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A Legal Newsletter for Municipalities.

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Inside this issue:

"Restoring" Merged Lots under HB 316

As you may recall, the 2010 Legislature responded to the NH Supreme Court decision in Sutton v. Gilford, 160 N.H. 43 (2010) (upholding a town ordinance merging adjacent non-conforming lots) by revising RSA 674:39-a to state: "No city, town, county, or village district may merge preexisting subdivided lots or parcels except upon consent of the owner." Due to questions on whether such law applied retroactively to lots already merged "involuntarily," the 2011 Legislature enacted HB 316 (effective July 24, 2011) which created a new section - RSA 674:39-aa.

Under this law, the owner of lots that were involuntarily merged prior to September 18, 2010 may request that the governing body "restore" the lots to their pre-merged status so long as the following conditions are met: (1) the request is made prior to December 31, 2016; and (2) no owner in the chain of title had voluntarily merged the lots (with the municipality bearing the burden of proof of such voluntary merger). All decisions of the governing body on such requests may be appealed to the ZBA under the provisions of RSA 676.

While a municipality may adopt an ordinance to restore merged lots that is less restrictive than these provisions, the municipality must post a notice informing residents of their rights to request such restoration. Such notice must be posted in "a public place" no later than January 1, 2012, and must remain posted through December 31, 2016. Additionally, the municipality must publish the same or similar notice in its annual reports for 2011 through 2015.

Furthermore, this law states that this restoration "shall not be deemed to cure any non-conformity with existing local land use ordinances." The municipality must also update all zoning and tax maps to reflect the pre-merged boundaries for such "restored" lots.

Thus, as a result of these combined statutes, municipalities are no longer allowed to involuntarily merge non-conforming lots for zoning, assessing or taxation purposes; and the protocols of new RSA 674:39-aa must be followed to allow for the "restoration" of lots that had been previously involuntarily merged.

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

Upcoming Events:

Local Government Center's 70TH ANNUAL CONFERENCE - NOVEMBER 16th – 18th, 2011

Donahue, Tucker & Ciandella, PLLC will be an exhibitor at the LGC Annual Conference being held November 16th—18th , 2011 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.

Life After Doolan: Notices of Tax Liens, Arrearages and Deeds.

As many tax collectors know, a March 2011 decision by Judge Deasy of the U.S. Bankruptcy Court for the District of New Hampshire, in the case, In re: Doolan, et al., set special requirements for notices of tax liens and tax arrearages. This article reviews those requirements. For specific guidance on how to update your notices, please contact us.

The Doolan case involved the notices of impending tax liens and arrearages sent to property owners in Pembroke and Derry, N.H., who had previously filed chapter 13 bankruptcy petitions. The judge found that the notices violated the "automatic stay" of the bankruptcy code, subjecting those towns to possible monetary sanctions. The notices violated the automatic stay in two ways: (1) the notices contained language not required by the relevant New Hampshire statutes; and (2) the notices did not provide any exceptions or special treatment for property owned by tax payers who had filed for bankruptcy and were therefore covered by the automatic stay.

The court's decision is effective *prospectively* only, meaning that the decision does not apply to past notices, but it covers all notices sent out after March 14, 2011. The notices at issue in the cases are similar to many, if not most, notices that were in use in cities and towns throughout New Hampshire. It is important for all municipal tax collectors to review the notices they send pursuant to RSA 76:11-b (arrearages) RSA 80:60 (notice of impending tax lien) and RSA 80:77 (notice of impending tax deed) to make sure they conform to the bankruptcy court's decision, to avoid monetary sanctions. Although the Doolan decision did not address notices of impending tax deed pursuant to RSA 80:77, those notices should also be revised to match the new requirements.

The City/Town should receive a notice of the bankruptcy filing. First, we recommend that tax collectors ensure that all bankruptcy notices come to them and identify clearly on City/Town property records any property owners who have filed for bankruptcy.

Second, we recommend that tax collectors include appropriate language carving out property owners who have filed for bankruptcy, on **all** notices of impending tax lien, impending tax deed and tax arrearages (since a taxpayer protected by the automatic stay may have slipped through the cracks and not be identified in your file), and any other correspondence to taxpayers regarding delinquent property taxes, tax liens, and tax deeding, such as a courtesy notice of taxes. Please contact our office if you would like assistance with drafting or reviewing that language.

Please note that, with use of the proper notice of impending tax lien, containing only the language permitted by statute or exempting property owners who have filed for bankruptcy and are protected by the automatic stay, the municipality *may* record a tax lien, following the procedures in RSA Chapter 80. Additionally, the interest rate *may* be increased, pursuant to RSA 80:69, after the execution of a tax lien; however, the municipality may not *collect* interest at the higher rate unless explicitly permitted by the bankruptcy court, and may *not* tax deed the property without bankruptcy court approval.

Finally, we strongly recommend that, before you send notices of impending tax *deeds* and again before executing the tax deeds themselves, you provide your counsel's office with a list of the property owners and their billing ad-

Life After Doolan cont.

dresses, so that your attorney can check with the NH Bankruptcy Court, and the Bankruptcy Court in other jurisdiction(s) if the owner(s) reside out of state, to verify that they have/have not filed for bankruptcy. The City/Town may *not* tax deed property of a tax payer in bankruptcy unless permitted by the Bankruptcy Court. An ounce of prevention is worth a pound of cure, as shown in the Doolan decision, where a town was found to be in contempt of court for willfully violating the automatic stay, based solely on the notices it sent.

For more information, please contact **Attorney Katherine B. Miller**.

Update on Variance Criteria.

The Supreme Court recently issued an opinion recognizing that changes in the variance criteria, particularly with regard to the hardship analysis, requires zoning boards to hear repeat variance applications in applicable cases. In Brandt Development Co. of New Hampshire, LLC v. City of Somersworth, issued October 12, 2011, the Court held that the City's Zoning Board of Adjustment was required to hear and decide the merits of the applicant's subsequent variance application for the same property. The ZBA had rejected the variance application under Fisher v. Dover, 120 N.H. 187 (1980), on the basis that a similar application was submitted 15 years prior. The Court held that the various changes in the Court's interpretation of the variance criteria over the years, including but not limited to the Simplex and Boccia decisions, constituted sufficient material change to warrant a review of the subsequent application.

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

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