Municipalis.SM

A Legal Newsletter for Municipalities.

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Inside this issue:

The Law of Variances Continues to Evolve.

The Supreme Court's most recent variance decision was Harrington v. Town of Warner, No. 2003-687 (April 4, 2005), which attempted to clarify how ZBA's are to distinguish between use and area type variances. Applicant Wyman had obtained a variance to expand his existing manufactured housing park onto an additional portion of his 46 acre lot. The ordinance established a maximum number of 25 manufactured home sites regardless of lot size; and Wyman currently had 33 sites. While Wyman had sufficient acreage to subdivide, he did not possess sufficient access or frontage to create the second lot. The ZBA granted a variance but limited the expansion to 25 additional sites to be added at the rate of five sites per year.

In upholding the Trial Court's finding that the ZBA's actions were reasonable, the Supreme Court noted: "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 is thus a use restriction….If the purpose of the restriction is to place incidental physical limitations on an otherwise permitted use, it is an area restriction….Whether the variance sought is an area or use variance requires a case-by-case determination based upon the language and purpose of the particular zoning restriction at issue." In this case, the Court determined that a use variance was required since the ordinance's language limiting the number of sites addressed intensity of use in order to preserve the character of the area.

The Court started to address the "three-prong" Simplex hardship standard, but only analyzed "a number of nondispositive factors" encompassed within the first prong. These "factors" included determinations of interference with reasonable use based on "dollars and cents evidence" and of the burden imposed being "distinct from other similarly situated property." Without commenting on the second and third prongs of the Simplex criteria, the Court noted that manufactured home parks were a permitted use, which fact "is entitled to considerable weight when evaluating the reasonable use of the property."

The Court also reiterated its holding from Hill v. Town of Chester, 146 N.H. 291, 293 (2001) that self-created hardship does not preclude a variance since "purchase with knowledge" of a restriction is only a "nondispositive factor" which allows the landowner to introduce evidence of good faith. Here, the Selectmen had advised Wyman prior to purchase that the park could be expanded; and the ZBA was uncertain on how to interpret the "25 site" limitation and had advised Wyman to seek the variance.

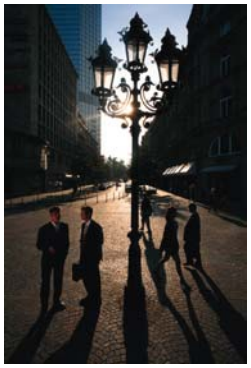
For more information, contact Attorney Christopher L. Boldt.

Upcoming Events.

-VISIT our booth at the **Local Government Center** annual conference on **November 16th and 17th** held at the Radisson/ Center of New Hampshire in Manchester, NH.

-Attorneys Sharon Cuddy Somers and Christopher Boldt will be participating in the **Local Government Center** lecture series discussing New Hampshire Variance Standards on the following dates and at the following locations: **Jaffrey Sept. 21**; **Lebanon Sept. 28**; **Whitefield Oct. 5**; **Meredith Oct. 19**; **Newington Town Hall Oct. 26**; and **Manchester Nov. 2**.

Recent Changes in the Right to Know Law.



When the Right to Know Law was created by the New Hampshire Legislature in 1977, the purpose of the legislation was to "... ensure the greatest possible public access to the actions, discussions and records of all public bodies ..." in order to further the objectives of a democratic society.

Subsequent to the passage of the statute, the use of computers and electronic mail (e-mail) changed the way municipalities do business and made proper implementation of the Right to Know Law more complex. In 2001, the New Hampshire Supreme Court first squarely addressed the need to rework the Right to Know Law in the wake of technological change and strongly encouraged the Legislature to do so. The New Hampshire Legislature formed the Right to Know Study Commission in 2003 and focused on the following key points: 1)Disclosure of e-mail and other similar forms of communication; 2)The requirements of governing bodies to store electronic and computer documents, and to allow access to such data, and recovering costs for retrieving such data; 3)Whether governmental websites can be used to post public records; 4)The status of proprietary data. See N.H. Laws 2003, 287:1 (House Bill 606). The work of the Commission is embodied in a report dated October 29, 2004 and in the provisions of HB 626, which, as of this writing, remains in Committee at the New Hampshire House of Representatives.

Towns and cities should monitor developments with this important piece of legislation. The bill clarifies and defines many important terms such as "public body" and "government records," and begins the process of recognizing what constitutes a "meeting" in this era of instant communication, and it addresses how to effectively notify members of the public of communication among and between members of public bodies. Finally, it clarifies that electronic forms of public records must be kept for the same period of time as paper counterparts, and clarifies how electronic forms of communication may be accessed by the public

For further assistance please contact Attorney Sharon Cuddy Somers.

Zoning of Wireless Communications Facilities.

Municipalities should proactively regulate the placement of personal wireless service facilities. This is true even if your municipality has a wireless zoning ordinance on the books now. The law is that denials of applications to close substantial coverage gaps may constitute effective prohibition in violation of federal law. That, plus the changing deployment strategies of wireless providers, means that existing zoning should be reviewed, tested and recalibrated every three to five years. This is an area where a static approach to zoning exposes the municipality to significant legal risk.

Once the municipality establishes where these facilities can be sited, the municipality should establish a hierarchy of siting values so that the siting most favored by the municipality is the easiest siting for the wireless applicant to obtain. Conversely, the siting which is least desirable from the municipality's point of view should be the most difficult siting for the wireless applicant to obtain.

One way to understand this principle is to picture the siting preferences in the ordinance in the form of pyramid. The right side of the pyramid is the specific siting permitted by the ordinance. On the left side of the pyramid is the process which attaches to that specific siting alternative. The intensity and level of process is defined by the horizontal distance across the pyramid. For example, at the tip of the pyramid, the most favored siting alternative is stated (i.e., use of the public rights of way, with a distributed antenna system ("DAS") or siting on an existing facility or structure). That alternative would require relatively minimal process, perhaps a building permit which is reviewed

Zoning of Wireless Facilities Cont.

by the director of planning. As you move down toward the base of the pyramid, progressively less favored siting alternatives are established and working across the pyramid progressively greater process attaches. The least favored siting alternative, at the base of the pyramid, requires the most process, represented by the distance across the base of the pyramid.

Two judicial developments merit notice. Nationally, the United States

Supreme Court, held that the remedies provided in the Telecommunications Act for violation of the facilities siting standards precluded obtaining relief under 42 U.S.C. §1983. This means that municipalities are not subject to the damages and attorneys fees claims which could arise based on 42 U.S.C. §1983. In a First Circuit Court of Appeals case, the Court held that there can be effective prohibition even where service exists but where there is a gap in coverage. The holding of the First Circuit rejected a decision of U.S. District Judge Barbadoro that there could be no effective prohibition so long as any carrier provides service within an area.

For further assistance, contact Attorney Robert D. Ciandella.

New Rule issued by FTC Requires Reasonable Measures in disposing of Employee Consumer Information.

The Federal Trade Commission (FTC) has implemented new rules requiring employers obtaining consumer reports to "take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal". The intent behind this new rule, which was promulgated by the FTC pursuant to the Fair and Accurate Credit Transaction Act (FACT Act), is to reduce the risk of consumer fraud and related harms, including identity theft. This new rule went into effect on June 1, 2005.

The consumer information that is covered by this rule includes any reported information provided to an employer by a third party consumer reporting agency, which conducts a background check for purposes related to current, former or prospective employees, and any compilation of such information. Such information may be in paper or electronic form.

The rule creates a "reasonable measures" standard in protecting against unauthorized access to or use of consumer information in connection with its disposal. The rule does not require that an employer destroy records. Rather, if records are destroyed or purged, the rule requires that the employer take such "reasonable measures".

The FACT Act does not define "reasonable measures", however the rule contains several examples of disposal methods that would satisfy the requirement. These include: 1) Establishing and complying with policies to burn, pulverize or shred consumer report information so that the information cannot be read or reconstructed; 2) Destruction or erasure of electronic files or media containing consumer report information so that the information cannot be reconstructed; or 3) Conducting due diligence before hiring a contractor to dispose of material identified as consumer information consistent with the rule. Such due diligence would include checking references, making sure the contractor is certified by a recognized trade association, and conducting an independent review of the entity's disposal security policies and practices.

This rule applies to physical discarding of consumer information as well as data stored on a computer that is to be donated or transferred to another party. Employers found in violation can be subject to damages and a claimant's attorney fees. Employers should carefully review their record retention and destruction policy and ensure a written policy is in place that is followed and complies with applicable law.

For further assistance, contact Attorney Douglas M. Mansfield.

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

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