wakefield, 158 N.H. 35 (2008) – Equitable Waiver of Dimensional Criteria; Disqualification of ZBA Member;

- The Supreme Court reversed that Trial Court and ZBA concerning a grant of equitable waiver for a waterfront access easement across a shorefront lot in favor of an adjacent non-shorefront lot. [36-37]
- The zoning ordinance required such easements to be at least 100 feet in width. [37]
- The Selectmen notify the prior owners that easement was invalid (Taylor was the subsequent owner of the shorefront lot). [37]
- The Trial Court granted the Town injunctive relief against the prior owners but declined to impose fines or penalties because the parties had a genuine dispute as to the applicability and interpretation of the ordinance. [37]
- The current owners of the non-shorefront lot filed an Application for Equitable Waiver, which the ZBA granted; and both the Taylors and the Selectmen filed Requests for Rehearing, which were denied. [37]
- The Supreme Court upheld the Trial Court's determination that a ZBA member was not disqualified under the "juror standard" simply because she was a former employee of the prior owners who had created the easement; and the Court agreed that a challenge to a member's qualification could be raised during a Motion for Rehearing so long as that was "the earliest possible time". [38-39]

- The Court analyzed the criteria of RSA 674:33-a and held that the Applicants did not meet the criteria of subsection I(b) where there was no error in "calculation" nor a misinterpretation of the ordinance by a municipal official. [40-41]
- The Court held that the OEP's "Handbook for ZBA Members" and the ZBA's own form's use of "honest mistake" and/or "legitimate mistake" was overly broad. [41-42]
- The Court recognized that the Applicants had also filed for a variance and an appeal of administrative decision and that "[t]hese options are presumably still available" to the Applicants. [42]

B. Schroeder v. Town of Windham, 158 N.H. 187 (2008) - Equitable Waiver of Dimensional Criteria

- The Supreme Court affirmed the Trial Court's decision that the ZBA lack authority to grant an Equitable Waiver where the restriction in question addressed a "use" rather than a dimensional criterion.
- Owners began construction of a detached garage pursuant to a building permit. [189]
- After construction began, concerns arose regarding potential impact on adjacent wetlands; and the Building Inspector issued a stop work order. [189]
- Adjustments to the garage were made and the stop work order was lifted. [189]
- Abutters appealed the decision to lift the order to the ZBA on the basis that the property was located in "Wetlands Watershed Protection Overlay District" ("WWPD") which prohibited any construction. The ZBA granted the appeal and the building permit was withdrawn. [189]
- Owners thereafter applied to the ZBA for an equitable waiver, which was granted. [189]
- Abutters appealed arguing that the relief granted by the ZBA constituted a waiver of a use restriction which could not be waived. [189]
- The Court ruled that RSA 674:33-a allowed the ZBA to grant an equitable waiver for physical or dimensional violations, not from use restrictions. [189 - 190]
- Although Owners argued that they were seeking relief from a setback provision, the Court determined that the "critical distinction between area and use variances is whether the purpose of the particular zoning restriction is to preserve the character of the surrounding area and thus is a use restriction." [190]
- The Court found that the WWPD was superimposed over existing zoning districts and imposed specific requirements in addition to those applicable in the underlying zone – one of which was the express prohibition of "permanent buildings in the WWPD." [191]
- Because of this express prohibition, which did not depend on size, placement on the property, or amount of Owner's land located within WWPD, the ZBA lacked authority to issue the equitable waiver. [191-192]

PRACTICE POINTS:

- The Court will read the criteria of RSA 674:33-a strictly.

- The Applicant is not protected by their own "error in calculation or misinterpretation of the ordinance" – such must have been made by a municipal official.
- Waivers are not allowed for "use" restrictions – only for dimensional restrictions.

V. STANDING

A. Joyce v. Town of Weare, 156 N.H. 526 (2007) – Buyer Claiming Standing as Person Aggrieved

- The Supreme Court affirmed the Trial Court's dismissal of Buyer's appeal of Planning Board decision due to lack of standing. [527]
- In 2003, Buyer entered into a P&S with Owner. [527]
- Buyer intended to subdivide the property for residential lots. [527]
- Owner gave Buyer a Power of Attorney ["POA"] to appear before the Planning Board and request subdivision approval and building permits by September 2003 [527]
- Buyer did not submit a subdivision application until March 2004. [527]
- By that time, the Town had adopted an interim growth management ordinance ["IGMO"] which prohibited the Board from acting on any subdivision applications for one year. [527]
- The Board tabled Buyer's application until after the expiration of the one-year period. [527]
- Buyer and Owner filed a joint petition with the Trial Court challenging the constitutionality of the one year moratorium and some of the permanent growth management ordinances enacted by the Town to follow the expiration of the IGMO. [527]
- The P&S expired in January 2006 and was not extended. Owner also revoked the POA and moved for voluntary nonsuit of his claims against the Town, which the Trial Court granted. Owner then submitted a separate subdivision application for the same property to the Planning Board. [527-28]
- Town filed a motion to dismiss Buyer's remaining claims on the basis that he lacked standing. [528]
- Buyer filed a civil suit against Owner based upon the termination of their business relationship asserting a claim for breach of contract, among other things. [528].
- Buyer argued that he had standing because "he could ultimately obtain an interest in the property through successful prosecution" of his case against Owner. [528]
- Trial Court granted the Town's Motion to Dismiss for lack of standing on the basis that he "no longer holds any interest in the actual property, [and] no longer has any right to pursue a subdivision of the property." [528]
- The Supreme Court analyzed the term "persons aggrieved" found in RSA 677:15 and prior case law concerning the factors which the Trial Court may consider, including "the proximity of the plaintiff's property to the site for which approval

is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the administrative hearings." [529]

- The Supreme Court held that constitutional arguments cannot be raised unless "the party's own rights have been or will be directly affected." [529]
- Court found that "The only interest that [the Petitioner] has ever had in challenging the constitutionality of the town ordinances arose from his contractual arrangement with [Owner]. Thus, his standing has up to this point relied upon his status as a contract vendee." [529]
- Finding that the contractual relationship had terminated, the Court held that Buyer no longer had standing through Owner and had to demonstrate his own independent standing. [529-530]
- The Court found that Buyer had no independent standing and that his "speculative interest in the property" pending the outcome of his civil suit against [Owner] did not convey standing at the present time. [530]
- The Court further rejected Buyer's argument that he had standing as a result of the expenditure he had made to date in the subdivision application. [530-31]

B. Johnson v. Town of Wolfeboro Planning Board, 157 N.H. 94 (2008) – Condo Owner Claiming Standing as Person Aggrieved

- The Supreme Court reversed and remanded the Trial Court's dismissal for lack of standing of Abutters' appeal of Planning Board decision. [95]
- Abutters owned a condo unit at the Pine Harbor Condominium ("PHC") development on Lake Winnipesaukee. [95]
- In 2003, Developer acquired a lakefront parcel adjacent to PHC and planned to replace an existing seasonal cottage with a larger year-round dwelling. [95]
- Abutters' unit was located approximately two hundred feet from the boundary line with Developer's parcel (separated only by common area) and less than five hundred feet from the proposed structure. [95]
- Developer needed a special use permit because the proposed building would lie within the wetlands buffer zone. [96].
- Abutters objected and challenged the request since it did not meet the special use permit criteria. [96]
- The PHC President attended the Planning Board hearing and did not object. [96]
- The Board granted the special use permit and Abutters appealed. Developer moved the Trial Court to dismiss on the basis that Abutters lacked standing. [96]
- The Trial Court found that (i) the PHC board had the authority to contract with Developer, (ii) the PHC board was acting on behalf of the unit owners when it decided not to take action, and (iii) Abutters did not assert an interest separate from that of PHC. [96]
- The Supreme Court disagreed: "Nowhere in the PHC Declaration or bylaws, however, is [the PHC's authority over the common areas] said to be exclusive of the unit owners' legal rights as individual property owners." [97]
- The Court next addressed whether the Petitioner's had standing as an aggrieved party under the analysis of prior case law, including Joyce, above. [98]

- Although the Trial Court did not apply this analysis, the Court held that remand was unnecessary because "the record reveals that a reasonable fact finder necessarily would reach a certain conclusion" and that the Court could therefore decide the issue as a matter of law. [99]
- The Supreme Court held that Abutters had standing as a matter of law because of the proximity of their unit to the proposed structure, the proposed change from seasonal to year-round was significant, Abutters alleged that the Planning Board approval was a "significant deviation" from the Board's treatment of similar prior applications, and that Abutters had demonstrated that their use and enjoyment of the common area would be directly affected by the proposed use. [100]

C. Baer v. Department of Education, 160 N.H. 727 (2010) – Taxpayer Claiming Standing

- The Supreme Court affirmed the Trial Court's dismissal of Concord Taxpayers' Declaratory Judgment suit for lack of standing
- The Concord School District "approved plans for the construction and renovation of the District's [two] elementary schools" but the lots for the two schools did not meet Department of Education ("DOE") standards for minimum lots size. [729]
- The District filed 2 applications for waiver of lot size and the DOE granted the waivers. [729]
- Taxpayers filed suit against DOE alleging that DOE exceeded its authority in granting the waivers, violated the Separation of Powers Clause, and violated the State's duty to provide adequate education. [729]
- DOE moved to dismiss on the basis that the Taxpayers did not have standing, while Taxpayers argued that they had standing simply as taxpayers. [729 - 730]
- The Supreme Court held that "[d]eclaratory judgment actions brought pursuant to RSA 541-A:24 must . . . meet the requirements for standing under the general declaratory judgment statute set forth in RSA 491:22." [730]
- The Court recognized that there are "two conflicting lines of cases regarding taxpayer standing to bring a declaratory judgment action." [730]
- The Court recognized that "[u]nder one line of cases, we have permitted taxpayers to maintain an equity action seeking redress for the unlawful acts of their public officials, even when the relief sought was not dependent upon showing that the illegal acts of the public officials resulted in a financial loss to the town." [730]
- "More recently, however, [the Court has] required taxpayers to demonstrate that their rights are impaired or prejudiced in order to maintain a declaratory judgment action." [730]
- The Court implicitly overruled prior case law and upheld the more recent line of cases to hold: "To maintain a declaratory judgment action, a party must show a present legal or equitable right. A party will not be heard to question the validity of a law, or any part of it, unless he shows that *some right of his* is impaired or prejudiced thereby." [730]
- The Court clarified that taxpayers status alone is insufficient to convey standing to bring a Declaratory Judgment action under RSA 491:22. [731]

D. Golf Course Investors of NH LLC v. Town of Jaffrey, 161 N.H. 675 (2011) – Non-Abutters Claiming Standing as Person Aggrieved

- The Supreme Court affirmed the Trial Court's reversal of ZBA decision, which had granted Residents' appeal of various Planning Board decisions
- The Planning Board had approved Developer's subdivision and condominium site plan applications. [676]
- Residents appealed decision of the Planning Board to ZBA arguing that the Board erroneously interpreted the zoning regulations as applied to Developer's applications [677]
- Residents' properties were 450 ft., 900 ft., 2400 ft., and 1200 ft. from the site and several were also located within the "Mountain Zone" as the site. [677]
- Only one Resident attended and participated in the Planning Board proceedings [678]
- At the ZBA public hearing, Developer argued Residents did not have standing because they were not "persons aggrieved"; but the ZBA disagreed and granted the appeal. [678 - 679]
- Developer appealed to Superior Court which ruled that the Residents did not have standing; and the Town appealed that decision. [679]
- The Supreme Court "assume[d], without deciding," that the Town had standing to challenge the Trial Court's decision. [679]
- The Court held that to have standing to appeal to the ZBA, a petitioner must be "aggrieved", which requires that they have "some direct, definite interest in the outcome" and they can demonstrate "particularized harm". [680]
- "To determine whether a non-abutter has a sufficient direct, definite interest to confer standing, the trier of fact may consider factors such as the proximity of the challenging party's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the challenging party's participation in the administrative hearings." [680]
- The Court noted that "[w]hether a person's interest in the challenged administrative action is sufficient to confer standing is a factual determination to be undertaken on a case by case basis." [680]
- The Court further explained the standard of review in such cases: "While the factual findings of the ZBA regarding standing are deemed *prima facie* lawful and reasonable, see RSA 677:6, the decision on standing may be subject to *de novo* review when the underlying facts are not in dispute." [680]
- The Court noted that a petitioner must bear the burden when standing is challenged and "cannot rest on unsubstantiated allegations, but must sufficiently demonstrate his or her right to claim relief." [680]
- The Court recognized the following undisputed facts in this case which precluded a finding of standing: the proximity of Residents' properties to that of Developer, the size of Developer's, the proposed changes to an existing building, and the extent of Residents' participation in the Planning Board hearing; and the Court

found that Residents "neither asserted, nor presented evidence supporting, particularized harm to them that would result from this project." [682]

- In conclusion, the Court upheld the Trial Court's ruling that a mere general interest in the outcome of a Planning Board proceeding on basis that approval of an application would violate town ordinance is insufficient to confer standing. [684]

PRACTICE POINTS:

- The question of standing is very fact specific; and the Court may consider any number of factors including the proximity of the plaintiff's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the administrative hearings.
- Just being a taxpayer is not sufficient.
- Just because an organization has no objection does not mean that a member of that organization cannot raise an objection.

VI. PROCEDURES

A. 74 Cox Street v. City of Nashua, 156 N.H. 228 (2007) – ZBA *Sua Sponte* Motion for Rehearing

- The Supreme Court affirmed the Trial Court's dismissal of writ challenging the ZBA's reconsideration of denial of request for rehearing. [229]
- In September 2005, the ZBA granted Owners' application for two variances. Intervenors filed a timely request for rehearing which was denied on December 6th. On December 13th, Intervenors notified the ZBA that various documents previously submitted with their request for rehearing had not been transmitted to the Board. At its December 13th meeting, the ZBA granted the request to reconsider its previous denial based on "information that was not presented or available at the time of the original hearing" and scheduled the matter to be reconsidered at its January 10th meeting. [229]
- Before that date, Owners filed suit as an appeal under RSA 677:4; but the Trial Court treated it as a petition for writ of certiorari, reasoning that RSA 677:4 granted no right of appeal from a decision to grant a request for rehearing. [229]
- The Supreme Court first analyzed whether certiorari review was appropriate and determined that, while it would ordinarily not be available, the City had advocated before the Trial Court that this was a certiorari review matter. Accordingly, Court assumed without deciding the certiorari review was available. [230]
- The principal question was whether the ZBA had inherent authority to reconsider the denial of a request for a hearing; and the Court noted that this was a case of first impression in NH. [230]
- The Court expressly rejected Owners' argument that ZBAs are creatures of statute alone and that without express statutory authority ZBA could not act as it did: "We have no difficulty concluding that when the legislature authorized ZBAs to

grant or deny requests for rehearing [under RSA 677:3, II], that statutory grant included the authority to reconsider decisions to deny rehearing within the thirty-day limit recognized by the trial court." [231]

- The Court further noted that ". . . municipal boards, like courts, have the power to reverse themselves at any time prior to final decision if the interests of justice so require." The Court stated that this opinion was based on the statutory scheme established under RSA Chapter 677 and the principal that a local board should have the first opportunity to pass upon any alleged error. [231]
- The Court also rejected Owners' arguments concerning due process violations in large part because Owners had failed to provide adequate briefing or citation to the record below. Additionally, the Court noted that Owners were in no worse position than they would have been had Intervenors appealed to Superior Court and that, arguably, the ZBA's decision to reconsider may have placed Owners in a better position by allowing resolution of potential issues in a quicker fashion. [231 – 232]
- Finally, the Court noted that the ZBA was entitled to exercise its inherent power to reconsider its decision only during the statutory appeal period so that there is not an open-ended period of vulnerability to reconsideration. [233]

B. <u>Atwater v. Town of Plainfield</u>, 156 N.H. 265 (2007) – (I) 30 Day Rule on Appeal of Planning Board Decision

- The Supreme Court reversed and remanded the Trial Court's decision dismissing Abutters appeal of Planning Board approval for lack of jurisdiction. [266]
- The Planning Board conditionally approved Developer's site plan application of in August and gave final approval 2 weeks later. [266]
- Abutters filed a verified petition within 30 days of the conditional approval, but sued only the Developer but identifying the Planning Board in the body of the petition. [266]
- The Trial Court subsequently allowed Abutters to substitute the Town as the defendant, but then granted the Town's Motion to Dismiss for lack of jurisdiction since the Town wasn't named as defendant with in 30 days of the conditional approval. [266]
- The Supreme Court initially recognized that the Abutters were not required to file a separate appeal from the final approval "in these circumstances". [267]
- The Court confirmed that "strict compliance with the thirty-day filing deadline of RSA 677:15, I, is required to vest the trial court with jurisdiction." [267]
- However, the Court noted that it has previously held that "defective or untimely service of a timely filed appeal from a zoning board of adjustment does not divest the trial court of its jurisdiction." [267]
- The Court stated that RSA 677:15 does not impose a notice requirement upon parties when filing an appeal and does not require notice of the appeal be provided within the appeal period. [268]

- The Court held that the appeal was timely: "[T]he plaintiffs' filing of the appeal within thirty days of the planning board's vote on [Developer's] application established jurisdiction." [268]

C. Cardinal Development Corp. v. Town of Winchester ZBA, 157 N.H. 710 (2008) – Time of Motion for Rehearing & Municipal Estoppel

- The Supreme Court affirmed the Trial Court's dismissal of an appeal from the ZBA for lack of jurisdiction due to Applicant's failure to timely file a Motion for Reconsideration pursuant to RSA 677:2, :3. [711]
- The 30th day fell on a Saturday; and Applicant believed it had until the following Monday to file the Motion. Petitioner's counsel contacted the ZBA's land use assistant at her home around 5:10 p.m. on the following Monday, was given a fax number by the assistant, and the Motion was faxed around 5:50 p.m. [711]
- The ZBA denied the Motion, in part, because the Motion was not officially received until after the 30 day deadline. [711]
- Applicant argued that a day is a twenty-four hour period and that its fax was timely because there was no mention of a 5:00 p.m. deadline in RSA 677:2. [712]
- The Supreme Court disagreed noting that although there is no specific requirement in the statute that motions be filed by close of business, common sense required that motions be filed by that time (in the absence of any ZBA procedural rule to the contrary). [714]
- The Court also ruled that the completed act of filing is the physical receipt of the document by the proper authority within the proper amount of time; and the Court determined that Applicant's request was not received until the day after it was faxed and thus was not "filed" within the 30 day period. [714 - 715]
- The Court also rejected Applicant's claim that the ZBA was estopped from asserting untimeliness (because of the assistant's providing a fax number) since there was no evidence that that assistant had authority to accept the filing or waive the 30 day period under RSA 677:2. [716]

D. Auger v. Town of Strafford, 158 N.H. 609 (2009) – (II) Proceedings After Remand

- The Supreme Court reversed and remanded the matter a second time where the Trial Court's determination was not consistent with the prior decision in Auger v. Town of Strafford, 156 N.H. 64 (2007) since the Trial Court entered a final order rather than further remand the matter back to the Planning Board and allow mediation. [611]
- The Supreme Court noted that "a trial court is barred from acting beyond the scope of the [Supreme Court's] mandate, or varying it, or judicially examining it for any other purpose than execution", but that lower courts need not read the mandate in a vacuum. [613]

- The Supreme Court held that the mandate required a further remand to the Planning Board for further proceedings concerning the waiver of the ten-lot limit and the issue of undue hardship. [614]
- Court also rejected Abutters argument that no remand was allowed since the yield plan had been reverse, in part because language of zoning ordinance stated that the Board "may require a yield plan." [615]

E. Radziewicz v. Town of Hudson, 159 N.H. 313 (2009) – Timing of Appeal to Superior Court

- The Supreme Court the affirmed Trial Court's dismissal of Abutters' appeal of a use variance for lack of subject matter jurisdiction due to filing the suit 32 days after the ZBA denied the Motion for Rehearing. [315]
- The Trial Court initially denied the Town's Motion to Dismiss; but at hearing, The Town orally renewed its motion which was granted. [315]
- Abutters argued that dismissal was improper since (i) the Town did not file a motion for reconsideration when the initial order to deny was issued and (ii) that their filing was timely based on Superior Court Rule 12(1) which allows for filings to be moved to the end of the next day if the 30th day falls on a Saturday, Sunday, or legal holiday. [315]
- The Supreme Court agreed with the Trial Court that plain language of RSA 677:4 did not allow for filing beyond 30 days when the 30th is a Saturday so that language of RSA 677:4 controlled notwithstanding Rule 12(1). [316 - 317]
- The Court stated that "[b]ecause the petitioners' appeal was not filed within thirty days, the superior court never had jurisdiction, and could not rely upon Rule 12(1) to establish jurisdiction that did not exist in the first instance." [317]
- The Court disagreed with Abutters' argument that because RSA 21:35, II was amended (after their appeal was filed) to specifically allow for statutory filing deadlines which fall on a Saturday to be moved to the next business day, this amendment was "clear indication that [the legislature] would support the …application of Superior Court Rule 12(1)". Rather, Court stated that it was "bound by the statute in effect at the time of petitioners' filing deadline", not by a law that was amended in the intervening period. [318]

PRACTICE POINTS:

- ZBAs (and probably Planning Boards) have internal authority within the initial 30 days from their vote to grant a rehearing even without an applicant's or abutter's motion.
- An appeal of a Planning Board's interpretation of the zoning ordinance must be filed with the ZBA within 30 days of the Planning Board's decision on that interpretation – which may well be before any vote to approve or disapprove an application.
- Consider stating expressly in your Board rules whether or not faxes or emails of applications or motions for rehearing will be accepted (and I suggest that

they not be), by what time and by whom. This can be especially important where, regardless of size, a Planning Department may not be open all days and/or all business hours.

- Wit the amendment of RSA 21:35, if the 30th day falls on a weekend or holiday, the appeal to Superior Court may be considered timely if filed on the next business day (meaning that the Radziewicz decision is no longer controlling). While we do not yet have a decision on point, I will wager that this statute would be read to apply to the 30 day filing requirement for Motions for Rehearing to the ZBA so that the Cardinal Development case might have a different outcome if decided today.

VII. ROAD ISSUES

A. Gill v. Gerrato, 156 N.H. 595 (2007) – Layout of Highway & Adverse Possession

- The Supreme Court affirmed the Trial Court's ruling on remand that a lane was a Class VI Highway either by layout or by continuous adverse use during the 1700's. [595]
- "Sufficient evidence of regular and consistent public use" in the 1700's included deed descriptions, historic maps, testimony of survey expert, "archeological remnants of the stone walls lining the lane" and the foundations of a mill. [596 – 597]
- Use of the lane to access "a commercial entity is of such a character as to create an inference that the lane was used adversely by the public for at least a twenty year period." [597]
- The Court disagreed with Defendant's claim that the 1842 version of RSA 53:7 discontinued all roads not then in use by the public – rather, "the plain language demonstrates a prospective intent to clarify what is required for a public highway, if it did not already exist." [598]
- The Court also rejected Defendant's request to create a judicial discontinuance; and the Court acknowledged that discontinuance does not occur simply by lack of use but must be by Town vote – with the party asserting discontinuance to prove it by clear and satisfactory evidence. [598 – 599]

B. Green Grow Corporation v. Town of New Ipswich, 157 N.H. 344 (2008) – Layout of Road & Upgrading Class VI Highway

- On Interlocutory Appeal, the Supreme Court determined that Applicant was required, under RSA 231:28, to show occasion existed for layout, upgrade and reclassification of a Class VI highway to a Class V highway, in connection with a proposed three-phase cluster subdivision to be located adjacent to the road. [345]
- The Selectmen had denied Applicant's petition since it had failed to establish "occasion" for the requested upgrade and reclassification under RSA 231:8. [346]

- Applicant appealed arguing that occasion requirement did not apply and, if it did, the Selectmen were not permitted to consider anticipated impacts associated with potential development that could result from the upgraded and reclassified road. [346]
- The Supreme Court disagreed with Applicant in part and held that the Legislature intended to incorporate the occasion requirement of RSA 231:8 into the conditional layout provision of RSA 231:28. [349]
- The Court restated two-step process for assessing occasion: (1) determine if the rights of the affected landowner outweigh the public interest in layout (if so, layout is not justified and there is no occasion for it); and (2) if, however, the public interest outweighs, then balance the public interest against burden the layout would impose on the Town (and if public interest again outweighs, occasion for layout exists). [350]
- The Town argued that "town burden" should include consideration of impacts of potential future development; and Applicant argued that to do so would improperly allow the Selectmen to act as the Planning Board. [351 - 352]
- The Court concluded that, based on review of the differing statutory planning and zoning roles and responsibilities of the legislative body, the Legislature did not intend for Selectmen to use 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 so that Selectmen may not consider impact associated with potential future development on the road as part of the layout balancing test. [353 – 355]

C. <u>Peter L. Gordon, Trustee v. Town of Rye</u>, __ N.H. __ (Docket No. 2009-836; Issued June 15, 2011) – Jurisdiction to Determine Status of Roadway; Scope of RSA 43 and "Prudential Affairs" Rule

- The Supreme Court affirmed in part, vacated in part and remanded the Trial Court decision to affirm the Selectmen's determination that a portion of a road had not become public by prescription.
- 6 Owners sought to have the Town maintain section of roadway abutting their properties as a Town road.
- At the request of one of the Owners, Town began plowing the roadway in 1997.
- Another property owner erected a gate across the roadway in 2005 which prevented the Town from continuing to plow.
- The Owners argued that the roadway had become a Town road through prescription and/or Town was precluded from denying the status of the road after plowing it since 1997.
- After a duly notice hearing, the Selectmen determined that the roadway was a private road based in part on lack of evidence of layout and on the language in adjoining deeds referring to private maintenance obligations.
- In a Petition for Writ of Certiorari, Mandamus and Declaratory Judgment, Owners argued that the Selectmen's previous actions precluded them from claiming that

road wasn't public and that the Selectmen did not have subject matter jurisdiction to decide whether the road was private or public.

- Trial Court held that RSA Chapter 43 gave the Selectmen jurisdiction to decide the status of the road because this chapter "also applies to a petition for the purpose of deciding any questions affecting the conflicting rights or claims of different persons."
- The Supreme Court held that the Selectmen's prior actions did not preclude them from claiming that the road was not public because they never "determine[d] that the road was a public road but merely responded to a plowing requesting" made by one of the Owners.
- The Court further held that the Selectmen did not have authority to decide prescription issue because RSA Chapter 43 addresses only rules and procedures to be followed; it does not give Selectmen powers not elsewhere delineated by law.
- The Court went through all the powers specifically granted to Selectmen by statute and found none that gave the Selectmen power to "determine whether a road has become public by prescription".
- Concerning the Selectmen's responsibility to "manage the prudential affairs of the town", the Court stated "it is worthy of not that the nearer we get to the time of the framers of the early statute, the more restrictive is the view that we find taken of the powers of selectmen."
- The Court remanded the issue of prescriptive rights to be heard by the Trial Court *de novo*.

D. <u>Russell Forest Management, LLC v. Town of Henniker</u>, __ N.H. __ (Docket No. 2010-719; Issued June 15, 2011) – Impact of Discontinued Roadway on Request for Building Permit under RSA 674:41

- The Supreme Court affirmed the Trial Court, ZBA and Selectmen's decisions that highway discontinued in 1895 did not become a private road but rather was an easement so that building permit was properly denied.
- The Court noted that the factual determination of whether a road has been discontinued is controlled by that discontinuance statute in effect at the time of discontinuance.
- The Court interpreted RSA 674:41 and determined that roadway/easement did not qualify under any of the criteria set out in Subsections I (a) – (e) so that the denial of the building permit was proper.

PRACTICE POINTS:

- The evidence will control the decision; but just because you've always done it that way, doesn't make it so.
- "Managing the prudential affairs of the municipality" is not an open ended authorization for Selectmen's actions.
- An easement may not qualify as a roadway for building permit purposes.

VIII. ENFORCEMENT ACTIONS

A. Town of Amherst v. Gilroy, 157 N.H. 275 (2008) – Zoning Enforcement and Fines

- The Supreme Court vacated in part and remanded to the District Court for further determinations concerning the Town's writ against Owner's non-conforming shed built without proper site plan review and surveyor certification. [276]
- Owner failed to appear at hearing; and after finding that proper notice had been given, the District Court assessed civil fines of $275 a day from date of notice through date of Order plus attorney fees and costs for a total fine of $42,350. [276]
- Owner appealed arguing that the District Court had concurrent jurisdiction with Superior Court only in civil matters not exceeding $25,000 and that the Court divested itself of jurisdiction by assessing a fine of $42,350. [276]
- The Town argued that because RSA 676:17, I, authorized a civil penalty of $275 for the first offense "for each day that such violation is found to continue," Court must view penalty awarded as 154 separate awards in the amount of $275 each. [277]
- Supreme Court reviewed the statutory language in place at that time and determined that RSA 676:17, unlike other enforcement statutory provisions, did not specifically provide that each day of violation constituted a separate offense. [278]
- Supreme Court concluded that "because RSA 676:17, I, does not indicate that each day of violation constitutes a separate offense, and, in fact, indicates that a continuing violation is a single offense, the district court lacked authority to impose a civil penalty in excess of $25,000." [279]
- Note that this decision resulted in a legislative amendment to RSA 676:17 to now specifically allow that each day is a separate violation.

B. Bennett v. Town of Hampstead, 157 N.H. 477 (2008) – Attorneys' Fees in Zoning Enforcement Matter

- The Supreme Court affirmed the Trial Court's award of attorneys' fees to the Town in an enforcement action and the denial of fees to Owner in unsuccessful Declaratory Judgment action alleging due process violations. [478]
- In 1998, Owner obtained a special exception to operate a landscaping business as a home occupation. [478 - 479]
- By 2005, the home occupation use had grown substantially and exceeded the scope of the prior approval via storing materials and heavy equipment outside, employing additional employees, etc. [479]
- The Town issued a cease and desist order revoking the prior special exception approval and requiring Owner to cease operations. Town Counsel also notified

Owner by letter of RSA 676:17 and the possibility of civil penalties and attorney's fees. [480]

- Subsequently, Owner filed suit for Declaratory Judgment challenging the constitutionality of the Ordinance and seeking a declaration that his use was a valid, pre-existing use; and the Town responded with a petition for injunctive relief to restrain operation of the business and to impose penalties pursuant to RSA 676:15 and 17. [480 - 481]
- The Trial Court granted the Town both preliminary and final injunctive relief, but ordered Owner to return business to scope approved in special exception rather than cease all operations, and awarded no civil penalties or attorney's fees. [481]
- The Town successfully sought reconsideration arguing that express language of RSA 676:17 entitled the Town to attorney's fees as the prevailing party in an enforcement action under the statute. [482]
- The Supreme Court affirmed the award of attorney's fees stating that "a prevailing party may be awarded attorney's fees when that recovery is authorized by statute, an agreement between the parties, or an established judicial exception to the general rule that precludes recovery of such fees." [483]
- The Court found authorization for award in RSA 676:17, II: "municipality shall recover its costs and reasonable attorney's fees actually expended in pursuing the legal action if it is found to be a prevailing party in the action." [484]
- The Court held that "shall" means mandatory so that Trial Court was required to award Town reasonable attorney's fees. [484]

C. City of Portsmouth v. Boyle, 160 N.H. 534 (2010) – Attorneys' Fees and Costs

- The Supreme Court affirmed the Trial Court's award of costs to Defendant in the City's zoning enforcement action for alleged clear cutting of trees within a wetlands buffer. [535]
- After prevailing before the Trial Court and on original appeal, Defendant moved for costs under Superior Court Rule 87 to recover expert and deposition expenses. [535]
- The Supreme Court rejected the City's argument that the statutory scheme and prior case law prevented use of Rule 87 in this type of case, i.e., RSA 676:17 is silent on costs being awarded to prevailing defendants while the subject is covered in RSA 676:17-a. [535 - 536]
- Instead, the Court focused on the terms of Rule 87 and RSA 676:17 and held that zoning enforcement cases are still "civil proceedings", that Defendant was the "prevailing party", and that "recoverable costs" include, in the Trial Court's discretion, expert and deposition transcript fees, even absent a finding of bad faith. [536 – 537]
- The Court further found that the City's requested relief for injunction and penalties under RSA 676:15 and 676:17 rendered the suit one in equity and thus clearly covered by Rule 87. [537]

PRACTICE POINTS:

- RSA 676:17 has now been amended so that fines are now recoverable for each day a violation occurs (meaning that the Gilroy case is no longer controlling).
- Attorneys' fees may be recoverable by the Town if notice of that potential is given to the violator in writing early in the process – ideally with the initial Notice of Violation.
- A successful defendant in an enforcement case may be able to recover significant expenses and costs from the municipality so – to borrow a line from Davy Crockett – be sure you're right; then go ahead.

IX. CONSTITUTIONAL CLAIMS

A. Carlson's Chrysler v. City of Concord, 156 N.H. 399 (2007) – Commercial Signs & 1st Amendment Rights

- The Supreme Court reversed the Trial Court's determination that the City's ordinance concerning electronic changeable copy signs was unconstitutional. [400]
- Owner of a car dealership submitted an application to the City Code Administrator ("CA") to erect an electronic changeable copy sign on its property to display messages about the cars for sale [400]
- CA denied the application because the sign ordinance prohibited "[s]igns which move or create an illusion of movement except those parts which solely indicate date, time, or temperature." [400]
- Owner appealed to the ZBA which upheld the decision of the CA. [401]
- Owner appealed and the Trial Court "held that the City's ordinance violated the First Amendment to the United States Constitution as an unlawful infringement upon commercial speech." [401]
- The City appealed to the Supreme Court arguing that the decision was "an unconstitutional infringement upon commercial speech" and that the Trial Court erred by "finding that there are less intrusive methods the City could use to achieve its goals." [401]
- The Supreme Court noted that the purposes of the sign ordinance, as laid out in the Zoning Ordinance, included maintaining and enhancing aesthetics and improving safety. [401]
- During the appeal, the City amended the sign ordinance to prohibit all electronic message signs; and this was challenged in a separate appeal and upheld as constitutional by the US District Court for NH . [401]
- The NH Supreme Court recognized that the speech at issue was "commercial speech" and described the 4-part test set forth in the US Supreme Court case of Central Hudson v. Public Service Comm'n, 447 U.S. 557 (1980): "(1) whether the advertising is neither unlawful nor misleading and therefore entitled to First Amendment protection; (2) whether the ordinance seeks to implement a

substantial governmental interest; (3) whether the ordinance directly advances that interest; and (4) whether the ordinance reaches no further than necessary to accomplish its stated goals." [402]

- The NH Supreme Court held: "[Z]oning is a legislative function, and judging the wisdom of the legislation is not the function of this court. The State zoning enabling act grants municipalities broad authority to pass zoning ordinances for the health, safety, morals and general welfare of the community." [404]
- The Court further held: "The City need not provide detailed proof that the regulation advances its purported interests of safety and aesthetics." [404]
- Finally, the Court held: "We disagree that the City, by prohibiting all electronic signs displaying commercial speech, has drawn an ordinance broader than necessary to meet and advance its substantial interests of traffic safety and aesthetics. The most effective way to eliminate the problems raised by electronic signs containing commercial advertising is to prohibit them. The City continues to allow other means of commercial advertising of a non-electronic nature." [405]

B. Community Resources for Justice, Inc. v. City of Manchester, 157 N.H. 152 (2008) – Zoning Ordinance Interpretation & Equal Protection Challenge

- The Supreme Court upheld the Trial Court's ruling that City's prohibition of correctional facilities in all zoning districts was unconstitutional as applied to CRJ. [153]
- CRJ was a non-profit organization that operated "halfway houses" under contracts with Federal Bureau of Prisons. The City classified this use as "correctional facility" and prohibited this type of use in all of zoning districts. [153]
- The Court applied the "intermediate scrutiny test" in determining that the City's prohibition of halfway houses as applied to CRJ violated CRJ's equal protection rights under the NH Constitution. [153]
- The "intermediate scrutiny test" required that the challenged legislation be substantially related to an important governmental objective with government bearing the burden to demonstrate that legislation met this test. [153]
- The City claimed that halfway houses were "undesirable" land use and that prevention of concentration of undesirable uses was an important governmental objective to which zoning restriction was substantially related. [154]
- The Court determined that the City provided no factual evidence beyond mere speculation that Federal halfway houses present danger to community such that the City needed to protect its residents. CRJ offered substantial evidence showing overwhelming support for reasonableness of halfway house. [154 - 155]
- The Supreme Court upheld the Trial Court's grant of "builder's remedy" finding that CRJ met its burden of proving reasonable use by a preponderance of the evidence. [155 - 156]

C. Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 159 N.H. 529 (2009) – Regulatory Taking; Due Process; Fisher v. Dover

- The Supreme Court affirmed the Trial Court's grant of a Motion for Summary Judgment for the Precinct concerning Owner's claim for a regulatory taking. [531]
- The Precinct had enacted an ordinance prohibiting building any structure more than 900 feet above sea level; and Owner's lot was located almost all above that elevation.
- Owner had originally appealed the denial of building permit to ZBA but had not subsequently challenged ZBA's denial of that appeal. Instead, Owner brought suit for inverse condemnation by regulatory taking and sought damages under 42 U.S.C. §1983. [531]
- The Supreme Court agreed with the Trial Court's application of the "finality doctrine", which allows courts to avoid ruling on regulatory takings claims if the underlying administrative proceedings are not yet final. Here, the Court held that the denial of the variance application was not yet final since the ZBA had instructed Owner to look at an alternative site that violated the spirit of the ordinance to a lesser degree. [533 – 534]
- The Court agreed with Owner that matter was not moot despite rescission of the ordinance during the life of the suit since a claim for temporary taking could still be brought and "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." [532]
- The Court also rejected Owner's claim that its affidavit raised sufficient factual issues on accessibility of the alternate site to defeat summary judgment. The Court found that the assertion of inaccessibility was "merely a conclusory allegation, unsupported by any factual basis". [535]
- The Court rejected Owner's argument that Fisher v. Dover, 120 N.H. 187 (1980) prevented a new variance application since the ZBA had directed Owner to re-file an application for a lower site. [535 - 536]
- Court noted that a Board could not require multiple successive applications to avoid making a final decision. [538]

PRACTICE POINTS:

- After-the-fact fixes do not eliminate liability as the Court recognizes the concept of a "temporary taking".
- In a close case, consider offering the applicant "the way out", but don't keep changing the goal posts.
- Under the "intermediate scrutiny test", the municipality will be required to prove that the challenged legislation is substantially related to an important governmental objective; and after-the-fact arguments without support in the legislation may carry little weight with the Court.

X. ENVIRONMENTAL ISSUES

A. Continental Paving v. Town of Litchfield, 158 N.H. 570 (2009) – Evidence concerning Special Exception; Wetlands Setback

- The Supreme Court affirmed the Trial Court's decision vacating ZBA's denial of special exception to build a gravel road within the "Wetlands Conservation District" ("WCD").
- The road would cross a wetland and be within sixty-seven feet of a vernal pool. [570]
- The ZBA based its denial on a fact sheet provided by the New Hampshire Audubon Society which recommended 100 foot buffer of natural vegetation around vernal pools. [570 - 571]
- The Town argued that the Trial Court acted as a "super zoning board" in concluding that specialized scientific knowledge was required to grant special exception, that the ZBA was bound to accept Applicant's experts in the absence of opposing experts, and that ZBA could not use information about vernal pools in general to educate itself, evaluate experts' opinions and come to its own conclusions. [571]
- The Supreme Court held that the ZBA's denial was not reasonable where (i) the ZBA did not take into account Applicant's experts' testimony, (ii) the ZBA did not actually question the credibility of the experts, and (iii) the fact sheet provided by the New Hampshire Audubon Society constituted general information not specifically addressed to the subject site and, therefore, insufficient to counter the uncontroverted expert opinions presented by Applicant's witnesses. [575 - 576]
- The Court concluded that the Trial Court did not substitute its own judgment or find its own facts, but properly found by a balance of the probabilities based on the evidence submitted to the ZBA that the ZBA's decision was unreasonable. [577]

B. Bedard v. Town of Alexandria, 159 N.H. 740 (2010) – Excavation Regulations; Attorneys' Fees

- The Supreme Court affirmed the Trial Court's grant of the Town's Motion for Summary Judgment concerning Owner's violation of excavation statutes and denial of the Town's attorney's fees. [741]
- Owner had encroached into the 50 foot set-back from a "disapproving abutter" established by RSA 155-E, 4-a, II. [741]
- The Court rejected Owner's argument that there was no violation since he disturbed the set-back area to create the necessary "natural repose" slope and did not remove the materials from the property as such was contrary to the "statutory scheme" established by RSA 155-E as a whole – especially RSA 155-E:1, II's definition of "excavation" as an area "including all slopes". [743]

- The Court also rejected the Town's argument that it was entitled to attorney's fees under either theories of "bad faith litigation", "substantial benefit" or under RSA 155-E:10 reference to RSA 676:17 because (1) the Trial Court had found Owner's suit was not egregious or in bad faith, (2) the "substantial benefit" rule had not been applied to suit brought by the government since it is the government's responsibility to protect the public interest, and (3) mandatory fees under RSA 676:17 could not be "incorporated" into RSA 155-E:10, which expressly includes the phrase "in its discretion." [744 – 746]

C. Motorsports Holdings, LLC v. Town of Tamworth, 160 N.H. 95 (2010) – Appeal of Planning Board Decision; Wetlands Ordinance; Voting Protocols

- The Supreme Court affirmed in part and reversed in part the Trial Court's remand to the Planning Board concerning a special use permit sought by Motorsports for a race course country club on 250 acres involving dredge & fill of 14,759 sq. ft. of wetlands and affecting 16,952 sq. ft. of intermittent streams and at least 16 distinct wetland areas. [96 – 97]
- Motorsports had obtained DES dredge & fill permit, DES alteration of terrain permit, Army Corp wetlands permit and DES water quality certificate. [97]
- A prior suit, Anderson v. Motorsports Holdings, 155 N.H. 491 (2007), determined that Motorsports still needed a special use permit under the Town's Wetlands Conservation Ordinance, which required calculations of total disturbances within both the wetlands and the 25 foot wetland buffer. [97]
- The Planning Board determined that Motorsports did not meet 5 of 7 criteria; but the Trial Court reversed that decision finding that the Board committed 3 errors of law: (i) by applying the WCO criteria to both access way and non-access way impacts; (ii) by failing to provide guidance to the applicant in violation of Part I, Art. 1 of the NH Constitution; and (iii) by failing to determine whether and where the WCO is more stringent than state and federal regulations. [99 – 100]
- The Supreme Court analyzed the WCO and determined that it set forth a regulatory scheme that governed the use of and impact on wetlands, but that it did not regulate zoning. [100]
- The Court focused on whether the Board adequately provided grounds for its decision in accord with RSA 676:4, I(h), and thus declined to address the constitutional issue. The Court noted that the statute and prior case law "anticipates an express written record" that sufficiently apprises an applicant of the reasons for disapproval and enables a reviewing authority to hold the Board accountable. [103 – 104]
- "A written denial letter combined with the minutes of a planning board meeting can satisfy the statutory requirement under RSA 676:4, I(h)"; but here the Board did not issue a written decision outlining its reasons and the minutes of the meeting contain "gaps". [103 – 104]

- The Court refused to consider a transcript of the meeting provided by Motorsports since it was not certified (citing Supreme Court Rule 15) and would not review a DVD of the meeting (although the Trial Court apparently had). [104]
- The Court noted that the minutes did reflect a procedure outlined by Town Counsel, but that the Board did not follow it; and the Court determined that the minutes failed to apprise the applicant of the Board's reasoning and failed to provide an adequate record to afford meaningful appellate review. [104 – 150]
- Additionally, the Court found that by voting on the project as a whole presented an "additional legal flaw" – that the separate votes on the criteria were not supported by reasoning or even any discussion as to which of the wetlands or buffer zone impacts were problematic; and the Court held that it is not the Trial Court's responsibility to "comb through the record" but rather that it is the Planning Board's responsibility to identify particular aspects of the proposed project that it found deficient under the WCO. [106]
- The Court also rejected Intervenor's claim that requiring details as to each impact would impose a "nearly impossible burden", and stated that the Court was not compelling a "particular methodology" for the Board to implement when reviewing the application. [107]
- The Court held that casting separate votes on each of the 7 criteria "with respect to the project as a whole, without providing reasons, explanations or findings directed to adversely affected wetland areas or buffer zones, does not constitute an adequate statement of the grounds of disapproval necessary to comply with RSA 676:4, I(h)." [108]
- The Court reversed the Trial Court's requirement that the Board determine whether or where the WCO is more stringent than the State or Federal regulations as not being a proper interpretation of the prior decision in Anderson. [110 – 111]
- The Court declined to reach Motorsports' objection against the Board's consideration of this matter at a "work session" since, as Trial Court determined, it "was not likely to raise on remand." [111]
- Similarly, the Court declined to address Motorsports' argument that the matter could not be remanded since the Board membership had changed, since this "novel notion" lacked legal argument or support. [112]

D. Batchelder v. Town of Plymouth ZBA, 160 N.H. 253 (2010) - Zoning Ordinance Interpretation; Floodplain; Excavation and Fill

- The Supreme Court affirmed the Trial Court, ZBA and Planning Board decisions concerning site plan for construction of a Lowe's on a 77.46 acre parcel entirely within the 100 year floodplain and partially within the "environmentally sensitive zone" of the Baker River. The plan required Developer to add 200,000 cubic yards of fill to elevate the structures above the floodplain and remove that amount of fill from the EMZ. [254]

- The Court agreed that the excavation within the EMZ was allowed as "incidental to lawful construction" by the terms of the ordinance, finding that "incidental" in this ordinance meant "subordinate" to the other development and not "minor" (in part due to another clause in the ordinance which used both terms), and that this construction was "lawful" as a result of the elevation of the building pad using the excavated materials. [257 - 258]
- The Court also agreed with the ZBA's treatment of "the entire site as the premises" and noted that, while the purpose of the ordinance may be to "reduce the disturbance and intrusion of earth around the protected Baker River," development was not prohibited within the EMZ. [258]

PRACTICE POINTS:

- The Court will examine the text of your ordinance and your decisions carefully.
- If you are voting to deny an application on environmental ground, be sure that you have the site-specific evidence to support the decision; and make the necessary votes and findings to express your reasons – even if it is onerous and time-consuming. In the long run, it will be more cost effective.
- Even when you're right, you won't always get your attorneys' fees.

XI. PREEMPTION

A. Lakeside Lodge, Inc. v. Town of New London, 158 N.H. 164 (2008) – Docks

- The Supreme Court reversed the Trial Court's and ZBA's imposition of a use limitation on Owner's Lake Sunapee dock due to preemption of State law and regulations.
- In 1991, the Town enacted zoning ordinance provisions which designated Owner's lot within a "shore land overlay district". [166]
- The ordinance defined "common area" as one "used by a group of [three] or more unrelated persons or by an association, club or organization consisting of [three] or more members" and also provided that use of common area for business or commercial purposes required special exception approval. [166]
- In 2002, the Town asserted that the use of Owner's dock by multiple unrelated persons violated the 1991 ordinance. [167]
- Owner asserted that its use predated the ordinance; and Owner applied for an exemption but Selectmen determined that no preexisting nonconforming use existed. [167]
- The ZBA reversed the Selectmen's decision but required that "there may be no more than six (6) users and six (6) boats at the dock at any one time." [167]
- The Supreme Court held that State law and regulations preempt the ability of local government to restrict personal use of Owner's dock. [167 - 169]

- Lakes comprised of more than ten acres are controlled by the State; and the State enacted series of statutes regulating rights to boat and to use/enjoy public waters so as to avoid piecemeal on-water regulation. [168 - 169]
- The Court explained that in addition to the common law right to boat recreationally on the lake, Owner also held littoral rights, which are incidental property rights associated with ownership of lakeshore property. [169]
- The Court stated that when the State allowed Owner to repair the dock in 1995, the State placed its imprimatur on Owner's use of the dock for personal boating. [170]
- The Court found that the Town lacked specific state statutory authority to infringe upon the right to boat and concluded that the ZBA acted *ultra vires* by imposing user and boat limits on Owner. [171]

PRACTICE POINTS:

- Stick to your own turf and be conscious of where the State's regulations encompass the field
- If/when a Board is found to have acted beyond its authority by imposing certain conditions, those conditions could be eliminated.
- When in doubt, the use of an "exemption" may provide a cost effective solution.

XII. RSA 91-A

A. Lambert v. Belknap County Convention, 157 N.H. 375 (2008) - Use of Secret Ballot

- The Supreme Court reversed and remanded the Trial Court's decisions under RSA 91-A (including that whole process could have been conducted in a non-public meeting) so that the appointment of the County Sheriff by secret ballot was invalidated and candidate applications were to be made available – subject to potential redaction of personal information. [376-377]
- The Supreme Court restated that the purpose of the Right to Know Law is to "ensure both greatest possible public access to the actions, decisions and records of all public bodies and their accountability to the people"; and the Court resolves questions regarding RSA 91-A "with a view to providing the utmost information." [379]
- The Court noted the plain language of RSA 91-A:2, II prohibits secret ballots except in town meetings, school district meetings and elections. [379]
- The Court also rejected the Convention's argument that the process could have occurred in non-public meeting since the Sheriff is an elected/appointed position and not an "employee" of the Convention such that RSA 91-A:3, II(b) did not apply. [379-380]
- The Court also restated the three-step analysis for determining whether a document is exempt from disclosure under RSA 91-A:5, IV for claims of privacy:

(1) whether there is a privacy interest at stake (if none, disclosure would be warranted); (2) whether the disclosure will inform the public about the conduct and activities of their government (if not, disclosure would not be warranted); and (3) balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. [382-383]

- The Court applied these three steps to determine that the application of the 7 candidates should be release, noting *inter alia* that the applicants were seeking to fill an *elected* position which would ordinarily mean that their personal information would have been subject to public scrutiny. [383-385]
- The Court remanded to the Trial Court for *in camera* inspection to determine whether any of the information on the applications should be redacted for personal reasons. [386]

B. <u>Professional Firefighters v. Local Government Center</u>, 159 N.H. 699 (2010) – Scope of RSA 91-A; Privacy Exemption

- The Supreme Court affirmed in part and vacated and remanded in part the Trial Court's determinations under RSA 91-A concerning certain salary and benefit information on LGC employees and those of two subsidiaries, NH Municipal Association and LGC Real Estate, Inc. [701]
- The Supreme Court analyzed prior case law and the record to hold that the subsidiaries were subject to RSA 91-A, in part because they are "conducting the public's business" (via performing functions that would otherwise be preformed by a governmental entity) under the direct supervision and control of LGC and they enjoy tax exempt status. [703 – 704]
- The Court rejected the LGC's argument that release of salary and benefit information would constitute an invasion of privacy and that such information is not exempt under RSA 91-A:5, IV (concerning "confidential, commercial or financial information"). [706 – 707]
- The Court applied 3-step analysis of whether disclosure would constitute invasion of privacy: (1) whether there is a privacy interest at stake (if none, disclosure would be warranted); (2) whether the disclosure will inform the public about the conduct and activities of their government (if not, disclosure would not be warranted); and (3) balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. In so doing, the Court held that no invasion of privacy would occur and the information must be disclosed. [707]
- The Court vacated and remanded the award of attorney's fees since the Trial Court did not address LGC's contention that it had withheld the information on its reasonable belief that the information was exempt under RSA 91-A:5, IV. [710 – 711]

C. Hull v. Grafton County et al., 160 N.H. 818 (2010) – Impact of Defective Notice of Meeting

- The Supreme Court affirmed the Trial Court's denial of Petitioner's Motion for Summary Judgment, request for equitable relief and for attorneys' fees and the granting of the Motion for Summary Judgment for the County, its Commissioners and Treasurer. [820]
- Petitioner's claimed that a defect in the Notice for the meeting wherein salaries for elected officials were set rendered the vote void so that these officials could not be paid.
- The defect was that the notice was published only in the State of NH House Record. [820]
- The County Convention met again after proper notice and voted to ratify the prior vote. [821]
- The Court interpreted RSA 23:7's requirement that salaries be set before the election filing date set forth in RSA 655:14 to be without a consequence in this case involving notice for a public meeting – especially where RSA 91-A:2, II is silent on the consequences of failure to give proper notice (although the Court recognizes RSA 91-A:8 states that a court "may invalidate" an action taken by a body in violation of RSA 91:A "if the circumstances justify such invalidation"). [823]
- The Court held that the prior vote was valid and that neither an injunction nor an award of attorneys' fees to Petitioners were warranted since the meeting was not in secret, was open to the public, and was noticed in the House Record. [826-827]

D. ATV Watch v. NHDOT, 161 N.H. 746 (2011) – Procedures Concerning Objections; Exemptions for Drafts, Notes and Attorney Communications

- The Supreme Court affirmed the Trial Court's denial of declaratory judgment, injunctive relief, attorneys' fees, costs and sanctions under both RSA 91-A and Part I, Art. 8 of the NH Constitution where the Department had produced most requested documents but redacted or withheld some under claims of "attorney materials", "attorney-client materials" and notes or drafts under RSA 91-A:5, VIII and IX. [749 – 750]
- The Trial Court inspected un-redacted copies "under seal" and in conjunction with a "Vaughn Index". [751]
- The Supreme Court interpreted RSA 91-A:4 in light of the Federal Freedom of Information Act and determined that the scope of search as represented by DOJ Attorney under an offer of proof (without objection by Petitioner) was adequate. [753 – 754]
- The Court rejected Petitioner's argument that certain documents should have been immediately available as "inadequately supported", i.e., Petitioner had provided no detail to support the conclusion. [757]
- The Court noted that there is no requirement for a "Vaughn Index" to accompany initial response.[757]

- The Court interpreted RSA 91-A:5, IX to protect "pre-decisional, deliberative communications that are part of an agency's decision making process" even when such documents are (i) shared between staff of different agencies, (ii) close to final, and/or (iii) contain facts – "the nature of the process is more significant than the nature of the materials". [758]
- Key was whether drafts were circulated to a quorum or majority of a public body (and Court did not make a distinction where the "quorum or majority" of the Agency is 1 – i.e., the Commissioner). [759 – 760]
- Hand-notes and "sticky notes" were deemed properly withheld under RSA 91-A:5, VIII; and the Court rejected Petitioner's contention that all notes made on government time are public records. [760 – 761]
- Similarly, the Court rejected argument that communications between attorneys for two agencies (both within the Attorney General's office) resulted in a waiver of privilege since the substance of the communication was "made for the purpose of facilitating the rendition of professional legal services to the client." [761]
- Finally, the Court affirmed denial of attorneys' fees where the discloseable documents were released prior to appearance of any attorney on behalf of Petitioner in the suit. [764 – 765]

E. Hampton Police Association v. Town of Hampton, __ N.H. __ (Docket No. 2010-323; Issued April 28, 2011) – Attorney Invoices Not *Per Se* Exempt from Production

- The Supreme Court affirmed in part and reversed in part the Trial Court's grant of injunction against the Town under RSA 91-A and order that the Town provide Association copies of outside counsel's invoices.
- The Association had requested copies of "each and every invoice from any and all attorneys advising the Town" on a given lawsuit involving Association members. The Town responded that the invoiced contained confidential information protected from production, including some invoices containing information unrelated to the subject suit. The Association clarified that it was not seeking confidential information and that it would accept redacted invoices. The Town produced one invoice and continued to assert privilege on the remainder.
- The Town provided invoices to the Trial Court for *in camera* inspection (which the Court later released to the Association without giving the Town a chance to object).
- The Supreme Court restated that the purpose of the Right to Know Law is to "ensure both greatest possible public access to the actions, decisions and records of all public bodies and their accountability to the people" and that the Court construes "provisions favoring disclosure broadly while construing exemptions narrowly."
- The Court agreed with the Town that Trial Court erred in requiring revised invoices since RSA 91-A does not require a public body or agency to compile, cross-reference or assemble information into a form in which it is not already kept or reported.

- The Court also held that "not all confidential records are *per se* exempt from disclosure." Rather a balancing test must be performed by the Court under which the party seeking to avoid disclosure must prove "that the disclosure is likely to (1) impair the information holder's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained."
- The Court rejected a *per se* rule that all attorney descriptive billing entries are privileged noting that billing statements that provide only general descriptions of the nature of the services performed and do not reveal the subject of confidential communications with any specificity are <u>not</u> privileged; but that the privilege <u>may</u> apply to information that reveals "the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of the law."

PRACTICE POINTS:

- The Court continues to stress that it reads RSA 91-A to favor open meetings and disclosure of existing documents and to strictly construe any exceptions allowed by the statute.
- Secret Ballots are only allowed at Town Meetings and their equivalents.
- While not all attorney time entries will be subject to disclosure, there is no "blanket" exception for such materials; but while there is no obligation to prepare additional documentation, the Court appears to sanction the concept of "redaction" so that privileged information is protected.
- Drafts which are not circulated to a quorum of the Body (or presumably the Agency Commissioner who holds a majority of one) are not subject to production.
- As a sweeping generalization, if it deals with public funds, the documents will likely have to be disclosed.

XIII. IMPACT FEES

A. <u>Upton v. Town of Hopkinton</u>, 157 N.H. 115 (2008) – Improvements to Adjacent Road

- The Supreme Court affirmed the Trial Court's decision upholding the Planning Board's imposition of a condition of approval that Developer pay 1/3 of the cost to improve a portion of an adjacent Town road ("the Road").
- Developer owned a 21 acre parcel where the Road was gravel and was surrounded by wetlands. [116]
- At the time, there were 5 single family homes on the Road; and the road was prone to flooding. [116 - 117]
- Developer applied for subdivision approval to create 4 residential lots. [116]
- The Planning Board held hearings and a site walk and discussed its concerns about flooding, including access to the new lots, emergency response, and school bus access. [117]

- The Board considered what was necessary to improve the Road; and with input from the Public Works Director, Developer's engineer and surveyor, the Board determined that the Road would need to be raised and the nearby brook dredged to install a box culvert at a price between $250K and $300K. [117-18]
- The Board approved the subdivision with the condition that Developer pay 1/3 of the cost of installing the box culvert. [118]
- Developer appealed to the Superior Court arguing that "the costs in this case did not bear a rational nexus to his proposed subdivision." [118]
- Superior Court upheld the Board's decision and Developer appealed. [118]
- On appeal, Developer argued also that the need to upgrade the Road was not "created" by his proposed development. [118]
- The Supreme Court noted that "[i]mpact fees are charges assessed by a municipality to shift the cost for capital improvements necessitated by a development to the developer and new residents. They are functionally the same as the developer exactions traditionally made as part of the subdivision or site review process." [119]
- The Court noted that impact fees are limited "to the extent that they bear a 'rational nexus' to the needs created by the project being constructed by the landowner" and they must be "a proportional share of municipal capital improvement costs which is reasonably related to the capital needs created by the development, and to the benefits accruing to the development from the capital improvements financed by the fee." [119]
- The Court held that an impact fee ordinance is not necessary for a municipality to obtain contribution for such improvement costs and "may require 'developers to pay an exaction for the cost of off-site improvement needs determined by the planning board to be necessary for the occupancy of any portion of a development.' RSA 674:21, V[j]." [119]
- The Court held that it was irrelevant if the flooding issues on the Road "predated" Developer's subdivision proposal, so long as the "the need for the upgrade is 'reasonably related' to the new development. [120]
- The Court concluded that this standard was met and that the Town properly required the Developer to pay for only his proportional share of the costs. [120]

B. Clare v. Town of Hudson, 160 N.H. 378 (2010) – Scope of Allowed Improvements and Accounting Requirements

- The Supreme Court affirmed in part and reversed and remanded in part the Trial Court's treatment of the Planning Board's refusal to refund a performance bond funds treated as impact fees. [379]
- The Planning Board had required Developer to post $81,705 for improvements to an impacted intersection. Developer tendered the funds in Sept. 2000; and the Selectmen voted to perform certain improvements to the two roadways and the intersection in March 2005. Developer inquired on status of improvements in 2006 to which the Town responded with affirmation in Nov. 2006 that the funds were being used to "complete improvements to the subject intersection." Funds

were actually paid to the contractor in July – Aug. 2007 after a second inquiry from Developer. [379 – 380]

- The Supreme Court noted that Developer originally brought his allegation that the funds were not used for the capital improvements for which they were collected under RSA 674:21, V(c) and (e) to the Town's Community Development Department and the ZBA – contrary to the terms of RSA 676:5, III, which states that decisions regarding innovative land use controls such as impact fees may not be appealed to the ZBA. Developer ultimately sought release of the performance bond from the Planning Board, which denied the request. [381]
- The Court also noted that the standard for reviewing Planning Board decisions is limited – the Court is obligated to treat factual findings as *prima facia* lawful and reasonable and cannot set aside the Board's decision absent unreasonableness or an identified error of law. [384]
- Developer conceded that the Town had timely encumbered his fund, but argued the accounting showed he was due a refund since funds had been used to upgrade existing facilities and infrastructures in violation of RSA 674:21, V(a) – namely upgrading the surface of roadways beyond the subject intersection. [385]
- The Court rejected Developer's challenge that the timing of the payment to the contractor (two days after Developer's second inquiry) rendered the payment invalid since the paving work had occurred a month prior. [385]
- The Court noted that the Trial Court had initially denied a joint motion to expand the certified record but then acknowledged the additional materials as an appendix to the Town's requests for findings of fact and rulings of law; and both parties had included the materials in their appendices to their briefs to the Supreme Court.
- The records reflected that of the over $116,000 spend on the overall project, only $75.437.05 was attributable to the subject intersection so that the Developer was entitled to a refund of $13,716.90 (the difference between the sums expended and the bond funds plus their accrued interest). [385 – 386]
- The Court noted that "the legislature has mandated specific bookkeeping procedures for impact fees" and that "impact fee funds and Town funds are not fungible". [385 – 386]
- "Given the lack of adequate accounting, required by statute, there was no reasonable basis upon which the planning board could have found that this portion of the bond fund was spend for the purpose for which it was collected." [386]

PRACTICE POINTS:

- The funds must be encumbered within the 6 year window and for the purposes stated at the time the fees were imposed.
- Keep the books straight – especially where the funds/purposes are part of a larger project.
- Prudence pays. Don't force a developer to fix ALL the problems that could be viewed as being impacted by the project – especially where pre-existing conditions point to problems the municipality should be fixing on its own.

XIV. MISCELLANEOUS MATTERS

D. Formula Development Corp. v. Town of Chester, 156 N.H. 177 (2007) – LUCT

- The Supreme Court reversed and remanded the Trial Court's denial of Developer's petition for abatement of land use change tax ("LUCT").
- The Court analyzed portions of RSA 79-A:7, IV and IV(a) (concerning when land is considered changed in use for purposes of applying LUCT) and RSA 79-A:7, V (concerning amount of land considered changed). [178 - 179]
- The Court determined two exceptions to the general rule of lot by lot LUCT assessment of RSA 79-A:7, V, are not dependent upon, nor related to, each other. These are separate exceptions so that land may fall under either or both. [180]
- The land at issue was 30 acre parcel, which was approved and developed as a cluster subdivision with 15 acres preserved as open space as required by Town's regulations. [180]
- The Court determined that open space was subject to exception (b): since 15 acres was reserved as open space to satisfy local land use requirements, then the property constituted the entire development site and came out of current use all at once. Additionally, the Court noted that a change in use on the development site determined the date on which LUCT should be assessed on the entire property. [180]
- The Court also found that the zoning ordinance treated clustered developments as a single site. [181]
- The Court then examined RSA 79-A:7, IV(a) for when site should be considered changed in use – namely when actual construction begins on site causing physical changes to the earth, such as roads, etc. [181]
- The Trial Court had found that construction on the road serving site began in December 2000 or January 2001. [182]
- The Supreme Court ruled it was error for the Trial Court to deny Developer's petition for tax abatement and remanded with instructions to determine more specifically when the road construction began for that is when the LUCT should have been assessed on the entire 30 acre tract. [182]
- The concurring opinion would base the decision on overruling Appeal of Estate of Van Lunen, 145 N.H. 82 (2000) to exclude any reading of RSA 79-A:7, V(a) to permit lot by lot assessment. [185 – 186]

E. Tonnesen v. Town of Gilmanton, 156 N.H. 813 (2008) – Aircraft Takeoffs & Landings under RSA 674:16, V; Special Exception

- The Supreme Court affirmed the Trial Court's denial of Declaratory Judgment action brought to determine whether the Town's requirement of a Special Exception for aircraft/helicopter take offs and landings was valid under RSA 674:16, V. [813]

- The statute provided that such activities are a valid use "unless specifically proscribed by local ordinance". [814 – 815]
- The Court restated the rule of "permissive zoning" – that it is "intended to prevent uses except those expressly permitted or incidental to uses so permitted." [815]
- The Court noted that under this statute, "even if a Zoning Ordinance is permissive, it will not be deemed to prohibit the use of land for aircraft landings and take offs merely because it fails to list this use as a permissive use." [815]
- The Court rejected the Applicant's argument that the Town's requirement of a Special Exception was in violation of the statute since the language of the statute expressly authorized the Town to "regulate and control" this use but was silent on the means by which to do so; and the Court held that a Special Exception was a legitimate means to allow the use in appropriate areas and deny the use in in appropriate areas. [816 – 817]

F. Hogan Family Enterprises, Ltd. V. Town of Rye, 157 N.H. 453 (2008) – Enforcement of Settlement Agreement

- The Supreme Court affirmed the Trial Court's enforcement of settlement agreement entered between Owner and the Town in litigation regarding drainage onto Owner's land. [455]
- Counsel for both parties negotiated settlement and met with the Trial Court in chambers. The Trial Court reviewed the terms, concluded that the parties understood and assented to the terms, and signed order noting that the case had settled and requiring parties to file their agreement within 30 days. [455]
- Owner later refused to sign and later argued that, because settlement involved transfer of an interest in land (a conservation easement), the agreement was subject to the Statute of Frauds. [456 - 457]
- The Supreme Court determined that the agreement was sufficiently under Trial Court's control so as not to be subject to Statute of Frauds because there was no indication that Owner had requested that the chambers conference be recorded, that Owner was represented by counsel in negotiations, that terms of agreement were contemporaneously memorialized by counsel, and that Trial Court specifically reviewed each of the terms with Owner and determined that he understood and agreed to such terms. [457]
- The Court also found that agreement was enforceable since the record reflected essential terms of the settlement and parties' assent to such terms. [458]
- The Court also concluded that there was no basis to set aside the agreement based on grounds of surprise, mistake or duress. [458]

G. Tarbell Administration, Inc., Trustee v. City of Concord, 157 N.H. 678 (2008) – Municipal Liability & Immunity

- The Supreme Court affirmed in part, reversed in part and remanded the Trial Court's summary judgment in favor of the City.
- Plaintiff owned an apartment building in City on property, under and through which a brook flows by means of a culvert. [680]
- The City operated a water treatment facility on a nearby lake, which included a dam, a reservoir and an emergency overflow spillway which flowed into the brook. [680]
- The City followed a reservoir management plan to maintain proper level of water in the lake; however, record rainfall caused the lake to overflow into emergency spillway and brook, resulting in severe water damage to Plaintiff's property. [680 - 681]
- Plaintiff sued the City for (1) negligence for failure to properly design and construct the dam (count I); (2) negligence for failure to properly maintain the drainage system, including cleaning debris from the brook (count II); (3) negligence for failure to properly control and regulate the water (count III); (4) trespass (count IV); and (5) nuisance (count V). [681]
- The Court reviewed prior cases on municipal immunity and noted that immunity has been abolished with the following exceptions: municipalities are still immune from liability for acts and omissions constituting (a) exercise of legislative or judicial functions, and (b) exercise of executive or planning functions involving making of basic policy decisions characterized by the exercise of discretion. [683 – 684]
- The Court found that the City's decisions regarding dam design and water level strategy were precisely type of policy decisions that discretionary function immunity sought to protect. [685, 687]
- The Court noted, however, that once the municipality exercised discretion and developed a plan or policy to handle an issue, there was no immunity for negligent failure to implement the plan or policy and, further, that there may be no immunity if municipality failed to establish plan or policy in the first place. [687]
- Concerning Count II, which involved the City's failure to clean out debris in the brook, the Court found that the City did not have a plan or policy concerning maintenance of drainage systems so that no immunity existed. [687]
- With respect to counts IV and V, the Court noted that these claims involved nuisance and invasion of private property from which immunity provided no shield and that such claims resemble unconstitutional takings so that municipal immunity did not apply. [688 - 689]

H. Kalil v. Town of Dummer ZBA, 159 N.H. 725 (2010) – Amendment of Pleading; Res Judicata

- The Supreme Court affirmed the Trial Court's dismissal of a second suit for inverse condemnation where Owner did not appeal the Trial Court's decisions to uphold ZBA on remand following first appeal. See, Kalil v. Town of Dummer ZBA, 155 N.H. 307 (2007). [727]
- The Town had raised the defense of *res judicata* in its Summary Statement but not in it original Brief Statement of Defenses filed in answer to Owner's writ. The Trial Court then allowed the Town to amend its Brief Statement and later granted the Town's Motion to Dismiss. [728]
- The Supreme Court read Superior Court Rule 28 and the Preface to the Rules to allow the Superior Court to waive application of any rule "as good cause appears and as justice may require" - especially given the Court's emphasis upon "justice over procedural technicalities." [728 – 729]
- Here, the Town had raised the defense of *res judicata* within 8 days of the expiration of the original 30 day window to file such defenses; and Owner failed to show any prejudice resulting from this delay. [729]
- The Court then analyzed the 3 elements for applicability of *res judicata* under a *de novo* review: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered in the first action." [730]
- The Court held that Owner's inverse condemnation claim was within "same cause of action" as original appeal of denied building permit, and refused to overturn the prior precedence on grounds of *stare decisis*. [731]

APPENDIX A

REQUIREMENTS FOR VARIANCE APPLICATIONS
Filed on or after January 1, 2010

by

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1. THE VARIANCE WILL NOT BE CONTRARY TO THE PUBLIC INTEREST.

As before, the case of Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577 (2005) and its progeny will likely continue to control this issue after January 1, 2010 – namely 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". Id., at 580. 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. Id., at 581. In making such a determination, the ZBA should examine various non-dispositive factors including whether the variance would (a) alter the essential character of the locality or (b) threaten public health, safety or welfare. Id. See also, Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102, 105-106 (2007); and Naser d/b/a Ren Realty v. Town of Deering Zoning Board of Adjustment, 157 N.H. 322 (2008).

2. THE SPIRIT OF THE ORDINANCE IS OBSERVED.

See, Criteria 1, above.

3. SUBSTANTIAL JUSTICE IS DONE.

As before, the Supreme Court reference in Malachy Glen, 155 N.H. at 109 to the Peter J. Loughlin, Esq., treatise will continue to apply. See, Loughlin, Land Use, Planning and Zoning, New Hampshire Practice, Vol. 15, 3d ed., and its reference to the Office of State Planning Handbook, which indicates as follows:

> "It is not possible to set up rules that can measure or determine justice. Each case must be individually determined by board members. Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by the

granting of a variance that meets the other qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance." Id. at § 24.11.

See also, Farrar v. City of Keene, 158 N.H. 684, 692 (2009).

4. THE VALUES OF SURROUNDING PROPERTIES ARE NOT DIMINISHED.

This variance criterion has not been the focus of any extensive Supreme Court analysis to date. That said, in considering whether an application will diminish surrounding property values, it is appropriate for ZBAs to consider not only expert testimony from realtors and/or appraisers, but also from residents in the affected neighborhood. Equally as important, Board members may consider their own experience and knowledge of the physical location when analyzing these criteria; but be cautious in relying solely on that experience/knowledge if it contravenes the evidence of professional experts. See, Malachy Glen, 155 N.H. at 107.

5. LITERAL ENFORCEMENT OF THE PROVISIONS OF THE ORDINANCE WOULD RESULT IN AN UNNECESSARY HARDSHIP.

(A) FOR PURPOSES OF THIS SUBPARAGRAPH, "UNNECESSARY HARDSHIP" MEANS THAT, OWING TO SPECIAL CONDITIONS OF THE PROPERTY THAT DISTINGUISH IT FROM OTHER PROPERTIES IN THE AREA:

(i) NO FAIR AND SUBSTANTIAL RELATIONSHIP BETWEEN THE GENERAL PUBLIC PURPOSES OF THE ORDINANCE PROVISION AND THE SPECIFIC APPLICATION OF THAT PROVISION TO THE PROPERTY; AND
(ii) THE PROPOSED USE IS A REASONABLE ONE.

(B) IF THE CRITERIA IN SUBPARAGRAPH (A) ARE NOT ESTABLISHED, AN UNNECESSARY HARDSHIP WILL BE DEEMED TO EXIST IF, AND ONLY IF, OWING TO SPECIAL CONDITIONS OF THE PROPERTY THAT DISTINGUISH IT FROM OTHER PROPERTIES IN THE AREA, THE PROPERTY CANNOT BE REASONABLY USED IN STRICT CONFORMANCE WITH THE ORDINANCE AND A VARIANCE IS THEREFORE NECESSARY TO ENABLE A REASONABLE USE OF IT.

THE DEFINITION OF "UNNECESSARY HARDSHIP" SET FORTH IN SUBPARAGRAPH (5) SHALL APPLY WHETHER THE PROVISION OF THE ORDINANCE FROM WHICH A VARIANCE IS SOUGHT IS A RESTRICTION ON USE, A DIMENSIONAL OR OTHER LIMITATION ON A PERMITTED USE, OR ANY OTHER REQUIREMENT OF THE ORDINANCE.

This is the crux of the legislative change wrought by SB 147. This removes the "use" vs. "area" distinction created by the Boccia decision but ostensibly leaves in place the post-Simplex court interpretations of the various criteria. Also, as listed in the statement of intent attached to the statute, Criteria 5(B) is meant to clarify that the pre-Simplex standard for unnecessary hardship remains as an alternative; however, some would argue that the language used does not exactly track the pre-Simplex cases.

The dual references of the property being "distinguished from other properties in the area" solidifies the repeated Court statements that the "special conditions" are to be found in the property itself and not in the individual plight of the applicant. See, e.g., Harrington v. Town of Warner, 152 N.H 74, 81 (2005); and Garrison v. Town of Henniker, 154 N.H. 26, 30 (2006).

This statutory revision does contain a fair amount of uncertainty – most particularly with the issue of who is the fact finder (ZBA or applicant) of what is reasonable under either (A) or (B), above. The Court's prior opinions containing the phrases that a use is "presumed reasonable" if it is allowed in the district and that the ZBA's desires for an alternate use are "not material" were all in the context of "area" variances and made with respect to the "public interest" and "spirit of the ordinance" criteria, above. See, Vigeant v. Town of Hudson, 151 N.H. 747, 752 - 753 (2005); Malachy Glen, 155 N.H. at 107. If this legislative change concerning "unnecessary hardship" is read to place the determination of "reasonableness" within the ZBA's purview, then the ZBA must have both the evidentiary basis and the clear findings to support its decision on this issue. Boards should expect to see a variety of arguments and evidentiary presentations, including economic arguments, by both applicants and abutters as to what is or is not reasonable concerning a given site. Be on the lookout for the next series of Supreme Court opinions interpreting this criterion.