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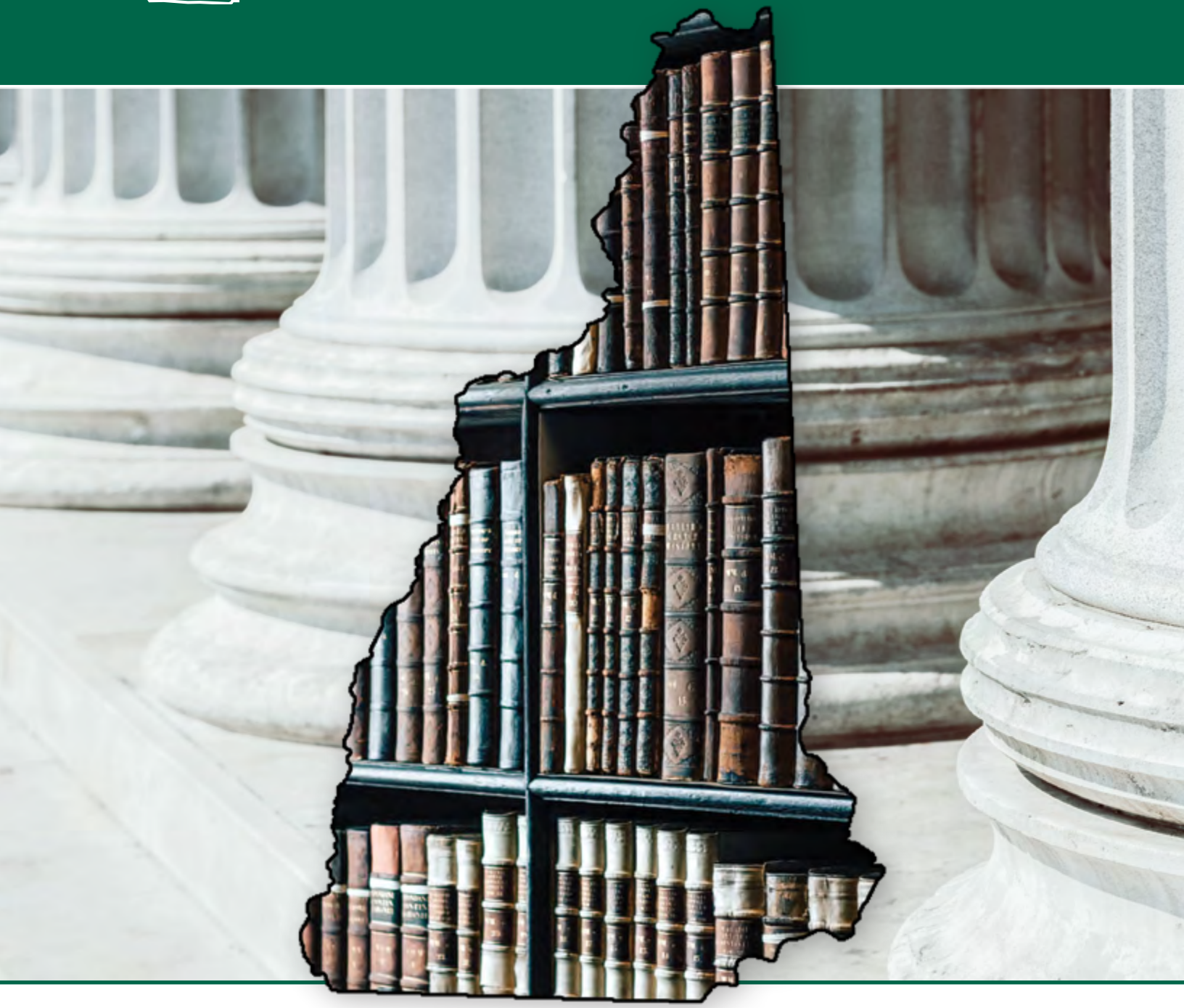

A compilation of case summaries prepared by the New Hampshire Municipal Association for the period covering October 1, 2023 through August 23, 2024.

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INTRODUCTION

The Court Update is a compilation of case summaries that appeared on the New Hampshire Municipal Association's (NHMA) website during the past year and are presented here as instructional material for municipal officials. Summaries have been compiled primarily from New Hampshire Supreme Court slip opinions; U.S. Supreme Court, First Circuit Court of Appeals, US District Court NH, NH Superior Court and Housing Appeals Board decisions of significance have also been included. The cases in this book cover the period from October 1, 2023 to August 23, 2024. Procedural aspects not germane to the central holding of a case have been left out.

Commentary is intended for municipal officials and is meant simply as a starting point in the local decision- making process. Nothing included in these summaries should be construed as legal advice on pending controversies or as a substitute for consultation with your municipal attorney.

NHMA's Legal Services attorneys are available to answer inquiries and provide general legal assistance to elected and appointed officials from member towns and cities. Attorneys can be reached by phone at 603.224.7447, or by email at *legalinquiries@nhmunicipal.org*.

CONSTITUTIONAL LAW

PPI Enterprises v. Town of Windham
NH Supreme Court
Case No. 2022-0707
February 2, 2024

An inverse condemnation claim is ripe for judicial review when the facts supporting the taking are well developed, the challenged action is final, and the impact on the parties is direct and immediate.*

The Town of Windham and PPI Enterprises have been involved in ongoing litigation regarding PPI's proposed site plan application to construct a self-storage facility. In August of 2021, after a prior appeal was remanded to the Windham Planning Board, the Board denied site plan approval due in part to safety concerns regarding the ten-percent grade of an access road. On appeal to the Superior Court, PPI argued the Board's consecutive denials of the site plan application rendered the property "essentially undevelopable, therefore resulting in an inverse condemnation without just compensation." In upholding the Board's August 2021 decision, the trial court ruled the Board's safety concerns arising from the grade of the proposed access road were sufficient to support denial of the application. The trial court also rejected PPI's claim for inverse condemnation because there remained plausible ways to develop the property if a second means of egress was sought or by resubmission of an application with an 8% road grade as required by the Chief of Police.

The Supreme Court concluded that there was an adequate reason for the Planning Board to reject the site plan due to the safety concerns arising from the proposed 10% grade of the access road to the self-storage facility. The Court then addressed whether PPI's claim of inverse condemnation was sufficiently developed to permit that claim to move forward.

PPI argued since the site plan was rejected by the Planning Board because a 10% grade for the access road was deemed unsafe, and the Board vigorously opposed the use of blasting operations to permit construction of an access road with an 8% grade, this demonstrated that further application for approval was futile. The Court explained that there is no set test to determine when regulation has gone too far and becomes a taking, an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A takings claims must be ripe for legal review, and the Court explained:

> Although we have not adopted a formal test for ripeness, we have found persuasive a two-pronged analysis that evaluates the fitness of the issue for judicial determination and the hardship to the parties if the court declines to consider the issue. With respect to the first prong of the analysis, fitness for judicial review, a claim is fit for decision when: (1) the issues raised are primarily legal; (2) they do not require further factual development; and (3) the challenged action is final. The second prong of the ripeness analysis requires that the contested action impose an impact on the parties sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage.

Because the town represented to the Court that the Planning Board would not necessarily deny a subsequent application that conforms with the 8% grade deemed acceptable to the Police Chief, the takings claims was not deemed ripe for review.

Practice Pointer: When drafting a disapproval of a land use application consider providing some guidance to the applicant on what modification of the application would permit granting approval.

**This decision is a final order of the court. Final orders are distinguished from court opinions in that they decide the merits of a case but do not create binding precedent. Final orders may be cited in briefs but only if identified as a non-precedential order. They can be helpful as guidance but are not law. See N.H. Sup. Ct. Rule 12-D (3).*

Lindke v. Freed
United States Supreme Court
Case No. 22-611
March 15, 2024

When a government official posts about job-related topics on social media, those posts will be deemed to be attributable to the State only if the official (1) possessed actual authority to speak on behalf of the State, and (2) purported to exercise that authority when he spoke on social media.

James Freed converted his private Facebook profile to a public page, thus allowing anyone to see and comment on his posts. In 2014, Freed become the city manager for Port Huron, Michigan, and began posting information related to his job, such as highlighting communications from other city officials and soliciting feedback from the public on issues of public concern. Kevin Lindke commented on Freed's Facebook posts, and he expressed his disagreement with the city's response to the COVID-19 pandemic. Freed then began deleting Lindke's comments and eventually blocked him from commenting at all. Lindke sued Freed under 42 U.S.C. §1983, alleging that Freed had violated his First Amendment rights. The District Court determined that because Freed managed his Facebook page in his private capacity, and because only state action can give rise to liability under §1983, Lindke's claim failed. The Sixth Circuit Court of Appeals affirmed.

On appeal to the US Supreme Court, the Court first observed that the Free Speech Clause of the First Amendment prohibits only governmental abridgment of speech, not private abridgment of speech. The question for the Court was whether Freed acted as a State Official engaged in state action or functioned as a private citizen. If Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own. The Court concluded that social-media activity constitutes state action under §1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media. To find that Freed acted with the authority of the State, that authority must have been rooted in written law or longstanding custom to speak for the State. That authority must extend to speech of the sort that caused the alleged rights deprivation. The inquiry is not whether making official announcements could fit within the public official's job description; it is whether making official announcements is part of the job that the State entrusted the official to do.

The Court noted that if the public official's social media page carried a disclaimer that it was a personal page or the views expressed were strictly personal views not on behalf of the government employer, it would be presumed the posts were indeed personal. The Court also ruled that a public official who fails to keep personal posts in a clearly designated personal account exposes himself to greater potential liability.

Practice Pointer: In order to avoid liability for deleting or blocking social media posts a public official should clearly label a personal social media account as only expressing personal views that do not represent the views of the government employer.

Sheetz v. County of El Dorado
United States Supreme Court
Case No. 2022-1074
April 12, 2024

Impact fees shall have an essential nexus to legitimate government interests and must have a rough proportionality to a development's impact on such land use interests.

George Sheetz applied for a building permit to construct a small, prefabricated home on his residential parcel of land in El Dorado County, California. To obtain a permit he had to pay a local traffic congestion fee for a single-family residence in the amount of $23,420. Based on the Court's decisions in *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994), Sheetz challenged the fee as an unlawful "exaction" under the Fifth Amendment Takings Clause. The California Court of Appeal rejected that argument because the traffic impact fee was imposed by legislation, and, according to the court, *Nollan* and *Dolan* apply only to permit conditions imposed on an ad hoc basis by administrators. The Supreme Court disagreed stating that The Takings Clause does not distinguish between legislative and administrative permit conditions.

Sheetz argued to the California Court of Appeal that the County had to make an individualized determination that the fee amount was necessary to offset traffic congestion attributable to his specific development. The County's predetermined fee, Sheetz argued, failed to meet that requirement.

The Court concluded that its decisions in *Nollan* and *Dolan* address this potential abuse of the permitting process. There, the Court set out a two-part test. First, permit conditions must have an "essential nexus" to the government's land-use interest. *Nollan*, 483 U. S., at 837. The nexus requirement ensures that the government is acting to further its stated purpose, not leveraging its permitting monopoly to exact private property without paying for it. Second, permit conditions must have "rough proportionality" to the development's impact on the land-use interest. *Dolan*, 512 U. S., at 391. A permit condition that requires a landowner to give up more than is necessary to mitigate harms resulting from new development has the same potential for abuse as a condition that is unrelated to that purpose.

The Court resolved that there is no basis for affording property rights less protection in the hands of legislators than administrators. The Takings Clause applies equally to both—which means that it prohibits legislatures and agencies alike from imposing unconstitutional conditions on land-use permits.

Practice Pointer: Whether an impact fee schedule is implemented through action by the planning board or adopted by the legislative body, the fee imposed "shall be a proportional share of municipal capital improvement costs which is reasonably related to the capital needs created by the development, and to the benefits accruing to the development from the capital improvements financed by the fee." RSA 674:21, V (a).

City of Grants Pass, Oregon v. Johnson Et Al.
United States Supreme Court
Case No. 23-175
June 28, 2024

The Eighth Amendment bar against cruel and unusual punishment does not prevent local government from enforcing laws banning camping on public property

The U.S. Supreme Court overrules a decision by the Ninth Circuit Court of Appeals in *Martin v. Boise*, 920 F. 3d 584 (2019) finding that the Eighth Amendment's prohibition against cruel and unusual punishment does not bar States and Municipalities from enforcing laws banning camping on public property. The *Martin* decision barred the City of Boise, Idaho from enforcing a public camping ordinance that made it a misdemeanor to use streets, sidewalks, parks or public places for camping where homeless individuals lacked access to alternative shelter. That access was deemed lacking according to the Ninth Circuit whenever there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters. Cities across the Western United States found the ill-defined involuntariness test to be unworkable, leaving local jurisdictions with little or no direction as to the scope of their authority in the day-to-day policing of public parks and places.

The Supreme Court observed that the Eighth Amendment's Cruel and Unusual Punishments Clause has always been considered to be directed at the method or kind of punishment a government may impose for violation of criminal statutes. The Cruel and Unusual Punishments Clause focuses on the question what method or kind of punishment a government may impose after a criminal conviction, not on the question whether a government may criminalize particular behavior in the first place. The Court found that that the punishments Grants Pass imposed on camping in public spaces were not cruel and unusual. The city imposes only limited fines for first-time offenders, with further enhancement of the penalty to include an order temporarily barring an individual from camping in a public park for repeat offenders, and a maximum sentence of 30 days in jail for those who later violate an order. Such punishments do not qualify as cruel because they are not designed to inflict terror, pain, or disgrace.

The Court concluded that The Constitution's Eighth Amendment serves many important functions, but it does not authorize federal judges to wrest from local officials their rights and responsibilities to develop and implement policies to address the complex problems of homelessness.

Practice Pointer: Under this decision local ordinances would be permissible that:

(1) prohibits sleeping on public sidewalks, streets, or alleyways.

(2) prohibits camping on public property with camping defined as setting up or remaining in or at a campsite, and a campsite being defined as any place where bedding, sleeping bags, or other material used for bedding purposes, or any stove or fire is placed for the purpose of maintaining a temporary place to live.

(3) that prohibits camping and overnight parking in public parks.

Penalties for violating such ordinances could escalate stepwise. An initial violation may trigger a fine. Those who receive multiple citations may be subject to an order barring them from municipal parks and public places for 30 days. Finally, violations of such orders can constitute criminal trespass.

EMPLOYMENT

Jason Boucher v. Town of Moultonborough
New Hampshire Supreme Court
Case No. 2022-00500
November 15, 2023

Public employees who suffer sufficiently adverse employment actions by municipal employers can make constructive discharge claims and a police officer who resigns under such circumstances can sue for wrongful termination even without exhausting administrative procedures under RSA 41:48

Jason Boucher was a Moultonborough police officer, rising to the position of sergeant and working full time, until he resigned in June 2020 due to actions of the Select Board ("Board") that "was very clearly aimed at undermining and isolating him." He alleged the Board flipped the chain of command diminishing his authority and harassed him with four allegedly meritless internal investigations in six weeks. He suspected it was retribution for supporting a candidate for chief that the Board did not agree with and for previously assisting other officers in forming a union.

Claiming he had little choice but to resign, Boucher filed a complaint in Superior Court alleging "Constructive Termination in Violation of RSA 41:48," the statute that guarantees police officers cannot be removed except for cause after notice and hearing. RSA 41:48. The trial court granted the town's motion to dismiss, saying he failed to exhaust his administrative remedies before going to court to seek money damages. Upon appeal of that decision, the Supreme Court had to consider whether Boucher had exhausted his administrative remedies, such as requesting a hearing, and whether constructive discharge is a cognizable cause of action in New Hampshire.

Regarding whether he sufficiently exhausted his administrative appeals, Boucher argued that the statute does not mention "constructive discharge," so its hearing requirement ought not apply in this case. The Court agreed. Citing *Karch v. BayBank FSB*, it defined "constructive discharge" as "when an employer renders an employee's working conditions so difficult and intolerable that a reasonable person would feel forced to resign." 147 N.H. 525, 536 (2002). While it acknowledged the policy reasons for the requiring a plaintiff to first exhaust administrative appeals are strong – judicial efficiency, agency autonomy, etc. – it also said RSA 41:48 only requires administrative process when "formally removed from [one's] employment by the Board." Because the statute does not address constructive discharge, the procedure in that statute does not apply, so there was no administrative appeal requirement for Boucher to satisfy. Additionally, on its face, "removal" proceedings are not at issue because Boucher resigned.

As for whether Boucher stated a claim upon which relief could be granted, the Court ruled that alleging constructive discharge satisfies the termination component of a wrongful termination claim. A wrongful termination claim is a cause of action in tort. *Porter v. City of Manchester*, 151 N.H. 30, 38 (2004).

Because the dismissal was reversed, the case will go back to the Superior Court to be assessed on the merits. The Plaintiff will still need to show the actions of the Board reasonably forced him to resign and that entitles him to damages.

Practice Pointer: Full-time police officers should only be removed through the process provided for in RSA 41:48, for cause and with a hearing before the Select Board. However sufficiently adverse employment conduct by a municipal employer against a police officer could bring about a claim for constructive discharge that could be deemed to be wrongful termination of employment.

HIGHWAYS

Lauren C. Shearer v. Town of Richmond
New Hampshire Supreme Court
Case No. 2022-0362
October 24, 2023

*If a town select board issues a decision denying a petition to lay out or accept a class IV, V, or VI highway, that decision constitutes "refusal" under RSA 231:38, the Supreme Court says.**

In 2022, the Superior Court granted summary judgment for the Town of Richmond in a case arising from a property owner's petition to lay out a class V highway. Lauren Shearer petitioned the select board to layout Bowker Road as a Class V highway to gain access to his property. Bowker Road was formerly a town road, laid out in 1766 and discontinued in 1898. Shearer's original layout petition was submitted to the select board in June 2021.

The Richmond select board scheduled a public hearing for November, which it noticed in October. Before the hearing could take place, Shearer emailed the town saying he would not participate in the hearing and filed a petition in Superior Court with two complaints. For one, he said the notice was given only 29 days prior to the hearing, not 30 as required by statute. RSA 231:9. For the other, he alleged that the town "neglected" to lay the road as petitioned. The hearing was cancelled and rescheduled for January 26, 2022; it was noticed on December 13, 2021, greater than 30 days prior. After the January hearing, the Board of Selectmen released a decision in March 2022 denying the petition to lay out Bowker Road as a class V road.

In the meantime, the proceedings before the Superior Court continued on the issue of the town allegedly "neglecting" to lay the road. The petition was made under New Hampshire RSA 231:38, I, which creates a cause of action "[w]hen selectmen have neglected or refused to lay out or alter [a class IV, V, or VI] highway." In January, shortly before the select board meeting, the Town filed a motion for summary judgment arguing the complaint did not sufficiently show it had "neglected" to lay the road: "plaintiff failed to demonstrate a material factual dispute on the issue of neglect." Shearer, representing himself, cross-filed for summary judgment. After the select board released its decision in March, the town submitted it along with an affidavit to the court to supplement the summary judgment motion. The Superior Court granted Richmond's motion and denied Shearer's, so the town prevailed. Shearer motioned for reconsideration, arguing that clearly the board's decision not to lay the road was a "refusal." The Superior Court denied the motion for reconsideration in part because it said it could not review the issue of "refusal" because the initial complaint had only raised "neglect." Shearer appealed to the Supreme Court.

The Town of Richmond argued that the Superior Court was right to only weigh "neglect" and not "refuse," as it was not initially briefed. Additionally, it argued that because of this, the complaint was not timely under the 60-day requirement of RSA 231:34, as more than 60 days passed between the November filing and Shearer first raising refusal. It also argued that this would be a new substantive claim, which cannot be raised in this type of motion. The Supreme Court disagreed.

The plaintiff argued and Court supported that the issue actually had been raised previously, thus it was preserved and not a new claim. It was raised by the Town of Richmond when it submitted its affidavit after the board of selectmen formally denied the petition. The Supreme Court, citing the dictionary definition of "refusal" and its 2011

ruling in *Crowley v. Town of New London*, said that the denial decision was refusal under RSA 231:38, I. Even if it had not already been raised, the Court implied that it would have been open for Superior Court review anyway. First, raising refusal late would not be inappropriate because the refusal itself had not happened until March, months after the initial complaint; second, New Hampshire's courts follow the principle that a party should not lose because of a "procedural technicality." *In re Proposed Rules of Civil Procedure*, 139 N.H. 512, 515 (1995). The motion for summary judgment for the town was reversed.

On the issue of whether to apply RSA 231:34 or 231:38, the Court said that RSA 231:38 applies because there was a refusal, not just a modification. Even if not, the 60-day tolling period under RSA 231:34 would have started from the March decision, not the November filing.

The Supreme Court remanded the case back to the trial court after reversing its ruling on the town's motion for summary judgment. It did not change the Superior Court's denial of the plaintiff's summary judgment motion, however. Now that neither of the opposing motions is granted, a trial shall be scheduled for the Superior Court to try the facts.

Practice Pointer: If a town select board issues a decision denying a petition to lay out or accept a class IV, V, or VI highway, that decision constitutes "refusal" under RSA 231:38 permitting the aggrieved party to appeal to the Superior Court.

**This decision is a final order of the court. Final orders are distinguished from court opinions in that they decide the merits of a case but do not create binding precedent. Final orders may be cited in briefs but only if identified as a non-precedential order. They can be helpful as guidance but are not law. See N.H. Sup. Ct. Rule 12-D(3).*

Appeal of James A. Beal & a.
New Hampshire Supreme Court
Case Nos. 2022-0182
October 12, 2023

It was reasonable for the HAB to overturn Portsmouth ZBA's decision blocking an apartment development because the ZBA failed to consider that economic unviability was sufficient to show a plan is not feasible and because it did not have the facts to say two applications were materially the same.

After years-long challenges from "a group of abutters and other concerned citizens," the New Hampshire Supreme Court reached a decision allowing development of a housing development along North Mill Pond in Portsmouth. In 2021, Iron Horse Properties, LLC, requested various approvals from the Portsmouth planning board regarding its planned redevelopment of the property. The company's proposal provided for three apartment buildings totaling 152 housing units and requisite parking. Previously, the site had industrial, and railroad uses, and the old rail infrastructure remained and, according to the developer, created a safety hazard. Iron Horse had submitted a proposal once before, for 178 units, but it was denied a variance by the ZBA. Its proximity to North Mill Pond means it contains a 100-foot wetlands buffer, which required conditional use permit to permit construction.

In addition to the rail setback and wetland buffer, the site contains view corridors to ensure that sightlines from perpendicular city streets to the water are not interrupted, and it contains a municipal sewer easement for pipes carrying wastewater to a nearby pumping station. Due to these restrictions and other land use requirements, Iron Horse sought a site review permit, lot line revision permit, and two conditional use permits: one for shared parking and one of building in the wetland buffer zone. On April 15, 2021, the planning board approved all the permits.

A "group of abutters and other concerned citizens" filed an appeal to the zoning board, which granted the appeal, effectively reversing the planning board's approvals. Iron Horse filed a motion for rehearing, which was denied, then appealed to the Housing Appeals Board. Of the nine claims the citizen group made before the ZBA, the Housing Appeals Board ("HAB") dismissed three and reversed six, meaning Iron Horse had prevailed. The group then appealed to the Supreme Court. The Supreme Court in reversing HAB decisions is limited to "errors of law" and "clear preponderance of the evidence … that such order is unjust or unreasonable." R.S.A. 541:13. Similarly, the HAB must accept the factual findings of municipal boards as reasonable, and it is limited in reversing such decisions only for "errors of law" and when convinced "by the balance of probabilities … that said decision is unreasonable." R.S.A. 677:6 and 678:9, I-II.

The first thing the Court had to address was whether the proposed project met the six criteria for a conditional wetland use permit under the Portsmouth zoning ordinance. Even though the petitioners express "some doubt" about all six criteria, they only briefed – and so the court only ruled on – two of them.

One was subsection (2), which allows conditional use permits in a wetland buffer only if "[t]here is no alternative location outside the wetland buffer that is feasible and reasonable for the proposed use,

activity or alteration." The petitioners argued that "smaller, truncated, and/or reconfigured versions" of the building could be placed elsewhere on the lot without violating the rail setback, view corridors, and sewer easement. The Court found for Iron Horse that the Planning Board and HAB did not err in finding no alternative was "reasonably feasible" or "viable" (which the Court says are synonyms). This is because the representative for the developer indicated at the initial hearing in 2021 that a smaller project would not be viable financially, as the project could not be built within economic likelihood of paying for itself. The Court found economic challenges sufficient to show infeasibility. It also found that the board was entitled to accept the representative's claim as fact. In doing so, it cited *Dietz v. Town of Tuftonboro*, in which it wrote, "it was not unreasonable for the [boards] to credit the representations made by [the applicant's] attorney that 'the cost would be prohibitive.'" 171 N.H. 614, 624 (2019).

The next criterion was in subsection (5): "The proposal is the alternative with the least adverse impact to areas and environments…" Similar to above, the Court found that moving the buildings to encroach less on the wetland buffer was not a workable alternative because it either would have required shrinking the buildings (infeasible) or run into the rail setback, view corridors, or sewer easement. It considered the representative's statement before the planning board again, as well as the four previously considered site plans, all of which would have also encroached into the buffer. The Court notes that the Portsmouth city attorney advised the planning board and that the wetland buffer had been previously disturbed as indicating the board was not unreasonable.

The second thing the court had to consider was whether the permit was lawful in the first place; local boards have wide discretion, but that discretion does not survive illegality. Under the doctrine of *Fisher v. Dover* land use boards cannot grant applications without material changes from a similar application that had been previously denied. Before the 2021 permit applications, Iron Horse applied for a variance in 2019 for a slightly different version of the project, which the ZBA rejected; in its appeal here, the ZBA said the new proposal was not materially different, and the Housing Appeals Board disagreed. The petitioners said the HAB must accept ZBA findings as fact and cannot allow approval of a previously rejected proposal. The Court disagreed.

The Court highlighted the material differences. The 2019 plan noted the height of the buildings at 60 feet, requiring a variance from the allowed 50 feet. The final 2021 plan measured it at 50 feet from the "new average grade plane" and even though the petitioners objected to the measurement, they conceded it was "exceeding 50' and reaching almost 60' in height." The HAB was right to find that the zoning board did not have the facts upon which to base its ruling that the proposals were materially the same, so the Supreme Court affirmed the HAB's ruling.

The Supreme Court affirmed the Housing Appeals Board decision as neither legally erroneous nor unjust or unreasonable and effectively ended challenges preventing the new housing development in Portsmouth.

Practice Pointers: (1) local land-use control boards may take the representations of a party or its attorney as true for the purpose of making decisions on applications; (2) a developer may show that alternative site plans are infeasible or unviable even if only because it will be more difficult for the developer to justify its investment; and (3) for a board to say that an application is too similar to a past rejected application, the factual record must support that finding.

Appeal of Town of Roxbury
New Hampshire Supreme Court
Case No. 2022-0238
November 14, 2023

*NH Supreme Court reverses Housing Appeals Board (HAB) decision and reinstates planning board decision because the HAB wrongly substituted its judgment for the decision of the planning board**

Greatwoods Unity Forests, LLC (Greatwoods) applied to subdivide a 159-acre lot fronting Middletown Road in Roxbury into three lots. Two of the lots would be about 6 acres each and, with a remainder parcel of 148 acres.

It was reported to the Planning Board that the zoning requirements would allow the lot to be divided into up to 31 lots, although just the two plus remainder were proposed, that would allow for two-family residences to be built on each, for a total of six possible households. At the meeting, the town's fire chief and the Board's chairman expressed concern about added traffic on Middletown Road, which "becomes virtually impassable during mud season," according to the chair. The surveyor for the property, who is a road agent in another municipality, said, "[i]f Middletown Road is already considered to be substandard, the Town should address that matter on its own initiative."

The Board denied the application, citing the expense to maintain Middletown Road, let alone with additional usage. It called the road unsafe and said the effects of added traffic were too much a burden to accept. In its memorandum of decision, the Board listed conditions making the road dangerous for new households, including its dead end without a passable outlet, narrow sections, and absence of guardrails and sidewalks. It said, "Middletown Road is at its capacity to safely support the present density of residencies." It cited the state law that says, in part, a town can block "subdivision of land as would involve danger or injury to health, safety, or prosperity by reason of the lack of water supply, drainage, transportation, schools, fire protection, or other public services." RSA 674:36, II(a).

Greatwoods appealed to the Housing Appeals Board ("HAB"), arguing that the decision was illegal and unreasonable as not based on facts found in the record. For example, Greatwoods said that since three of the four voting members of the Board lived on Middletown Road this meant their personal opinions clouded their decision making. Counsel for the town argued to the contrary that board members appropriately used their personal, firsthand knowledge, not opinion, to inform the decision making. After a hearing and site walk, the HAB reversed the Board's decision, finding for Greatwoods. The Town of Roxbury appealed to the NH Supreme Court.

The Supreme Court had to assess whether the HAB had wrongfully "substituted its judgment for that of the Board," or erred in determining the Board improperly applied the RSA 674:36 standard pertaining to "scattered or premature development," or incorrectly concluded that the Board's denial was overly concerned about future development.

Regarding the Town's argument that the HAB substituted its judgment for the Board's instead of containing itself to whether the Board's decision was supported by the record, the Court agreed with the Town that "[t]he scope of the HAB's review of a planning board's decision is not to determine whether it agrees with the board's findings, but, rather, is limited to whether there is evidence in the record upon which the planning board could have reasonably based its findings," (citing *Appeal of Chichester Commons*, 175 N.H. 412, 415-16 (2022)). The Court said that not only did the HAB "substitute its judgment" by relying on its own observations rather than the factual records, but also by "discrediting the personal knowledge of the Board members." While a planning board cannot base a decision on vague concerns or mere opinion (*See, Ltd. Editions Properties v. Town of Hebron*, 162 N.H. 488, 497 (2011)), it can consider its members' own knowledge and familiarity with the region. *Nestor v. Town of Meredith*, 138 N.H. 632, 636 (1994). The Court said what the planning

board did here is more like *Nestor*, relying on personal observations, not mere personal opinion, especially because it was supported by the fire chief's testimony.

When addressing the argument by Greatwoods's the HAB was correct that the Board had no basis to deny the application as "premature or scattered," the Court pointed out that the Town has a provision in its subdivision regulations (§ 403) incorporating RSA 674:36, II(a), which addresses providing against subdivisions that would be "scattered or premature subdivision" that risk "danger or injury to health, safety, or prosperity." Pointing to its decision in *Garipay v. Town of Hanover*, the Court found again for the Town. That case said the Board must determine what amount of development would create a hazard as related to the services, including access for public safety vehicles and connection to public utilities. *Garipay*, 116 N.H. 34, 36 (1976). The HAB said the Board never addressed this test, but the Court found on appeal that the Board's conclusion that "The subdivision would increase danger to public health and safety, life and property, and is therefore denied" does directly address it. After all, the Court says that prematurity is a relative, not absolute, concept. *Id.*

On the issue of whether HAB erred by "concluding that the Board's decision to deny the subdivision application was based on a concern about future development," the Court held, that "any denial of subdivision approval will naturally have the secondary effect of limiting growth." *Ettlingen Homes v. Town of Derry*, 141 N.H. 296, 298 (1996).

The Supreme Court reversed the HAB's decision and reinstated the Board's denial of the subdivision application.

Practice Pointer: RSA 674:36, II(a) empowers local government to include in their subdivision regulations provisions to provide against such scattered or premature subdivision of land as would involve danger or injury to health, safety, or prosperity by reason of the lack of water supply, drainage, transportation, schools, fire protection, or other public services, or necessitate the excessive expenditure of public funds for the supply of such services.

**This decision is a final order of the court. Final orders are distinguished from court opinions in that they decide the merits of a case but do not create binding precedent. Final orders may be cited in briefs but only if identified as a non-precedential order. They can be helpful as guidance but are not law. See N.H. Sup. Ct. Rules 12-D(3), 20(2).*

Harvey v. Barrington
New Hampshire Supreme Court
Case No. 2021-0601
February 27, 2024

Subdivision approvals are subject RSA 674:41 and lots shall have street access

A subdivision approval by the Barrington Planning Board in 2006 created two lots; a front lot (lot 1-0) that was subject to an easement for access and utilities for the benefit of a back lot (Lot 1-1). The deed to the purchaser of the front lot recited that it was subject to a forty-foot-wide access and utility easement as shown on the 2006 plan. Note 12 on the approved plan stated the easement was to be used for a single lot and one building location on Lot 1-1.

In 2021 the owner of Lot 1-1, Hendersons, sought and received ZBA approval for one additional building lot. Over the protest of the owner of Lot 1-0, Harvey, the Planning Board then approved a further subdivision of Lot 1-1 into two lots. Harvey appealed the subdivision approval to the Superior Court where the court sided with Hendersons ruling that the ZBA and Planning Board had respective authority to approve variances and amend subdivision plans.

Harvey argued on appeal that the trial court erred by upholding the planning board's decision to approve a second lot in reliance on the deeded easement, which, she argued, restricts access to only one lot. She also argued that the ZBA lacked the authority to modify the easement by modifying the restrictions in the 2006 plan, which were incorporated into her deed.

On appeal to the Supreme Court, the court first decided that the easement language that burdened Lot 1-0, for the benefit of Lot 1-1, incorporated language found on the recorded 2006 plan, and that language clearly limited the use of Lot 1-1 to a single lot and one buildable location. Consequently, neither the planning board nor the ZBA could change the terms of that easement through subdivision approval. In light of this limitation on the access easement, the planning board's decision to conditionally approve the subdivision contradicted the requirements of RSA 674:41. That statute requires that a lot shall not be issued a building permit nor be granted subdivision approval, unless the lot has access to a street. As there was no access for two lots over this easement as it is limited to "a single lot and one buildable location," the planning board was precluded from approving the new plan absent legal access to the back lot consistent with RSA 674:41. *Turco v. Town of Barnstead*, 136 N.H. 256 (1992).

Practice Pointer: Subdivision approvals need to be cognizant of easement rights of the subdivided properties, and those rights may incorporate limitations and conditions from recorded plats and plans. Obtaining a written affirmation by the land use professional representing the applicant (i.e., licensed land surveyor, civil engineer, etc.) that the planning board's proposed subdivision approval is not contrary to such easement interests should be considered.

Newfound Serentiy, LLC v. Town of Hebron
New Hampshire Supreme Court
Case No. 2023-0153
April 3, 2024

Failure to timely file a Housing Appeals Board appeal does not preclude proceeding with a timely appeal to the ZBA since the HAB appeal would be premature before the ZBA had the opportunity to rule on the zoning questions

Newfound Serenity was denied site plan approval by the Hebron Planning Board for a seasonal recreational vehicle park and Newfound appealed that denial to both the Housing Appeals Board and the Hebron ZBA. The appeal to the HAB was dismissed as being untimely (a dismissal that Newfound did not appeal), but the appeal to ZBA was timely and the ZBA overturned four of the Planning Board's reasons for denying the site plan but upheld one reason and declined to address two other reasons for lack of statutory authority. Newfound then appealed the ZBA decision to the Superior Court.

In the Superior Court the Town argued that Newfound effectively bifurcated its initial appeal such that the ZBA would review the Planning Board's reasons for denial related to the zoning ordinance and the HAB would review the reasons for denial falling outside the ZBA's jurisdiction. The Town asserted that because two of the Planning Board's reasons for denying site plan approval were exclusively within the HAB's statutory authority to review and because the HAB dismissed the plaintiff's appeal as untimely, and the plaintiff did not appeal the dismissal to Supreme Court, the Planning Board's decision as to those issues became final. The Town also argued that because Newfound appealed the Planning Board decision in part to the HAB, the plaintiff waived its right to bring an action in superior court. The superior court agreed with the Town and granted the motion to dismiss. This appeal followed.

On appeal to the NH Supreme Court, the Court first observed that the governing statutes require that issues arising from a planning board decision that are appealable to the ZBA must be resolved by the ZBA before an appeal can be taken to superior court or the HAB. In this case, the ZBA finally resolved the plaintiff's appeal with its dismissal of the motion for rehearing on October 11, 2022. On October 27, 2022, Newfound plaintiff filed its complaint in superior court appealing the Planning Board and ZBA decisions. That complaint was otherwise timely and proper under the statute. Read as a whole, the applicable statutes contemplate final resolution of zoning-related issues by the ZBA before an appeal of a planning board decision to superior court (or the HAB) becomes timely. The objective is plain: exhaustion of ZBA remedies avoids serial litigation and potentially inconsistent outcomes arising from a single site plan application. Therefore, considering this objective and under the plain language of the statutes, the plaintiff's initial appeal to the HAB was not late; instead, it was premature. Therefore, the dismissal by the trial court was erroneous and reversed by the court.

Practice Pointer: Aggrieved planning board applicants whose plats or plans are rejected for reasons related to zoning compliance must first bring their appeal to the ZBA in order avoid serial litigation and potentially inconsistent outcomes.

Mojalaki Holdings v. City of Franklin
New Hampshire Supreme Court
Case No. 2022-0122
April 9, 2024

Denial of site plan approval cannot be based solely on the purpose provisions of the planning board's regulations

Mojalaki Holdings sought site plan approval from the Franklin Planning board for a solar panel array that required installing new utility poles and cutting down mature trees so the solar panels can receive sufficient sunlight. It would sit on about six and a half acres of the approximately 96 acres of land owned by Mojalaki. The City's site plan review regulations had no ordinance language specifically addressing solar panel arrays. Neighbors to the project raised concerns about impacts to the local scenery and general distrust of solar projects due to prior bad experiences.

The Board denied site plan approval by concluding that the project conflicted with several of the purpose provisions in the City's site plan review regulations and gave three reasons for its denial. First, it opined that installing new utility poles would "create an industrial look and character which is out of place in this neighborhood." Second, it opined that the solar panel array "creates an endangerment, an adverse impact, to both the direct abutters to the project, and to the overall residents of the neighborhood." And third, it opined that cutting down mature trees to plant new trees contradicts the purpose provisions. Mojalaki appealed the decision to the superior court where the court upheld the denial of the site plan application, relying on the first and third of the Board's three reasons for denial.

The Supreme Court agreed with Mojalaki's argument that it was illegal and unreasonable for the Board to deny solely in reliance on the purpose provisions of the site plan regulations. As the Court explained, purpose provisions outline the goals of site plan review regulations. Conversely, other provisions detail the specific technical requirements that applications must meet to achieve the goals of the purpose provisions. The purpose provisions do not detail specific requirements that an applicant must meet. Without specific requirements, the applicant is left without objective standards to guide the application and the proposed project is left to be judged by the subjective views of the Board through ad hoc decision making. Turning to its' decision in *Trustees of Dartmouth Coll. v. Town of Hanover*,171 N.H. 497 (2018) the Court concluded that sole reliance on the purpose provisions of the site plan review regulations to deny the approval was an ad hoc decision motivated by vague concerns not founded on specific technical requirements of the site plan regulations. The Court then concluded that no further fact finding was necessary and granted Mojalaki a builder's remedy requiring compliance with 14 conditions spelled out in the town planner's draft decision in favor of approval.

Practice Pointer: When addressing approval or disapproval of a site plan the planning board should be guided by specific technical requirements applicable to the proposed use, and not based solely on the general-purpose provisions of its regulations.

Appeal of Elizabeth Hoekstra
New Hampshire Supreme Court
Case No. 2023-0189
May 14, 2024

Zoning rules that provide limitations and restrictions on the manner of using travel trailers interpreted to permit short-term rental of such trailers

The Hoekstras own a single-family home in the residential district in Sunapee and maintain a travel trailer on their property they use as a short-term rental. The town's zoning administrator notified the Hoekstras the use of the travel trailer as a short-term rental was prohibited under the local zoning provision that states that any use not specifically permitted is prohibited. The Hoekstras appealed that determination to the Sunapee ZBA which upheld the zoning determination. The Housing Appeals Board upheld the decision of the ZBA.

Sunapee has a "permissive" zoning ordinance under which any use not expressly permitted is prohibited. Article IV of the ordinance is titled "Use Regulations," and within that article, section 4.10 contains a list of uses permitted by right or by special exception in each zoning district, "subject to the other provisions of this ordinance." Separately, Article III of the ordinance, titled "Dimensional Controls," contains a section, 3.40, titled "Additional Requirements," which apply in all districts. Subsection 3.40(m) states that travel trailers "are permitted," subject to certain restrictions.

The town argued that since the short-term rental of a travel trailer was not a use permitted under section 4.10, it was prohibited. The Hoekstras did not claim that section 4.10 permitted their use but argued that the "additional requirements" essentially created an additional permitted use, rather than imposing a restriction on uses permitted under section 4.10. The town acknowledged that a travel trailer was allowed on the property but stated that offering it to the public as a short-term rental constituted a separate use that is not permitted.

The Supreme Court concluded that under the plain language of the "additional requirements" a travel trailer is a permitted use and may be used for temporary sleeping quarters for not more than ninety days in a twelve-month period so long as it complies with State or Town sewage disposal requirements and all other provisions of the ordinance including building setbacks. The Court further declined to address any policy considerations regarding the effect of short-term rentals, limiting its decision to a review and interpretation of the plain language of the Town's ordinance. *Town of Conway v. Kudrick*, 175 N.H. 714, 721 (2023).

The Court concluded that the Housing Appeals Board erred as a matter of law and reversed its order upholding the ZBA's decision that the Hoekstras' rental of their travel trailer for short-term occupancy is not permitted under the Town's ordinance.

Practice Pointer: Municipalities should carefully examine zoning regulations that seemingly only dictate use limitations on permitted uses and scrutinize those provisions to be sure uses not listed as permitted uses in a table of uses do not get inadvertently permitted.

Appeal of Town of Hollis
New Hampshire Supreme Court
Case No. 2023-0346
May 24, 2024

Planning Board improperly rejected plan acceptance when it conducted a substantive review where it should have only determined if the checklist items had been submitted

Elderly housing developers, Raisanen Homes and Toddy Brook Investments, appealed to the Housing Appeals Board (HAB) when the Hollis Planning Board denied plan acceptance of their proposed 40-unit project. After completing conceptual consultation and design review, the planning board rejected plan acceptance for three reasons: (1) failure to comply with the general standards of the Hollis Zoning Ordinance related to housing for older persons; (2) failure to provide a detailed water supply report; and (3) failure to comply with subdivision regulations related to road and driveway design standards.

On reversing the decision of the planning board, the HAB concluded that the board unlawfully denied the application as incomplete. The HAB found that "the record in this appeal reveals that the Applicant completed the subdivision application and checklist provided by the Town."

On further appeal to the NH Supreme Court the town argued that it was appropriate for the planning board to consider some level of substantive review to ensure zoning compliance prior to accepting an application as complete. The court disagreed pointing out that whether an application is "complete" is an administrative task by which a planning board ensures only that the applicant has provided sufficient information to allow the board to proceed with consideration and to make an informed decision as to whether the proposed development satisfies basic requirements. Furthermore, the town's subdivision regulations define a completed application as one that provides all of the submissions and fees noted in a checklist found in the appendix to the subdivision regulations.

In upholding the decision of the HAB the court essentially ruled the Hollis Planning Board had engaged in a substantive review of developers' application, rather than simply determining whether the checklist of items for plan acceptance had been satisfied

Practice Pointer: When determining whether a plan is a completed application for plan acceptance under RSA 676:4, planning boards should avoid substantive assessments of the application and instead focus on whether the required checklist of items for plan acceptance spelled out in the board's regulations have been submitted.

RIGHT-TO-KNOW LAW

In Re City of Rochester
Office of the Right to Know Ombudsman
Docket No. RKO 2023-018
November 3, 2023

Media members who are resident citizens of neighboring states filing Right-to-Know requests on behalf of publications with New Hampshire addresses likely count as "citizens" under RSA 91-A.

The original version of RSA 91-A:4 stated that "*Every citizen* … has the right to inspect all public records … and to make" copies and abstracts thereof (emphasis added). Pt. 1, Art. 8 of the NH Constitution provides that ". . . the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Finally, today's Right-to-Know Law addresses this question in two places. RSA 91-A:4, I says, "*Every citizen* … has the right to inspect all governmental records … and to copy and make memoranda or abstracts of the records" (emphasis added). RSA 91-A:4, IV(a) does not bestow this access as a right, but presents it like an obligation of the government, saying, "Each public body or agency shall, upon request … make available for inspection and copying any such governmental record" that it has, except as prohibited by statute or RSA 91-A:5.

In August of 2023, the Right-to-Know Ombudsman (RKO) received an appeal on whether a person who is not a resident and citizen of New Hampshire can use RSA 91:4 to gain access to public records. Harrison Thorp, a resident and citizen of Lebanon, Maine, a handful of miles from where Lebanon and Rochester border one another, operates a digital publication called the "Rochester Voice" ("the *Voice*"). The *Voice* is registered for trademark protection in New Hampshire as an "online newspaper" and lists as its mailing address as a post office box in Milton, New Hampshire. Thorp, acting for the *Voice*, had submitted a Right-to-Know request to the City of Rochester, which he reports on. Rochester declined to grant the request, arguing that only New Hampshirites have the right to use RSA 91-A to gain access to public records as "citizens." The city argued "citizen" in the statute (which is not defined) is the same as "Resident; Inhabitant" under the law, defined as, "a person who is domiciled or has a place of abode or both in this state … and who has, through all of his or her actions, demonstrated a current intent to designate that place of abode as his or her principal place of physical presence."

The U.S. Supreme Court issued non-binding dicta supporting this position in its 2013 case *McBurney v. Young*, in which it identified New Hampshire as one of the several states whose "freedom of information laws … are available only to their citizens." Still, the U.S. Supreme Court does not have final say over the meaning and intent of New Hampshire's statutes or state constitution, so the RKO in his decision considered the likely intent of the legislature and policy impacts of each interpretation.

He looked at the public journals from the legislature at the time it passed RSA 91-A but found no discussion of why it used the phrase "Every citizen" or what it means. He then acknowledged the outcomes that were possible under different interpretations. It would be plausible under one interpretation, he said, for a legal permanent resident who owns property and is regularly engaged in civic affairs to be denied this right if they are not a naturalized citizen. So, he looked at all the facts that connected Thorp and the *Voice* – residence in a neighboring jurisdiction, a New Hampshire mailing address, and practice as a journalist whose coverage area is centered in New

Hampshire – to find that the statute is "likely [to] be viewed as sufficiently expansive to encompass the enterprise undertaken by Mr. Thorp in this case."

The Right-to-Know Ombudsman is charged with speedy resolution of cases, so he made this ruling while acknowledging that he has no authority to interpret or create binding precedent for the meaning of the law. That power is reserved to the New Hampshire Supreme Court's alone (see *Bel Air Associates v. N.H. Dept. of Health and Human Services*, 154 NH 228, 232 (2006)). Until the Supreme Court has ruled on this question, the U.S. Supreme Court's dicta and the Right-to-Know Ombudsman's narrow order are the guidance we have.

Practice Pointer: If requests for public records are made by a person or entity not a citizen of New Hampshire NHMA recommends that such requests be honored if the person makes the request in person or agrees to come to the municipal offices to retrieve the records.

Albert S. Brandano v. Superintendent of the New Hampshire S.A.U. 16 & a.
New Hampshire Supreme Court
Case No. 2022-0084
November 3, 2023

If a municipality or agency has promised a date by which documents requested under Right-to-Know law will be available, it must either make the records available by then or notify the requester of any delay.*

School Administrative Unit 16 ("the SAU") received a Right-to-Know request from Albert Brandano on July 4, 2021. The request sought documents relating to "Diversity, Equity, Inclusion and Justice" (DEIJ) committees from July 2019 through June 2021. In the request, Brandano identified documents related to that topic "in SAU16 or any School District in SAU16." There were eight request in total: (1) charters, member lists, and similar founding documents for DEIJ committees; (2) agendas, work product, and minutes from DEIJ committee meetings; (3) "All emails or other written communication" between DEIJ committee leaders and other SAU officials regarding "DEIJ activity"; (4) "All records of any DEIJ Activity" of any school board or subcommittee; (5) "All records of any DEIJ Activity of any SAU16 officer"; (6) contracts or applications related to DEIJ activities; (7) other records of expenses incurred supporting DEIJ activities; and (8) "All records of any DEIJ-Activity-related curriculum materials, for example books, that were distributed, assigned, recommended, or suggested to any SAU16 teachers or students." The superintendent confirmed receipt of the request by email on July 7.

In his email response to Brandano, Superintendent David Ryan explained that most of the requested material was publicly available via the SAU's website. He said that he needed five days to respond to requests (6) and (7) and 45 days to respond to request (3), as they would require time and labor to compile. On July 16, he sent material in response to requests (6) and (7) and said he would provide documents responsive to request (3) within "the 45 days previously indicated."

After those 45 days had passed, the plaintiff twice contacted the SAU to say that the SAU had not provided the missing information within the time as promised. On September 28, Brandano filed a complaint asking the Superior Court to order production of the information he requested and award attorney's fees and costs. On October 14th the SAU provided invoices from three schools in response to request (7) and filed a motion to dismiss, and thereafter a hearing was held on October 20. Despite the SAU still having not answered request (3), the court granted preliminary dismissal of the complaint on the condition the SAU adequately responded to request (3) within 45 days of the decision. Superintendent Ryan sent a PDF containing emails with some identifying information redacted in response to request (3) a week later, and in January he emailed Brandano saying all responsive documents had been sent. The plaintiff then filed a motion to compel, which was denied, and he appealed the order granting the motion to dismiss and denial of his request for attorney's fees.

On the appeal of the granted motion to dismiss, the Court found that the order was appropriate. The SAU successfully argued that it was the wrong target of the request, as documents requested were held by individual schools, not the SAU itself, which the Court says are distinct agencies for the purpose of RSA 91-A. "By its plain language, the statute identifies a school district as a public agency separate from a school administrative unit. RSA 91-A:1-a, V." It also agreed with the defendant that it need not produce every conceivable document to comply with a request, just to "[demonstrate], beyond material doubt, that, as of the date of the hearing, they conducted a search reasonably calculated to uncover all relevant documents." Citing *ATV Watch v. N.H. Dep't of Transp.*, it said, "the issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover" them. 161 N.H. 746, 753 (2011). (While the SAU did not submit one in this case, the Court advised that an agency could demonstrate such a search by submitting a thorough and detailed affidavit.)

On Brandano's motion to compel, which claimed over 300 pages of documents were missing, the Court again affirmed the trial court's decision and found for the SAU. On Brandano's claim that the PDF was over-redacted, the Court was convinced by the SAU's statement that it redacted names of parties not subject to the order only, i.e. not officials or DEIJ committee leadership, such as parents and vendors. Regarding the missing-pages claim, the SAU said it was "junk mail" and messages unrelated to the Right-to-Know request. The Court reviewed the documents to parse these claims and found that the trial court did not err in denying the motion to compel, as the SAU had already provided everything it was required to. Everything not provided was either not responsive to the request or already available. In doing so, it quoted *Triestman v. U.S. Dept. of Justice, Drug Enfor.*: "[T]o require an agency to collect and produce information that has already been made public would not further the general purpose of FOIA, which is to satisfy the citizens' right to know what their government is up to" and "FOIA does not obligate an agency to serve as a research service for persons seeking information that is readily available to the public." 878 F. Supp. 667, 671 (S.D.N.Y. 1995).

Finally, on the issue of attorney's fees, the Court had to evaluate whether the initial legal action was necessary to motivate the SAU to provide the documents under RSA 91-A. Because the SAU created a self-imposed deadline, and failed to meet that deadline, and still did not act on request (3) until after the trial court ruled on the motion to dismiss months later, the Court concluded that it "knew or should have known" it violated RSA 91-A. So, while Brandano is not entitled to attorney's fees related to seven of the eight requests, he can collect attorney's fees for costs incurred in getting the SAU to respond to request (3). The Court emphasized the "self-imposed deadline" in reaching this conclusion.

The Superior Court will consider the attorney's fees award on remand.

Practice Pointer: It is not always necessary to provide to a requester the date by which you will provide them with requested documents, but if you do, take care to adhere to it or inform the requester if there is a reasonable delay. Additionally, if requested information is already publicly available, it is sufficient to show the requester where they can find it on their own.

**This decision is a final order of the court. Final orders are distinguished from court opinions in that they decide the merits of a case but do not create binding precedent. Final orders may be cited in briefs but only if identified as a non-precedential order. They can be helpful as guidance but are not law. See N.H. Sup. Ct. Rule 12-D(3).*

American Civil Liberties Union of N.H. v. N.H. Div. of State Police
New Hampshire Supreme Court
Case No. 2022-0321
November 29, 2023

While RSA 105:13 protects some police personnel information during criminal trials, it cannot be used to deny a Right-to-Know request under RSA. 91-A. Still, RSA. 91-A:5 protects some personnel files if there is a strong privacy interest.

In February 2017, a New Hampshire state trooper and member of the state's Mobile Enforcement Team, Officer Wilber, pulled over a driver for having snow covering her vehicle's rear lights. The following events resulted in the driver spending 13 days in jail and having multiple allegedly unconstitutional searches performed of her effects and person. She initiated civil suits, the first of which settled, and state police and the Attorney General's Office investigated the officer's history and behavior, finding "disturbing facts" about his investigations that were "an embarrassment" to the state police. In August 2021, around the time the officer was dismissed and placed on the Exculpatory Evidence Schedule (commonly known as the Laurie List), the American Civil Liberties Union of New Hampshire ("ACLU") submitted a Right-to-Know request to the state police under RSA. 91-A:4 for "[all] reports, investigatory files, personnel, and disciplinary records concerning State Police Trooper Haden [Wilber] that relate to any adverse employment action." After the Division of State Police had "not produced the requested information" and appeared to have "no intention of doing so in the future," the ACLU filed a complaint to compel disclosure. The trial court found for the ACLU.

The Division argued that the requested records were exempt from disclosure under RSA. 105:13-b, III, which says in part "[n]o personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purpose of obtaining or reviewing non-exculpatory evidence in that criminal case" unless so ordered by a judge who reviews it in advance. The court disagreed with this reading, stating that there is no inference to be made about public disclosure from this statute which is about trial procedure. Citing *Doe v. Attorney General* and *New Hampshire Center for Public Interest Journalism v. New Hampshire Department of Justice*, the court said that RSA. 105:13-b has always only applied "within the limited context of a specific criminal trial." *Doe*, 175 N.H. 349, 354 (2022); *N.H. Center for Public Interest Journalism*, 173 N.H. 648, 656 (2020).

Additionally, the Division argued that the opinion of the Court in *Petition of State of N.H. (State v. Fuchs),* 174 N.H. 785, 791 (2022) said no further dissemination of police personnel files should be permitted beyond what is required under exculpatory evidence rules. The Court concluded this was a misread and "no further dissemination" referred to the party in *Fuchs* having already received the record and that language was instructing them not to disseminate it further. (See *Petition of State of N.H. (State v. Fuchs)*, 174 N.H. 785, 791 (2022). This decision specifically says it does not overrule or diminish *Fuchs*.

Right-to-Know law is meant to "ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." N.H. RSA. 91-A:1. This is not the same purpose as RSA. 105:13-b, which effectuates procedure for non-exculpatory evidence in a defendant's criminal case. The Court sees these as distinct and has no problem with two different statutes regarding police personnel records differently. The Right-to-Know law itself provides for exceptions agencies can apply to deny disclosure, including, "personnel … files whose disclosure would constitute invasion of privacy." N.H. RSA. 91-A:5, IV. To consider this exception, courts should use a balancing test weighing the government's interest in nondisclosure plus the individual's interest in privacy against "the strength of the public interest [in disclosure] as tied to the purpose of the Right-to-Know Law." Citing *Union Leader Corp. v. Town of Salem*, 173 N.H. 345, 355 (2020); *Reid v. N.H. Attorney Gen.*, 169 N.H. 509, 527-29 (2016).

Justice Hicks wrote the opinion of the majority, in which Justices Hantz Marconi and Donovan joined. In dissent, Justice Bassett contended that the RSA. 91-A:4, I clause saying every citizen has the right to inspect records "except as otherwise prohibited by statute" should be read broadly. Because RSA 105:13-b is a statute that the court has said prohibits disclosure of police personnel records "for all purposes other than fulfilling the prosecutor's duty turning over … relevant evidence," the dissent argues Right-to-Know law should not be allowed to be circumnavigated. Because the majority held for the ACLU, the Division of State Police will have to disclose the requested information as Right-to-Know law allows.

Practice Pointer: If a municipality or agency for any reason has an interest in not disclosing a police personnel record, subject to a Right-to-Know request, it must do so within the exceptions provided in RSA. 91-A, not statutes that are narrowly tailored to criminal proceedings, such as RSA 105:13. Additionally, this case reaffirms the Court's previous rulings which conclude that conduct by police officers, while on duty, may carry a small privacy interest, but in most cases that interest will be outweighed by a compelling public interest under the balancing test.

Jonathan Stone v. City of Claremont
New Hampshire Supreme Court
Case No. 2023-0083
March 20, 2024

Parties may not negotiate away the public's right to access records under RSA 91-A through private settlement agreements or confidentiality agreements.

A journalist sought disclosure of records related to the plaintiff via a Right to Know Request under RSA 91-A. The plaintiff was a former Claremont police officer. The records sought by the journalist were related to varies Internal Affairs reports against the officer. As part of a negotiated settlement between the officer and the City, the parties came to an agreement to "purge" the plaintiff's personnel file of all references to a suspension, notice of termination, and all events leading up to them. It was also agreed that the matter would not be reported to the newspaper or other media outlet, and if any media outlet asked about the events the parties agreed to provide no comment.

Now, the plaintiff argues that this agreement prohibits the disclosure of these records pursuant to a Right to Know request. First, the court recognized that the confidentiality agreement itself acknowledges that there may be other provisions in the law, or changes to the law, that would alter the confidentiality of these records. It is clear from the facts that these records are considered governmental records under RSA 91-A. They are investigative records related to the actions of a City police officer who was acting in his official capacity at the time. While the plaintiff may have a privacy interest in some of the information contained in these records, there is a strong public interest involved here. The terms of this settlement agreement between the City and the plaintiff will not supersede the constitutional requirements imposed under RSA 91-A and therefore, the records are subject to disclosure.

Practice Pointer: If a municipality intends to negotiate a confidentiality agreement involving public records that may be subject to disclosure, it must be cognizant about the limitations of such an agreement, should someone file a Right to Know request seeking such information.

Kenneth T. Michaud
v. Town of Campton Police Department
New Hampshire Supreme Court
Case Nos. 2022-0328
April 18, 2024

There is no blanket exemption contained within the Right-to-Know Law for records that may or may not be subject to a discovery motion in pending litigation. Instead, the Town should have gathered records and analyzed them for any possible exemptions/disclosures pursuant to a Right-to-Know request regardless of whether the requestor's motive was to circumvent the discovery process.

Plaintiff Kenneth Michaud submitted a RTK request to the town of Campton Police Department seeking certain records pertaining to himself, his address, or any member of his household. The town denied the request, asserting that, based on similarities between the request and a motion for discovery filed by the plaintiff in a separate litigation between the parties, the request constituted "a veiled effort to circumvent the discovery process" in that pending litigation and was therefore an impermissible use of the RTK Law. It was established that the Town of Campton neither collected the relevant documents pursuant to the RTK request, nor evaluated any documents for potential disclosure under a 91-A analysis, but rather sought to use a blanked exemption given the fact that there was pending litigation.

The court looked at the fact that the Town initially denied the request without first reviewing the records responsive to that request. The Town cited the *New Hampshire Right to Life* case and argued that this case establishes a categorical exemption to the RTK Law that applies when the requester's motive in seeking governmental records is to circumvent or supplement the discovery process in another pending litigation. The court reiterated its previous assertion that the requester's motive in seeking disclosure is irrelevant to the question of access, and as a general rule, if the information is subject to disclosure, it belongs to all, regardless of motive. Instead of focusing on the requester's motive, the test established in the *Right to Life* case assesses whether the disclosure of the requested records would in effect circumvent discovery limitations by releasing documents that would not be subject to routine disclosure upon a showing of relevance in other litigation. This is not a blanket exemption. Notably, in *New Hampshire Right to Life*, the State did not assert a blanket denial of the plaintiffs' request. Instead, the State produced some responsive documents and withheld or redacted others pursuant to a specific statutory exemption — indicating that it had compiled and reviewed records responsive to the plaintiffs' request before replying to that request.

Consequently, the Town violated the RTK Law by relying on a blanket exemption that does not exist. The court found that the denial of the plaintiff's request was based on motive and without first reviewing the records responsive to the request and determining which records, if any, should have been withheld or redacted because their disclosure was otherwise prohibited by statute or RSA 91-A:5.

Practice Pointers: Records which are subject to disclosure under the Right-to-Know law are available to any member of the public who wishes to access them. Just because there is pending litigation, does not create a blanket exemption which allows municipalities to deny producing public records. Municipalities should always apply an RSA 91-A analysis to records being requested regardless of whether or not those records could be obtained through other, non RTK, avenues. In many instances, records which are rightfully subject to a privacy exemption under RSA 91-A:5 could be obtained through other avenues, such as through the civil or criminal discovery process, but this does not mean that towns can deny RTK requests without first applying a proper exemption.

Union Leader Corp. v. N.H. Dep't of Safety
New Hampshire Supreme Court
Case No. 2023-0208
July 3, 2024

RSA 169-B:35 states that "court records" involving juveniles are to be withheld from public inspection. However, the term "court records" is not to be read as an expansive term. Court records are to include only records generated and possessed by the courts themselves. All other records are still subject to a privacy exemption analysis.

On October 13 and November 21, 2022 the Union Leader requested records from the Department of Safety under the Right-to-Know Law. The newspaper sought records, including incident reports, related to the response by NH State Police to the Sununu Youth Services Center. The Union Leader specifically requested records with confidential information redacted. The department refused to disclose any records on the ground that "law enforcement investigative records pertaining to juvenile delinquency…are confidential per RSA 169-B and are therefore not publicly available under RSA 91-A."

The department relied on the court's previous ruling in *Petition of State of New Hampshire,* 172 N.H. 493, arguing that the decision in that case broadly categorized "court records" to include law enforcement investigatory records concerning a juvenile. The court disagreed with this interpretation. The court stated that in construing the juvenile delinquency statutes and the Right-to-Know Law together, in light of their respective purposes, the court agreed with Union Leader that the term "court records" in RSA 169-B:35 should not be read so expansively as to "shield the entirety of a broad category of otherwise public records from a request made pursuant to the Right to Know Law, RSA 91-A, even if that record is related to alleged unlawful conduct by unidentified minors." The state's juvenile confidentiality statutes should be read to promote the goal of protecting juvenile anonymity, rather than broadly construed to prevent disclosure of otherwise public information that would be contained in redacted police incident reports involving juveniles.

The Right-to-Know Law exempts records whose disclosure is "otherwise prohibited by statute." RSA 91-A:4, I. RSA 169-B:35, II prohibits disclosure of juvenile "court records," a term that the statute does not define. The court now clarified that term to mean only records that are generated and possessed by the court itself. To the extent that a Right-to-Know request encompasses records generated and possessed by governmental entities other than the courts, this exemption contained within RSA 169-B:35 includes only information whose disclosure would run counter to the purpose of rehabilitating delinquent minors.

Consequently, this means that when records containing information about juveniles are requested under the Right-to-Know law, they will only be categorically exempt if the document itself was created by the court for court purposes. All other records that may be in the custody of the municipality, including police reports, investigative reports, or other documents related to the delinquency of a minor, are to be evaluated under the private vs. public balancing test while also considering the purpose of rehabilitating delinquent minors. To the extent that the identity of the minor can be redacted and protected, the remainder of the information may still be available for public inspection.

Practice Pointer: If a municipality receives a public records request for information involving a juvenile, you are most likely going to need to evaluate that request under a standard Right-to-Know analysis. To the extent that a redacted version of the record can be produced, adequately protecting private information, that information may need to be provided.

Charles Cole v. Town of Conway
New Hampshire Supreme Court
Case No. 2022-0648
May 3, 2024

The Primex pooled risk management program is not insurance and statutory governmental immunity remains intact for municipalities covered by Primex

Charles Cole brought a personal injury suit against the Town of Conway for injuries he suffered when he tripped over broken and missing sidewalk bricks. Conway moved to dismiss the complaint arguing Cole had failed to allege with particularity how it had received written notice as required by RSA 231:92. That statute provides that a municipality cannot be held liable for personal injury due to construction, maintenance, or repair of public highways and sidewalks unless such injury or damage was caused by an insufficiency and the municipality had notice of the insufficiency. The trial court dismissed the complaint due to the lack of evidence Conway received prior notice of the broken and missing sidewalk bricks. The trial court also ruled Conway was entitled to statutory immunity because the risk management coverage afforded by Primex was not an insurance policy within the meaning of RSA 507-B:7-a.

Under RSA 507-B:7-a, when a municipality has in place a policy of liability insurance it cannot assert immunity for performance of governmental functions, such as provided under RSA 231:92. Conway is a member of Primex's pooled risk management program and both the trial court and the Supreme Court concluded that the liability coverage afforded by Primex is not a policy of insurance as described in RSA 412 and hence RSA 507-B:7-a does not apply.

On the question of whether Conway had received prior notice of the sidewalk defects, evidence was offered at the trial court that a news article described statements by the Town Engineer at a select board meeting that seemingly suggested it was known "for years and years" the sidewalk pavers were improperly installed and were cracking and disintegrating. The Supreme Court agreed that if this were true this would satisfy the requirement under RSA 231:92, II. Cole was given leave to amend his complaint and to submit further evidence on remand whether Conway had prior notice of the sidewalk defect.

Practice Pointer: Municipal immunity arising out of highways and sidewalks under RSA 231:92 exists if insurance coverage is afforded by a pooled risk management program such as offered by Primex and there was no prior municipal knowledge of the highway or sidewalk defect.

Appeal of David Strauss
NH Supreme Court
Case No. 2022-0525
February 22, 2024

*For good cause shown a select board may grant a property tax abatement that effectively resolves a pending BTLA case**

In 2015 property owners Strauss were granted an abatement of $26,300 by the Effingham Select Board because the view from their property was incorrectly designated "panoramic" and "extreme distant." Then, in 2020, when a town wide revaluation again designated the property as having a "wide" and "distant" views that were closer to panoramic and extreme distant the Board accepted the recommendation of its contract assessor Avitar, and Strauss appealed to the BTLA seeking an abatement of $42,000.

Avitar moved to dismiss on the grounds that the Strauss failed to meet their burden of proof because they provided no evidence of the property's market value. The BTLA granted that motion, finding that the taxpayers "did not present any credible evidence of the Property's market value" and therefore failed to meet their "burden of proving by a preponderance of the evidence that they are paying more than their proportional share of taxes." Strauss timely move for rehearing arguing that their appeal was based upon a physical description error, not a valuation opinion difference, and therefore evidence of fair market value was not required. The BTLA issued an order suspending the dismissal order pending a decision on the taxpayers' motion for rehearing.

While the motion for rehearing was pending before the BTLA, David Strauss attended a public meeting of the Effingham Select Board where he argued his property's view had not changed since 2015 when the previous abatement had been granted. Taking note of the pending BTLA matter and the motion for rehearing, and the presentation by David Strauss, the select board voted to grant an assessed value abatement of $42,000 based on good cause shown under RSA 76:16, I (a). The taxpayer subsequently notified the BTLA of this abatement action and sought approval of that action as an informal settlement or dismissal of the pending appeal. The BTLA refused to accept the request for approval of the informal settlement, and later issued a show cause order seeking an explanation from town officials why and under what authority the Effingham Select Board granted the abatement for tax year 2020 after the BTLA had issued its March 30 decision dismissing the taxpayers' appeal. Following that hearing the BTLA issued an order that the Town was without authority to grant the abatement.

The Supreme Court ruled that the town select board effectively settled the case before the BTLA in accordance with New Hampshire's long-standing policy of promoting settlement. Under RSA 76:16, I (a) the select board may abate any tax, including prior years' taxes, for good cause shown, and could thereby resolve the pending BTLA matter.

Practice Pointer: Even where a property abatement appeal is pending before the BTLA a select board retains the ability to effectively settle that appeal by granting an abatement for good cause shown under RSA 76:16, I (a).

**This decision is a final order of the court. Final orders are distinguished from court opinions in that they decide the merits of a case but do not create binding precedent. Final orders may be cited in briefs but only if identified as a non-precedential order. Final Orders can provide helpful guidance, but they do not have precedential value. See N.H. Sup. Ct. Rule 20 (2).*

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