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A Legal Newsletter for Municipalities.

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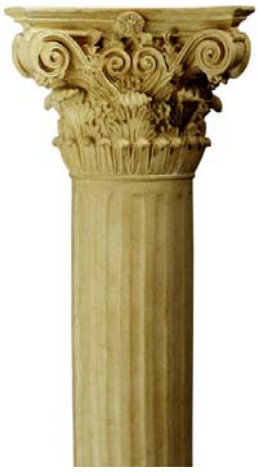


Inside this issue:

Local Welfare and State Medicaid.

In a recent decision, the New Hampshire Supreme Court clarified the relationship between local and state aid. The interaction between state aid and eligibility for local general assistance, pursuant to RSA Chapter 165, is complex. There are an array of programs administered by the State and jointly funded by the State and federal government, including Old Age Assistance, Aid to the Needy Blind, Aid to Families with Dependent Children, and Aid to the Permanently and Totally Disabled. All of those programs are types of state assistance, the eligibility of which is defined in RSA 167:6. In addition, recipients of all of those programs' benefits are also eligible for medical assistance or "Medicaid." The question that came up in Smith v. City of Franklin, 159 N.H. 585 (2010) was whether or not someone receiving Medicaid, specifically "Medicaid/Aid to the Permanently and Totally Disabled," is precluded from receiving local general assistance. RSA

167:27 allows "medical and surgical assistance" from the State without precluding local general assistance. The confusion arises because the phrase "Aid to the Permanently and Totally Disabled" is attached to both one category of Medicaid or medical assistance, and to one category of State aid. The Supreme Court recently clarified that "Medicaid/Aid to the Permanently and Totally Disabled" is, in fact, a type of Medicaid or medical assistance, and therefore receipt of that type of benefit does not preclude an applicant from also being eligible for local assistance pursuant to RSA Chapter 165. This clarification should be of assistance to welfare directors, who now have clear guidance that an applicant for local or general welfare or assistance is not ineligible, based on receiving Medicaid, even if the Medicaid is labeled as Medicaid for the category of the Aid to Permanently and Totally Disabled Individuals.

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

Upcoming Events:

Local Government Center's 69TH ANNUAL CONFERENCE - NOVEMBER 17th – 19th, 2010

Donahue, Tucker & Ciandella, PLLC will be an exhibitor at the LGC Annual Conference being held November 17th—19th , 2010 at the Radisson Hotel in Manchester, NH. Please stop by to see our booth, speak with our municipal attorneys, and obtain copies of our writings of legal interest to municipalities.

Local Government Center's 35th Annual Municipal Law Lecture Series

Attys. Sharon C. Somers and Katherine B. Miller of DTC will be speakers at the Municipal Law Lecture Series discussing Managing the Approval Process of Cell Towers on September 15, 22, 29 in Keene, Whitefield and Meredith and on October 13, 20, 27 in Lebanon, Derry and Dover .

Land Use Legislative Update.

This session, the legislature passed several bills which will affect municipalities and their land use boards. RSA 674:39-a was amended to prohibit municipalities from merging contiguous preexisting lots without the consent of the landowner. This was enacted in response to Sutton v. Town

of Gilford, 160 N.H. 43 (2010) in which the New Hampshire Supreme Court applied the plain language of the prior version of RSA 674:39-a and found that municipalities were not barred from adopting an ordinance under which contiguous lots were automatically merged. 160 N.H. at 55.

RSA 676:5 was amended to permit Boards of Adjustment to charge "reasonable fees" to the applicant for administrative costs and expenses associated with special investigative studies, review of documents, or other matters involving appeals or applications before the Board. Thus, Boards of Adjustment will have similar authority to that of Planning Boards to require that applicants, rather than land use boards, pay for reasonable expenses incurred in relation to the application review. In addition, if a Board of Adjustment hires a third party for review and consultation purpose during the review process, the Board may require reimbursement from an applicant for reasonable expenses for the third party consultation. However, the reimbursement for expenses applies only if the third party review and consultation does not substantially duplicate review services provided to the Planning Board regarding the same applicant. Also, the Board of Adjustment must obtain detailed invoices from the third party consultant to demonstrate that the expenses are reasonable.

Also this session, the legislature adopted SB 328, effective July 17, 2010, and which amends RSA 676:4 I(b). The intent of this legislation is to mandate that Planning Boards can not reject an application as incomplete for purposes of jurisdiction simply because related state or federal permits, such as DES approvals, are not in hand when the application is made.

For additional information or questions, please contact **Attorney Keriann Roman**.

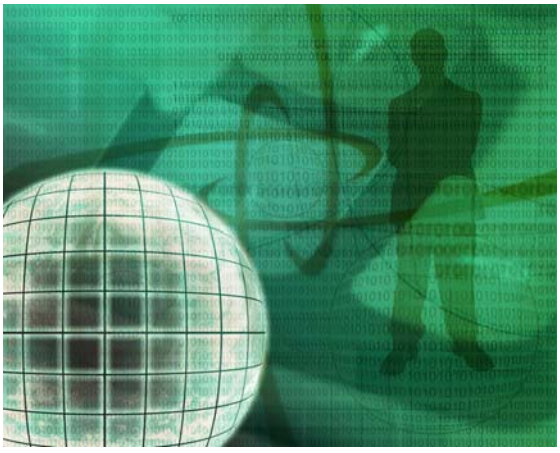
The Right to Know Law - Developments in the Law.

Does RSA 91-A, the Right to Know Law, require a municipal board to discuss the written advice of its attorney in public? Apparently so, when the attorney's advice does not concern a pending or threatened litigation matter and the attorney is not present to meet with the board members.

RSA 91-A requires that all meetings be open to the public (RSA 91-A:2, II). However, the Right to Know Law specifically carves out an exception to that general rule by stating that "consultation with legal counsel" is not a meeting of any kind subject to the law (RSA 91-A:2, I, (c)).

Recently, the Carroll County Superior Court had occasion to examine the legislature's intent when it drafted the phrase "consultation with legal counsel"; the Court looked first to Webster's Dictionary. The dictionary defined "consultation" to mean "a conference or meeting for deliberation, discussion, or decision."

Accordingly, to fall within the carve out in the Right to Know Law, the Court held that the board's attorney had to be present. The Court did not rule whether the attorney could be present electronically or by telephone. The Court also stated that the plain meaning of "with" means "accompanied by or accompanying." The Court then looked at RSA 91-A:3, II (e). This section, the Court held, permits a board to meet in non-public session without legal counsel present to discuss only the limited subjects of pending or threatened legal claims against the body or its members. Based upon its analysis, the Court held that a discussion of legal advice outside of a public meeting and when the board's attorney is not present does not fall within the limited exemption of RSA 91-A:3, II.



Given the Court's holding, the safest course for any municipal board when discussing the written advice of its attorney is to include the attorney in the discussion by meeting with the attorney, or having the attorney be part of the discussion telephonically or electronically.

For additional information or questions, please contact **Attorney Robert M. Derosier**.

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

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

DTC Municipal Practice Group

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