2012 Municipal Law Update.

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Part I – New Statutes.

NOTE: These summaries are meant as "red flags" only – to highlight those new laws that municipalities need to know about, or may want to take action on. For a more complete list of 2012 Session Laws affecting municipalities, see the N.H. Municipal Association's *Legislative Bulletin*.

A. Land Use and Environment

USE OF IMPACT FEES ON STATE ROADS; ACCOUNTING. CH. 106 (SB 291) allows an impact fee collected by a municipality to be used for a state road project if "related to the capital needs created by the development." But the new law also says the municipality is prohibited from collecting ***new or additional*** impact fees specifically aimed at state highways.

> ***COMMENTS:*** (a) Those prohibitions in essence mean that, in order to utilize the enabling authority in this bill, fees must be ***diverted*** to a state project ***away from*** another capital project for which they were first collected. The Legislature thus appears to have created an ***exception*** to the general rule in RSA 674:21, V, that an impact fee "shall be used solely for the capital improvement for which is was collected" (a rule courts had constructed strictly, *see Clare v. Town of Hudson*, 160 N.H. 378 (2010)).
>
> (b) Still, in my view such a diversion could, in some cases, raise legal questions in terms of the ***constitutional*** "rational nexus" test which all impact fees must meet. I'd say utilizing this new law is fairly risky… unless a town gets a green light from its own attorney in a specific case.

Chapter 106 also requires all municipalities with impact fee ordinances to prepare an annual report listing the times and amounts of all fees collected, and all capital projects for which fees were spent.

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BUILDING & FIRE CODE APPEALS INFO. CH. 225 (HB 1480) requires local fire chiefs, building inspectors and any others responsible for enforcing fire or building codes to give citizens information on how their decisions are appealed. [Hopefully some helpful soul (e.g. the Local Govt. Center) will develop a one-page boilerplate towns can use for this purpose.]

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STATE BUILDING & FIRE CODES. CH. 242 (HB 137) makes several changes to the laws governing building and fire codes:

- Incorporates the 2009 Existing Building Code into the NH State Building Code (and updates other IBC codes to the 2009 versions).
- Designates the local fire chief as the local official who enforces the state fire code (and removing the Fire Marshal's office from that role).
- Permits a municipality, in lieu of appointing an official "building inspector," to contract out for code enforcement.
- Permits the local building code board of appeals to decide issues under the state building code and state fire code. However the local board has no authority to waive any portion of those state codes.
- Says that whenever there is a conflict between state fire and building codes, the provisions providing the highest life safety standard will prevail, but if the municipal officials can't decide which one prevails, the property ***owner*** can ***choose*** which provision to follow [!]

> [Idea for a new TV quiz show: "*Which Law Will YOU Choose To Obey?*"]
>
> ***Comment:*** While the state codes are still technically not a state mandate on towns and cities, given that a town can choose not to expend money enforcing them, this law does remove the State Fire Marshal's office from any role in assisting municipalities except in the case of certain state buildings.]

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LANDOWNER QUASI-IMMUNITY. CH. 214 (HB 1551) revises RSA 212:34 – the NH statute which confers strong protection from liability upon those landowners who give permission to the public for recreation activity on their land, without charge. The statute is re-formatted using definitions (previously missing). Among the substantive changes are:

(a) A new provision which says that a landowner's posting of warnings does not give rise to any liability based on the inadequacy of the warning, ***if*** the

underlying activity is covered by this statute (in other words, an owner can post a warning without undertaking any tort-law duty to those being warned); and

(b) A new provision which says that a plaintiff who loses on a liability claim as a result of this statute may be required to pay the ***landowner's*** attorneys' fees if the claim did not have a reasonable basis.

> ***NOTE:*** The liability protections under this statute apply to municipal properties, the same as to private properties.

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CONSERVATION COMMISSION MEMBERS ON PRIVATE PROPERTY. CH. 202 (HB 514) prohibits members of a local conservation commission from "enter[ing] private property to gather data about the property…" without permission of the landowner (or a warrant). The permission can be oral or written, but if it is oral, someone must make a written record of it.

> ***COMMENTS:*** (a) This bill contains no overt exceptions – for example, for lands where the owner has already granted general public access, or where there is an existing conservation easement guaranteeing public access. Thus this new law, at least on its face, leaves conservation commission members with ***less*** freedom vis-à-vis private property than other citizens!
>
> (b) Despite the seeming flippancy of the above comment, the safe and smart procedure for ***all*** persons acting as agents of any unit of government is ***never*** to enter private property without ***some*** type of provable permission (or a warrant, e.g. an Administrative Inspection Warrant). Otherwise, you could face a federal lawsuit under 42 U.S.C. §1983 for using state authority to violate property rights without Due Process.

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PRIME WETLANDS. CH. 235 (SB 19) substantially narrows the definition of "prime wetland" under state law, thus narrowing the types of wetlands subject to being designated as such. It also eliminates state-level protection for the 100-foot buffer around all prime wetlands hereafter designated (thus leaving that buffer protection remaining only for those designated between August of 2007 and August of 2012).

> ***NOTE:*** Towns and cities do retain their authority to provide for greater protection for wetlands (in a zoning ordinance) than given by state law. [Conservationists might well argue that this new law serves as a good example of why towns might wish to do so.]

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LOCAL TREE WARDENS. CH. 24 (HB 108) makes revisions to the tree warden law (RSA 231:139 et. seq). It takes the Dept. of Resources & Econ. Devel. out of the process of appointing local tree wardens. It also extends the tree warden's duties to the care of trees in public commons, parks and cemeteries, in addition to those within highway rights-of-way.

> ***NOTE:*** This bill does ***not*** alter the general presumption that trees in highway rights-of-way belong to the abutting owner (subject to being cut by the town only for traffic safety reasons, and with prior notice to the owner)… ***unless*** the town or city has specifically acquired the rights to those trees, under RSA 231:141 et. seq. The need for this acquisition process is probably one reason not many towns have tree wardens.

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B. New Municipal Administration, Finance and Taxation Laws.

TAX IMPACT STATEMENTS ON TOWN WARRANT. CH. 6 (HB 1170) allows a town (or school district) to vote to require that the annual budget and all special warrant articles having a tax impact will in the future include a notation stating the estimated impact of the article on the tax rate. The determination of tax impact is to be made by the local governing body.

> ***NOTE:*** That means, at least for now, that a Budget Committee has ***no*** say over the content of the tax rate impact statement. This bill doesn't say what happens in SB2 towns if an appropriation is amended at the First Session. In fact, this bill does ***not*** expressly permit the tax impact statement to appear on the official ballot at all – only on the warrant.

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SPECIAL REVENUE ARTICLES. CH. 181 (SB 254) requires a 2/3 vote of the town or school district (in those with town meetings) to alter the source or fractional portion of revenue going into a special revenue fund, or to change the purpose of the fund – thus making that procedure parallel to what is required for changing the purpose of a capital reserve fund. This law also clarifies the definition of "special warrant article" under the Municipal Budget Law to include any article calling for appropriation of any amount ***to or from*** a separate fund such as a capital reserve or special revenue fund.

NOTE: The main upshot of a warrant article being defined as "special" is that the governing body, during the year, cannot transfer that appropriation to any purpose other than the one stated in the special article.

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VOTER IDENTIFICATION. CHAPTERS 284 (SB 289) and ***289 HB 1354) –*** in combination – create the following impacts on voting in New Hampshire:

- Beginning with the November 2012 election, all voters will be requested to present a photo ID in order to vote.
- There is a list of acceptable photo IDs, but the moderator or supervisors may determine ***another*** form as "legitimate," subject however to potential voter challenge.
- A voter without a photo ID may be allowed to vote if s/he is personally identified by the moderator or a supervisor of the checklist, subject however to potential challenge.
- Anyone without a photo ID and not ID'd by a moderator or supervisor must fill out a challenged voter affidavit (whether or not actually challenged).
- Everyone filling out a challenged voter affidavit is subject to later verification of his/her identity by mail, and if that fails, it will make the person subject to investigation by the AG for voter fraud.
- For all elections after 9/1/13, any voter filling out an affidavit must also have his/her picture taken and attached to the affidavit.

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VOTER REGISTRATION. CH 285 (SB 318), among other things, repeals the law that says a person's claim of domicile for voting purposes is not conclusive of residence for other purposes. It requires a voter to acknowledge that (a) a person can only have one domicile; (b) s/he has no other domicile; and (c) in declaring a NH domicile, s/he is subject to all other NH laws applying to residents, such as car registration and drivers' licenses.

NOTE: On the day I drafted this description, the press was reporting that the Superior Court had found portions of this law to be constitutionally suspect. I have not reviewed that decision.

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CEMETERY FENCES. CH. 4 (HB 382) eliminates the state law requirement for municipalities to install or maintain a fence around all cemeteries.

[Maybe folks aren't dying to get in (or out!) quite as fast as they used to be!]

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RIGHT-TO-KNOW AND LIBRARIES. CH. 96 (SB 214) clarifies that the Right-to-Know Law applies to any public library established or accepted by a town (e.g., meetings of library boards of trustees must be open to the public). It states, however, that documents otherwise exempt are not rendered public documents by this new law solely by being in the custody of a library.

> ***NOTE:*** ***Some*** libraries defined as "public libraries" have in fact ***never*** been "established or accepted by a town." Presumably this law does not apply those libraries.]

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MUNICIPAL UTILITY WORK ON PRIVATE PROPERTY. CH. 178 (SB 231) creates an exception to the general rule that charges for municipal utility services (electric, gas, water or wastewater) create a lien against the owner's property – specifically, a municipal utility cannot do work on customer property beyond the "*utility's final shutoff point or the point at which the property owner is responsible for construction or maintenance, or both*" (with exceptions for emergencies or amounts under $250) ***unless*** there is a ***written contract*** between the utility and the landowner.

> ***NOTE***: It may be prudent for towns and cities to re-examine their utility ordinances to make sure the point represented by the phrase in italics above is adequately defined or described.

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SEWER COMMISSION COSTS. CH. 138 (SB 389). Although badly written, this new law appears to require a town sewer commission to pay to the town (presumably out of the sewer fund, and into the town's general fund) all of the town's costs incurred in support of the sewer commission, including the costs of financial audits, facility insurance, office support and treasurer's compensation.

> ***OMG!!*** This is about the worst example I've ever seen of a state law enacted to "fix" a "problem" that I'm sure 233 out of New Hampshire's 234 municipalities did not have!
>
> So…let's suppose the sewer commissioners meet in the town hall twice a month. ***Who*** is supposed to calculate how much "rental" they owe to the town? ***And…***how much will it cost the taxpayers to pay someone to perform these silly calculations!?
>
> This bill appears to reflect somebody's strong belief that a town's general taxpayers should not have to pay ***one penny*** toward a service (sewer) that some of them don't benefit from. Yet this belief has ***no*** basis in law. Towns often spend general tax money on things that don't benefit everyone (e.g. a road project serving only one neighborhood). And there is no legal mandate requiring public sewers to be supported through user fees at all.

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ELECTRONIC TAX BILLS. CH. 29 (HB 1224) allows the local governing body (e.g. board of selectmen) to authorize the tax collector to ***send*** tax bills by electronic means. Even with that authorization, bills can only be sent electronically to someone requesting that in writing. But these E-people cannot be charged any more (or less) than someone being billed using paper.

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RIGHT-TO-KNOW LAW – NEW REMEDY. CH. 206 (HB 1223) adds to the potential remedies for a violation of the Right-to-Know Law (RSA Ch. 91-A). If any public officer or employee violates the law ***in bad faith*** the court ***must*** impose a civil penalty of between $250 and $2000. Such a person may be required to reimburse the public body or agency for any attorney fees it has been required to pay to the person who brought suit. A court may also order "remedial training."

> ***AHEM!*** Given that all elected officials are citizens and all citizens are potential elected officials, the notion of "remedial training" is a bit curious – at least from a separation of powers viewpoint. Hey, maybe judges should begin ordering "remedial training" for members of the Legislature who sponsor bills which later get overturned as unconstitutional!

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PRO-GADFLY LAW. CH. 262 (HB 1510) says that any taxpayer in a taxing district (i.e. town, school district, etc.) has standing to file a declaratory judgment action alleging that the public agency has engaged in unlawful or unauthorized conduct, even if that taxpayer's personal interests are not affected. Notably, this law does ***not*** affect standing under various appeals statutes, such as zoning appeals (which require personal "aggrievement," *see Goldstein v. Town of Bedford*, 154 N.H. 393)

> [Those "local watchdog" types now have a bigger bite! This new law takes effect January 1, so everyone take a deep breath!]

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LENGTH OF LUCT LIEN CH. 104 (HB 225) extends the period during which the town or city has an automatic lien for the Land Use Change Tax (the 10%-of-value tax charged when land under Current Use is changed to a non-qualifying use). Previously the automatic lien period was ***18 months*** from the date the town received notice of the change; it is now ***24 months***. (After that time, the town only has a lien for the LUCT if it has executed and recorded a tax lien).

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CURRENT USE – ACCESS ROADS. CH. 160 (SB 395) clarifies an existing exception to the general rule that construction of a road disqualifies land from Current Use. If a road is constructed over a ***pre-existing*** easement or right-of-way ***solely*** for purposes of accessing adjoining property, and if the underlying landowner has no property interest in the adjoining property, then the underlying landowner's land can remain under Current Use, and that owner pays no LUCT (although the owner of the ***adjoining*** land ***does*** pay an LUCT on the land altered by the road).

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PRORATED ASSESSMENTS FOR DAMAGED BUILDINGS. CH. 169 (SB 382) requires local assessing officials to prorate the tax assessment on a building which is damaged by fire or natural disaster such that it can't be used for its intended purpose. The adjustment is made to the building's value prorated according to the number of days during the tax year (April 1 to March 31) that building was available for use. To protect a municipality during a major disaster, the total tax reduction from this proration is limited to .5 percent of the municipality's total tax valuation.

> ***NOTE:*** There is still ***no*** pro-ration for the ***opposite*** situation – e.g. a building under construction is still valued according to its status on April 1 of the tax year, regardless of whether construction is completed after that. Therefore this bill should be thought of – ***not*** as altering the overall method by which property is assessed – but rather as a type of tax relief for someone suffering a disaster.

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CAPITAL LETTERS IN THE CONSTITUTION CH. 259 (HB 1350) proclaims that in any new or amended article of the N.H. Constitution, proper nouns and the titles of all officers shall be capitalized.

> ***COMMENTS:*** Hunh?!? I'm scratching my head:
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> (a) Why was this bill assigned to me to report on? It has nothing to do with municipal or real estate law.
>
> (b) How could a simple act of the Legislature ever prevail over a constitutional amendment? (Can't you just see our Court overturning a constitutional amendment solely because it wasn't capitalized correctly!?)
>
> (c) This bill violates the rules we all learned in 8th grade – You don't capitalize a title if it is being used generically ["*The bill was vetoed by Governor Lynch*." versus "*The term of a governor is 2 years*."] Titles in the Constitution are all used generically.
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> (d) Do our NH Legislators truly have nothing better to do?

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Part II – The Courts.

NOTE: These summaries are digested from NH Supreme Court advance sheets. Pages and citations are omitted. Procedural aspects not crucial to the central holding are left out, as are factual issues not germane to a grasp of evolving legal principles. These are "red flags" only. ***If your interest is grabbed, read the whole thing***! Commentary here is meant only as very generic. It should not be construed as advice on any pending controversy, or as a substitute for consulting one's own attorney.

A. Planning, Zoning And Environment Cases.

1. *PREEMPTION:* Prime Wetlands Designation Is A Local Land Use Control. *Town of Newington v. State,* 162 N.H. 745 (November 29, 2011).

Newington tried to force a construction project on Pease Development Authority land to comply with the Town's prime wetlands designation under RSA 485-A:15. The Pease statute (RSA 12-G:13) says plainly that "land use controls of the town" shall not apply.

The Town tried to argue that prime wetlands designation was not a local land use control. But the Court – analyzing the statute – said state officials play no role in designating prime wetlands. The fact that the ***effect*** of such designation is set by statute, and that the state does play some role in enforcement, was not enough to swing the balance.

> ***COMMENT:*** This case – tied to the unique language of the Pease statute – provides us no real generic lesson. The issue of preemption usually hinges on weighing whether a local ordinance is inconsistent with a comprehensive state scheme. Here the "local" regulation was ***part of*** the comprehensive state scheme.
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> Conceptually, this case is not so much about preemption as about the rule that a more specific statute prevails over a more general one (the more specific one here being the Pease Development Authority law).

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2. *SCOPE OF 5-YEAR EXEMPTION:* Substantial Change In Approved Plans Is Not Vested. *Harborside Associates, L.P. v. City of Portsmouth,* 163 N.H. 439 (Feb 15, 2012).

RSA 674:39 exempts recorded planning-board-approved plans from changes in local regulations for 5 years. The Parade Hotel had an approved site plan, but sought to alter it to change some retail space into a conference center. Meanwhile the City had enacted more strenuous parking standards. The Planning Board held that the alteration was covered by the "vesting" under 674:39, and need not comply with the new parking standards. But the Supreme Court disagreed.

Under RSA 674:39 the exemption applies only if development occurs "in accordance with the approved [plan]." The Court acknowledged that an approval "cannot sensibly be treated as absolute." But the key question (according to Justice Lynn) is whether the change is "***substantial***" rather than merely "***incidental***." The Court declined to draw any hard-and-fast line between those two. But it said any actual ***change of use*** (here from retail space to conference center) will ***always*** be a "substantial" change.

Parade argued the "administrative gloss" doctrine, but the Court – following now-clear precedent – said that doctrine doesn't apply unless a provision is ambiguous. RSA 674:39 is not ambiguous on this issue.

> Besides, the "administrative gloss" doctrine has, in the past, only been applied when a ***local ordinance*** is consistently interpreted as having a certain meaning ("gloss") by those charged with administering it – the theory being, if the local legislative body were dissatisfied with the interpretation, it would have amended the ordinance. RSA 67:39, by contrast, is a ***state*** statute, but one which is ***locally*** administered by every town with a planning board. It's hard to see how the "administrative gloss" doctrine could ***ever*** apply in such a case.

Finally, the City's new parking standards, by their express terms, applied only to "changes or expansions of existing uses." Parade argued that, since their lot was vacant, there was no "existing use" to be changed, hence, under that wording, new standards didn't apply. The Court said basically: Nice Try, but the retail space constituted an "existing use" for which the property had been approved, even though no construction had yet occurred.

> [Not to mention, if that argument were valid, ***no*** development of vacant land would ***ever*** have to comply! But hey, the argument definitely gets a C for creativity!]

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3. *FAILURE TO TIMELY APPEAL ZBA* Deprives Owner Of Right To Raise Declaratory And Constitutional Claims. *Bosonetto v. Town of Richmond* 163 N.H. 736 (June 29, 2012).

This case teaches a wealth of lessons. Bosonetto, whose lot had frontage on an unapproved private road, sought to replace his "grandfathered" mobile home with a new 3-story home elsewhere on the lot. The Selectmen denied a building permit based on RSA 674:41, I(d) (no building on lot whose sole frontage is on an unapproved private road unless Selectmen adopt a policy to permit that). Bosonetto then appealed to the ZBA under Paragraph II of 674:41. But the ZBA said that paragraph was not met, because – in the words of that statute's criteria – the permit would "increase difficulty in carrying out the master plan," would "cause hardship to future purchasers," and could cause "undue financial impact on the municipality." The ZBA also found that the permit was not within the "vested" right of the "grandfathered" mobile home, because the new house was bigger, and at a different location.

A. Untimely Appeal. The ZBA first voted orally to deny the appeal, then later voted to adopt a set of written reasons. Bosonetto filed a motion for rehearing under RSA 677:2 which was within 30 days of the second vote, but not of the first. The Court held it was untimely, saying there was nothing about the first vote which prevented it from being deemed a "decision" triggering the 30-day clock. Under 677:2, a later alteration of the written minutes or written decision enables a party to ***amend*** a motion for rehearing already filed, but it does ***not*** extend the 30-day time for filing.

> ***ADVICE FOR ZBAs:*** Citizens deserve to know when a decision is intended as final, and not subject to later written elaboration. If your Board intends to draft a written decision, ***don't take the vote until that written decision is in front of you.*** Any votes taken prior to that time should be carefully identified as "preliminary" and not final for purposes of motions for rehearing. [Besides, a vote which seems right in the abstract may well generate second thoughts once the written reasoning is in front of the Board.]

B. Estoppel. After the ZBA vote, the Town Clerk gave Bosonetto instructions on how to appeal. But the instructions were based on an older version of the statute, and said the 30 days started "after the [ZBA] decision is filed." Bosonetto argued the Town should thus be estopped from applying the 30 days strictly. However, one of the 4 elements of estoppel is that a representation must be made with the intent of inducing reliance on it. The Court held here that – in context – the Clerk's instructions were ***not*** made with that intent. On the contrary, the instructions referred to the appeals statutes and recommended that the party "become familiar" with them.

Justice Conboy said further that estoppel would be inappropriate here because: (a) Though undecided in NH, most jurisdictions hold that estoppel applies only to misstatements of fact, not misstatements of law, and (b) Applying estoppel would mean the superior court was using equity to assume

jurisdiction, contrary to the well-established rule that a timely appeal is a jurisdictional prerequisite.

C. Exhaustion. Bosonetto also asked for declaratory relief from the local boards' decisions, based on his claim of a vested nonconforming use. But the Court said failure to exhaust administrative remedies usually precludes declaratory relief. While that rule does have an exception if the issue is one purely of law "*peculiarly suited to judicial rather than administrative treatment*," the question of whether a change or expansion of nonconforming use is "substantial" (hence not permitted) is one closely tied to the specific ***facts*** of each case. Hence administrative remedies must be exhausted.

D. Constitutionality. Finally, Bosonetto asked the Court to declare RSA 674:41 unconstitutional as applied to nonconforming uses. But the Court said that argument presumed his 3-story house was a lawful continuation/expansion of his nonconforming use, contrary to the ZBA's actual holding, which he had forfeited the right to challenge due to the untimeliness of the appeal. "It is a bedrock principle that a declaratory judgment action cannot be based upon a hypothetical set of facts."

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4. *SITE PLAN WAIVERS:* Planning Board Need Not Produce Written Decision. *Property Portfolio Group, LLC v. Town of Derry*, 163 N.H. 754 (June 29, 2012).

MTM Realty had gotten site plan approval in 2005 to change a former fire station to a restaurant. In 2010 it sought a waiver from a site plan regulation requiring dumpsters to be 25 ft. from a property boundary. RSA 674:44, III(e) mandates all site plan regulations to include a waiver procedure, and the Derry Planning Board had enacted one requiring a showing of "unnecessary hardship" (among other criteria). MTM's claim of hardship was that due to the features of the site, compliance with the setback would cause the dumpster to interfere with a delivery/parking area and a fire lane, whereas the proposed site would be better screened from public view. The Planning Board granted the waiver. The minutes reflected individual Board members generally agreeing with MTM's argument.

RSA 674:44, III(e) requires that the "basis for any waiver [be] recorded in the minutes of the board." PPG (the abutter) argued that written findings were required on all the criteria, including hardship. But the Court disagreed, saying the "basis" for the waiver ***can*** lawfully consist of board members' individual reasoning, as reflected in the minutes.

The Court also ***substantively*** upheld the finding of hardship. Planning boards are entitled to the same type of deference as a ZBA (as reflected in RSA 677:6), and here the evidence reasonably supported the Board's decision.

COMMENTS: (a) For those wondering whether the test for "unnecessary hardship" for planning board waiver purposes is the same as for ZBA variance purposes (as set forth in RSA 674:33, I(b)(5)), we still don't know. Chief Justice Dalianis didn't delve quite that deeply here.

(b) Despite the holding here that written findings aren't required, most municipal attorneys nevertheless ***recommend*** such findings. An explained board decision is always easier to defend.

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5. *BUILDING ON A CLASS VI HIGHWAY:* ZBA's Denial Of 'Exception' Under RSA 674:41, II Is Upheld. *Merriam Farm, Inc. v. Town of Surry* (September 12, 2012).

[***NOTE:*** The opinion described below is unpublished (hence not binding precedent). The original published opinion issued July 18 was withdrawn.]

Merriam Farm sought to build on a lot whose only frontage was a Class VI highway. When the Selectmen disapproved its permit request, citing RSA 674:41, I(d), it appealed to the ZBA under Paragraph II of 674:41.

Merriam's main argument was that the ZBA misapplied the "practical difficulty" standard. RSA 674:41, II permits relief only "Whenever the enforcement of…this section would entail practical difficulty or unnecessary hardship…" Merriam claimed the "practical difficulty" standard was much less stringent than "unnecessary hardship."

The Court, however, declined to address that argument, because even assuming "practical difficulty" existed, Merriam failed to meet ***other*** standards under 674:41, II. For example the ZBA found that allowing the permit would "cause hardship to future purchasers" because the only access would entail either climbing steep hills or crossing a deficient bridge. The Board also found that the permit would "increase the difficulty of carrying out the master plan," because the master plan in Surry discouraged development on Class VI roads. Finally, the ZBA held that the permit would create expenses for the taxpayers, because even though the developer offered to sign a waiver vis-à-vis the Class VI road, "*the ZBA's experience has been that those who initially waive services often come to the town requesting those services anyway*." The Court said these findings were supported by the evidence.

NOTE: In the original version of this opinion, Justice Dalianis launched into a complex discussion of whether "practical difficulty" truly has a different meaning from "unnecessary hardship." She concluded (surprisingly, in light of the history of NH variances since 2000) that – at least in RSA 674:41, II – both phrases were intended to embody one single standard. [Again, though, that portion of the opinion has been withdrawn.]

COMMENT: One criterion in RSA 674:41, II which was ***not*** discussed in this case (or in *Bosonetto,* above), is the language which permits relief only "*when the circumstances of the case do not require the building…to be related to existing or proposed streets*…" I've long thought that standard would be darn hard to meet for any year-round residential use. But I'm unaware of any case construing it.

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6. *INJUNCTION* Against Occupancy of Home Without Sprinklers Is Upheld. *Town of Atkinson v. Malborn Realty Trust* ___N.H.___ (August 17, 2012).

The ZBA granted the Osborns a variance to convert their seasonal home to year-round. Due to difficult access issues, the variance was conditioned on "meeting the requirements of the police & fire departments." The fire chief told them they must install sprinklers, or build a new driveway with a 10% grade or less. Instead they installed a 13.7% drive, and no sprinklers. The Court upheld an injunction against occupancy until the sprinklers were installed, and imposed civil penalties and attorney's fees.

The Osborns' main argument was that the chief's order violated Laws of 2010, Ch. 282, which prohibited local codes or ordinances from mandating sprinklers in single-family residences. But the Court said the fire chief's order was not an ordinance or code. Moreover the NFPA Fire Code (part of the State Fire Code) expressly allows a fire chief to mandate sprinklers when "*site conditions or unique structure designs*" result in an access road design that doesn't meet the Code.

Civil Penalty. RSA 676:17 calls for a civil penalty of $275 per day for the first offense, and $550 per day for "subsequent offenses" and says each day is a separate offense. The trial court had held that the $550 rate applies to each day except the first day. But Justice Conboy wrote that an "offense" consists of the violation of which the owner receives written notice. A continuing violation doesn't give rise to a "subsequent" offense.

Attorney's Fees. The trial court had declined to award attorney fees, because the town's attorney was on retainer, hence no amount was "actually expended" on this enforcement action, per RSA 676:17, II. The Supreme Court reversed, saying that "actually expended" can include the amount by which a retainer is depleted.

COMMENT: In the past, I would have questioned whether a ZBA could lawfully delegate discretion over a condition of approval to a fire chief. However, given that Ch. 242 of 2012 (described above) designates the local fire chief as the enforcer of the State Fire Code, the condition here was one the chief had the authority to impose ***even without*** the condition attached to the variance.

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B. Roads and Other Real Estate Issues.

1. *ROAD EXCAVATIONS BY UTILITIES:* Can A Municipality Charge A Fee? *Energynorth Natural Gas, Inc. v. City of Concord,* ___N.H.___ (July 18, 2012).

Under RSA 236:11 and 231:185, a utility permitted to dig in a public highway must restore the highway to "*as good condition as it was in before so doing*." Concord requires not only full restoration, but an additional road damage fee. The trial court here had granted summary judgment to the utility, reasoning that the City's fee presumed that true restoration to original condition was impossible, and held that the fee was ***preempted*** by the Legislature's assumption that true and full restoration ***is*** possible.

The Supreme Court disagreed, saying the statute didn't reflect any factual assumption one way or another on the part of the Legislature. The City had submitted some evidence that patched pavement is never of the same quality as the original. The Court said that created a disputed material fact, which made summary judgment improper. The case was remanded.

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2. *BOUNDARIES:* Mutual Acquiescence Differs From Adverse Possession *O'Hearne v. McClammer,* 163 N.H. 430 (March 23, 2012).

This was a boundary dispute case. Most of its fact details are of no general interest. But the result hinged on the doctrine of mutual acquiescence in a boundary for more than 20 years. The Court stressed that that doctrine differs from adverse possession, even though both are grounded in the 20-year statute of limitations. The mutual acquiescence doctrine requires no proof of adversity, but is instead grounded in behavior by ***both*** parties recognizing a certain boundary as the true one, and occupying and using the land accordingly. Here, for example, there was evidence that the two prior owners had walked the boundary together on several occasions, and had asked each other for various types of permission over the years based on the boundary as the Court ultimately determined it to be.

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C. Cases On Governmental Administration.

1. *SUPERIOR COURT DECISION OF NOTE:* SB2 'First Session' Cannot Amend An Article So As To 'Disinfranchise Voters.' *Bailey v. Town of Exeter*, (May 27, 2011).

In the SB2 "Official Ballot Referendum" form of town meeting, most warrant articles are subject to being amended at the 'First Session' (open deliberative meeting) with the amended form then voted on at the 'Second Session' by official all-day balloting. Over the years voters at the First Session have sometimes utilized techniques that try to make an amendment into a final vote – for example, amending an article by replacing the whole thing with the words "To see." In response the Legislature enacted RSA 40:13, IV(c) which prohibits amendments which "eliminate the subject matter of the article."

The amendments at issue here added a "not" at the beginning of an article (so that an article to see if the Town will establish a Budget Committee was altered to an article to see if the Town will ***not*** establish a Budget Committee). Judge McHugh held that these amendments violated the statute, because they rendered each article moot, making the original intent impossible to effectuate. He compared the second sentence of the new statute (which ***does*** allow an amendment which "zeroes-out" an appropriation), and found that the aim of the first sentence, by contrast, was to prohibit amendments which nullify any possible action under the article.

> ***COMMENT:*** Having closely observed the Legislative debate over "SB2" when it was originally enacted in the 1990s, I know that the main intent of creating the 'First Session' was to preserve the voters' right to amend warrant articles to the same extent as in a traditional town meeting (as opposed to having the form of ballot questions dictated solely by the governing body or a group of petitioners). In a traditional town meeting, final action ***is*** often achieved by acting on a motion to amend. The mind-set reflected here, by contrast, is that the folks attending the 'First Session' somehow aren't truly "the voters." In my view the upshot of this result is in fact to shift power ***away*** from the electorate, and more toward those who originally draft each warrant article.

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2. *RIGHT-TO-KNOW LAW, ACT I:* Location of Public Building Surveillance Cameras Is Not Releasable. *Montenegro. v. City of Dover,* 162 N.H. 641 (Nov. 2, 2011).

Montenegro sought to know the precise locations and operation times of City police surveillance equipment which had been placed in public buildings, plus the job titles of those who were monitoring it.

The Court first clarified that the rules on releasing police department files, which previously shielded only ***investigatory*** files, were altered by *Murray v. NH Div. of State Police*, 15 N.H. 579 (2006), so as to parallel changes in the federal Freedom of Information Act. A law enforcement record no longer need necessarily be "investigatory" in order to be exempt.

It must, however, meet one of six tests. The fifth of these is information whose release "*would disclose techniques and procedures for law enforcement investigations or prosecutions, or… could reasonably be expected to risk circumvention of the law*." The Court held that the surveillance information was exempt under this test, in essence adopting the City's argument that releasing the times and locations "would provide a roadmap for the commission of crime."

Privacy? Montenegro tried to argue that the failure to disclose implicated the constitutional privacy rights of those engaged in private activities in public buildings (e.g. rental of city meeting rooms by civic groups). The Court declined to address the question, because Montenegro had never used City property for private activities, and thus had no standing to raise that issue.

Job Titles of Monitors. The Court did, however, mandate the release of the names and job titles of those monitoring the equipment. The City tried to assert the "internal personnel practices" exemption. But Justice Hicks said that exemption is limited to records involving hiring and firing, employee work rules, performance, discipline and investigations.

> [♫ When it's least expected, you're elected; It's your lucky day! ♫ ♫ Smile! You're on Candid Camera! ♫]

* * *

3. *RIGHT-TO-KNOW LAW, ACT II.* Names and Details of NH Retirement System Beneficiaries Are Releasable. *Union Leader Corp. v. NH Retirement System,* 163 N.H. 673 (Nov. 3, 2011).

The Union Leader wanted the names of the 500 state retirement system members who received the highest annual pension payments in 2009.

The trial court ordered release under RSA 91-A:4, I-a. But the Supreme Court held, based on legislative history, that that section embraces only severance paid when a public employee is terminated or resigns, not ordinary retirement payments.

But the Court also held that the names are ***not*** protected under any ***other*** exemption, and specifically not the "invasion of privacy" exemption under 91-A:5, IV. The test under that exemption is whether the privacy interest at stake, if any, is outweighed by the public's interest in disclosure, if any. Here the Court said there is a privacy interest, but it is no higher than employees' interests in their names and salaries (which were held releasable back in *Mans v. Lebanon School Bd*, 112 N.H. 160 (1972)). Significantly, the newspaper had not asked for data which would have revealed the retiree's personal circumstances, e.g. disabilities.

The public interest in disclosure was found to be an interest in uncovering error or corruption – for example if a figure well-known to have served only a short time were found to be receiving high payments. Since RSA 91-A places the burden of persuasion on those seeking to prevent disclosure, the balancing test here fell in favor of disclosure.

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4. *RIGHT-TO-KNOW LAW, ACT III:* Attorney 'Consultation' Does Not Include Review Of Written Advice. *Ettinger v. Town of Madison Planning Bd,* 162 N.H. 785 (December 8, 2011).

Under RSA 91-A:2, I(b) "Consulation with legal counsel" is excluded from the definition of "meeting," with the result that such consultation need not occur in a meeting open to the public, nor need minutes be taken.

Here the Board and its administrative assistant went into private session to discuss E-mails and a written opinion from the Board's attorney, claiming to be covered by the "consultation" exemption. The Supreme Court held that the term "consultation" requires "*at the very least…the ability to have a contemporaneous exchange of words and ideas between the public body and its attorney*." Review of written opinions is not "consultation." The Court rejected the Town's argument that the statute was meant to be coextensive with the attorney-client privilege.

However the Court upheld the ***denial*** of attorney's fees, because the law was unclear prior to this decision.

> ***COMMENTS:*** (a) A cynical taxpayer might harrumph that the Court here was just trying to boost municipal attorneys' coffers, since a "consultation" usually costs more than an E-mail opinion. But the fact is, public officials are rightfully stingy with taxpayer funds, so alas, the true impact of this decision will be that local boards will make more decisions ***without*** legal advice.
>
> (b) What about having the attorney at the other end of a telecommunications line? The Court didn't say, but my hunch is that a speaker phone audible to everyone ***will*** count as a "contemporaneous exchange," but that a process of reducing all exchanges down to a text or E-mail probably will not.

(c) This decision magnifies the problem public bodies and their lawyers have in trying to preserve the attorney-client privilege – given that reviewing the advice in public risks waiving that privilege. The only safe advice is for board members to review written legal advice ***on their own***, and to scrupulously avoid mentioning in public that the advice was even received. That can be hard to remember during a heated public deliberation. (Despite that conservative advice, I would still argue that off-hand references to written legal advice made by individual board members cannot constitute a waiver, since the privilege belongs to the board ***as a body*** and can only be waived by action of that body)

* * *

5. *RIGHT-TO-KNOW LAW, ACT IV:* Attorney-Client Privilege Not Necessarily Waived By Public Session. *Professional Fire Fighters v. N.H. Local Govt. Ctr.*, 163 N.H. 613 (May 11, 2012).

Following the Supreme Court's previous decision that the LGC was subject to RSA 91-A, PFFNH asked for numerous records, including meeting minutes containing legal advice. The parties agreed that, in light of the Court's prior decisions, the meetings where the advice was received should have been open to the public, but also that no members of the public in fact attended them.

The Court held that the legal advice was protected from disclosure under RSA 91-A:5, IV ("confidential information") The attorney-client privilege renders the information confidential. The Court decided, in essence, that since no one knew ***at that time*** that the meetings were required to be open to the public, the expectations of confidentiality were reasonable at the time.

COMMENT: This result is probably limited to the unique facts of the case, and does not help resolve the dilemma discussed in my Comment (c) under *Ettinger* (above).

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6. *RIGHT-TO-KNOW LAW, ACT V:* State Fire Marshal Is A Law Enforcement Official. *38 Endicott St. North, LLC v. State Fire Marshal,* 163 N.H. 656 (May 11, 2012).

The Petitioner in this case was an owner whose property had burned, and who sought all the Fire Marshal's office's records pertaining to an ongoing investigation of the fire.

The Court said the Fire Marshal's office is a "mixed-function agency" some of whose purposes ***do*** include law enforcement (e.g. arson investigations). The specific records in this case were an investigation into the

suspicious origins of the fire, and hence were compiled "for law enforcement purposes" under the *Murray* rules (discussed above under *Montenegro*).

The first of the six potential reasons for nondisclosure of law enforcement files under *Murray* is that disclosure "*could reasonably be expected to interfere with enforcement proceedings*." The Petitioner argued this rule applies only if the agency offers proof of when charges are likely to be filed and against whom. But the Court all that is required is a showing that enforcement is "reasonably anticipated."

> [Clearly if it were otherwise, an investigation would have to be *concluded* in order to prove the exemption!]

Justice Lynn also said that neither *in camera* examination of the documents, nor a *Vaughn* index were essential to the allowance of this exemption. Rather, "*generic determinations of likely interference* [with enforcement] *often will suffice*." Here the Fire Marshal had produced an affidavit which specifically described each category of document, with an explanation of how disclosure of each could interfere with investigation or prosecution.

> [Well, it sure took a "fight-fire-with-fire" attitude to file this lawsuit! But despite all the "fireworks," it clearly "backfired"!]

* * *

D. Property Tax Cases.

1. *NUCLEAR CONTAINMENT FACILITIES* Are Not 'Treatment' Facilities. *Appeal of Town of Seabrook,* 163 N.H. 635 (May 22, 2012).

This complex decision (which anyone interested in taxation of nuclear plants will already have devoured!), involved which portions of a nuclear power plant are tax-exempt as pollution control treatment facilities under RSA 72:12-a. Most notably, the Court held that elements such as the containment structure, whose sole function is to protect the public and environment in the case of an extraordinary loss-of-coolant disaster, are not "treatment" facilities at all, and hence do not qualify for the exemption.

* * *

2. *RELIGIOUS EXEMPTION:* City's Apportioning Of Church Property Upheld. *Appeal of Liberty Assembly of God,* 163 N.H. 622 (May 22, 2012).

RSA 72:23, III exempts property used directly for religious purposes. Here the City had granted the exemption on around 40% of the church's property, but denied it on, for example, portions of the church building used as apartments, storage rooms, and dorm rooms.

The Church argued that a "house of worship" must be 100% exempt under the statute's wording, and not subject to apportionment on a room-by-room basis. But the Court held that the "used directly for religions [purposes]" requirement applies to all categories in the statute, including the "houses of worship" category. Hence under the reasoning in *Appeal of Emissaries of Divine Light,* 140 N.H. 552 (1996), apportionment of the exemption is appropriate within a building as well as for a parcel of land.

The Church also argued that for a city to examine the religious use of spaces within a building creates unconstitutional entanglement of government with religion. But the Court said neither the City nor BTLA had questioned the validity of the Church's religious views, and had properly focused on the ***use*** of the particular portions of property.

* * *

3. *TAXPAYER SIGNATURE* Not A Jurisdictional Prerequisite To A Superior Court Tax Appeal. *Appeal of Henderson Holdings,* ___N.H.___ (July 31, 2012).

In the 2011 decision of *Appeal of Wilson*, 161 N.H. 659, the Court upheld a rule promulgated by the Board of Tax and Land Appeals which required a BTLA tax abatement appeal to be dismissed if the taxpayer has not signed – as part of his/her ***local*** abatement application – a statement certifying that the request has a good faith basis and that the facts are true. That rule was based upon RSA 76:16, III, which prescribes the contents of the BTLA form for local tax abatement applications.

But local abatement denials can be appealed ***either*** to the BTLA or the superior court. The question in ***this*** case was whether the ***superior court*** must dismiss an appeal where the taxpayer has not signed the local application.

The Court held: (a) That the Selectmen in Sugar Hill rightfully denied the application due to the lack of a signed statement – which does, as *Wilson* held, constitute "necessary information to process such a request," ***BUT*** (b) The statute does ***not*** create a ***jurisdictional*** prerequisite, and the superior court (which does not have a rule parallel to that of the BTLA) still has the discretion to "*examine the record to determine whether, in its sound judgment, the taxpayer is entitled to consideration on the merits of its application*."

COMMENTS: (a) Full disclosure: my law partner Adele Fulton, Esq. argued this appeal on behalf of Sugar Hill. (The superior court case is still pending.)

(b) But speaking solely as an observer, I'm still puzzled on what this decision means generically. Plainly it means a town is not entitled to an ***automatic*** dismissal in court for lack of a signature. But does the superior court retain the ***discretion*** to dismiss on that basis, rather than proceeding to the merits? The italicized quote above suggests that it does.

(c) Especially baffling is the Supreme Court's conclusion: "We remand this case to the superior court to consider whether the petitioner is entitled to review ***by the Town*** on the merits of its application." (emphasis added). Does that mean the superior court can remand a case to a Town? How can that result possibly jibe with the Court's statement two paragraphs earlier that *Wilson* "provides an independent basis upon which the Town may reject applications that are not signed…."?

(d) What ***does*** seem clear is that this decision gives some taxpayers a reason to opt to appeal to court, rather than to the BTLA. It also seems plain that towns are much ***less*** likely to deny an abatement request due to lack of a signature, knowing they might still face the merits of that request later in court.

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E. Constitutional Issues and Governmental Liability.

1. *FREE SPEECH RIGHTS* May Be Exercised By Mythical Hairy Beasts. *Doyle v. NH Dept. of Resources & Econ. Devel.*, 163 N.H. 215 (Jan. 13, 2012).

Doyle and others dressed up as "Bigfoot" (Sasquatch) and staged a filming event on Mount Monadnock. State Park Manager Hummel confronted the group and told them they had to leave for lack of a "special-use" permit. Doyle sought declaratory injunctive relief, claiming his free speech rights had been violated.

The Court held that the Department's regulation requiring a special-use permit was unconstitutionally overbroad. The Court assumed, ***without deciding***, that Monadnock State Park is a "traditional public forum" (governmental property which "by long tradition has been devoted to assembly and debate") – but only because neither party had challenged that assumption

below. Since the regulation is content-neutral, the test is whether it is "narrowly tailored to serve a significant government interest."

The asserted purpose of the regulation was to allow DRED to manage the competing use of park resources. But the Court pointed out that the regulation applies regardless of group size, and park resources are not threatened by one person protesting, or 6 people praying, on a mountaintop. "Permit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring."

The requirement for the permit to be issued 30 days in advance also violated the "narrowly tailored" requirement. The Court said a permitting ordinance must contain some provisions allowing for "spontaneous expression."

> [...Including, I guess, the 'spontaneous expressions' uttered by other hikers when they see monsters on the trail!]

* * *

2. *NUISANCE and TAKINGS:* Littoral Owners Have No Right To Flowage Above Natural Low Water Mark. *Morrissey v. Town of Lyme*, 162 N.H. 777 (December 8, 2011).

Water levels on Post Pond in Lyme historically varied depending on whether beavers had dammed the downstream wetlands. In recent years the Town installed beaver pipes and breached dams, so as to keep the pond near its natural low water mark – in part to protect the town's adjacent ball field and beach. Neighbors claimed a nuisance and a taking, saying the shorefront on their properties had been converted from submerged areas into mud.

The Court upheld dismissal of the claims. *Fish v. Homestead Woolen Mills*, 134 N.H. 361, held that there is no duty to maintain public waters at a level above natural low water mark. And unlike water pollution cases such as *Sundell v. New London*, 119 N.H. 839, the alterations in the owners' pond access here did not rise beyond "mere annoyance or inconvenience."

A claim against the State for allegedly violating the wetlands laws by not prohibiting the Town's actions was also dismissed as inadequately pled.

> [I bet the Town's officials felt this whole lawsuit was – quite littorally – a dam nuisance!]

* * *

3. *HIGHWAY LIABILITY:* Discretionary Immunity Doctrine Is Alive And Well. *Ford v. N.H. Dept. of Transportation*, 163 N.H. 284 (February 24, 2012).

An accident occurred at the intersection of two state highway in Windham. The traffic light was out due to ice storm power outages – a fact of which the Town police had notice. Both State and Town were sued for negligence. The Court upheld dismissal of the Town because it has no duty sounding in tort with respect to state highways (RSA 231:93). The fact that the Town knew about the outage did not create such a duty, *Trull v. Conway*, 140 N.H. 579. The Court said Ford's argument that *Trull* was badly reasoned cannot rise above the threshold of overcoming *stare decisis.*

The State likewise was dismissed because the allocation of state resources to deal with a winter weather emergency is a discretionary function to which immunity applies. Ford argued that the State has a duty to abide by the *Manual on Uniform Traffic Control Devices*, which says that the responsible agency "should" provide for maintenance of traffic control signals. The Court said "should" is not a mandatory word, and in any event the overall purpose of the *Manual* is to invite the exercise of discretion, not to limit it (thus following *Bergeron v. Manchester*, 140 N.H. 417).

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4. *'FIREMAN'S RULE'* Applies Only To Injuries Arising From The 'Fire.' *Antosz v. Allain*, 163 N.H. 268 (Feb. 24, 2012).

A volunteer firefighter slipped and fell on snow and ice covering the driveway of the house at which he was responding to an emergency call. The landowner moved to dismiss, citing the "Fireman's Rule" (RSA 508:8-h), which shields an owner from claims by emergency responders due to injuries arising out of the incident to which they are officially responding.

The Court held that the statute didn't apply here. The firefighters were responding to a fire in the home's hot water heater, not to the icy drive. In some jurisdictions the common-law Fireman's Rule would apply, but the N.H. statute is unambiguous.

[The action by Supreme Court here was to reverse the trial court's dismissal. Clearly the issue of ultimate liability was not reached.]

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F. Public Employment Cases.

1. *BARGAINING UNITS:* On-Call Employee Cannot Count Toward 10-Employee Minimum. *Appeal of Town of Deerfield,* 162 N.H. 601 (Oct. 27, 2011).

Under RSA 273-A, there must usually be at least 10 employees with a community of interest in order to form a union. Those employed "seasonally, irregularly or on call" are excluded from the definition of "public employee."

Here a certain police officer worked a regular schedule at the time the petition for certification was filed with the PELRB. But he had become an "on-call" officer prior to the actual certification. The PELRB held that the 10-member requirement is adjudged as a "snapshot" at the time the application is ***filed***. The Court reversed, saying the law clearly prohibits the ***certification*** of a unit with less than the required number.

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2. *PELRB JURISDICTION:* Bargaining Agreement Giving Local Board 'Final And Binding' Authority Over Grievances Is Upheld. *Appeal of Silverstein,* 163 N.H. 192 (Jan. 13, 2012).

A teacher in Andover filed an unfair labor practice complaint with the PELRB over certain benefit cuts. The collective bargaining agreement in effect had a 3-step grievance procedure: (a) hearing before the principal; (b) hearing before the superintendent; and (c) a "final and binding" hearing before the school board.

The Court held that the bargained-for provision was enforceable. The PELRB has no jurisdiction if the CBA creates an alternative "final and binding" procedure. The purpose of RSA 273-A – to "foster harmonious and cooperative [labor] relations" – would not be furthered by setting aside a grievance process freely bargained for. Analyzing precedent, the Court rejected Silverstein's argument that the PELRB retains jurisdiction unless there is a binding arbitration clause.

The Court also rejected Silverstein's Due Process claim. Even assuming a hearing before the School Board would otherwise be insufficiently "judicial" to comply with Due Process, such procedural rights can be, and were, waived by the union.

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3. *COMPOSITION OF BARGAINING UNIT* Not Altered By Long Practice Or Employer Acquiescence. *Appeal of Hollis Education Assn.,* 163 N.H. 337 (March 9, 2012).

Two speech-language pathologists employed by the Hollis Sch. District tried to file an unfair labor complaint with the PELRB. The union certification, dating from 1976, included only "certified teachers, librarians and guidance counselors." The PELRB held, and the Court affirmed, that speech-language pathologists, while certified, were not "teachers," were not included in the bargaining unit.

The Court rejected arguments based on (a) a consistent practice for several decades of treating these employees as part of the unit; and (b) major changes in the teaching profession since 1976. The Court said the union should have sought an alteration of its certification, using the procedure in RSA 273-A. But that hadn't happened. Hence the PELRB lacked jurisdiction.

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4. *CONSTRUCTIVE DISCHARGE:* Claim Accrues When Resignation Is Submitted. *Jeffery v. City of Nashua,* 163 N.H. 683 (June 12, 2012).

Jeffery, a long-time payroll employee of the City, filed claims of constructive discharge and breach of contract. ("Constructive discharge" refers to a claims that an employee's working conditions have unlawfully been made so difficult and intolerable that s/he was forced to resign.) The issue here was when the 3-year statute of limitations begins to run in such a case. Based on detailed analysis, Justice Conboy concluded that the statute is triggered by the ***submission*** of the resignation (that being the act which resulted from the alleged illegal treatment), and ***not*** the later time at which the resignation actually becomes ***effective.***

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5. *PELRB AUTHORITY* Over Bargaining Unit Certification Is Exclusive. *Professional Firefighters of Wolfeboro v. Town of Wolfeboro,* ___NH___ (July 20, 2012).

In 2002 the Town entered into a purported collective bargaining agreement with its firefighters, who had never been certified by the PELRB as a bargaining unit. The agreement had a status quo provision which the Firefighters sought to enforce in 2010. They claimed the agreement was valid

under RSA 31:3 (amended 1955) which says towns "may recognize unions of employees and make…contracts with such unions."

The Court held that only the PELRB can certify a union for bargaining purposes, and to any extent that RSA 31:3 might imply otherwise, it was superseded by the comprehensive scheme represented by RSA 273-A, enacted in 1975. The 2002 bargaining agreement was therefore *ultra vires* and void.

The Firefighters' claims that the Town should be held to the agreement due to laches or estoppel were rejected. There was no evidence that the Town knew of any legal infirmity in the agreement until it met with legal counsel in 2010 (and no prior court decision had ruled on the relationship between the two statutes).

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So…overall, not exactly a stellar year for public employees in the New Hampshire Supreme Court.

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[End of Waugh, 2012 Municipal Law Update]