

## Selected Land Use Cases from NH Local Government Center's Court Update, 2008 Edition

### Banning Electronic Changeable Copy Signs Under Zoning Is Valid Restriction on Commercial Free Speech

#### **Carlson's Chrysler v. City of Concord**

No. 2006-362, November 8, 2007

Regulation of signs by zoning ordinance involves a unique set of issues under the First Amendment of the United States Constitution. Signs are a form of expression, but they are also structures that call for regulation. "Commercial speech," defined as "expression related solely to the economic interests of the speaker and its audience," receives less protection than other expression. The United States Supreme Court case of *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), adopted a four-part test to determine the validity of government restrictions on commercial speech: (1) whether the advertising is unlawful or misleading, in which case it would not be protected speech; (2) whether the ordinance seeks to implement a substantial government interest; (3) whether the ordinance directly advances that interest; and (4) whether the ordinance reaches no further than necessary to accomplish its stated goals.

In this important case the New Hampshire Supreme Court addressed the constitutionality of a zoning ordinance that prohibits electronic changeable copy signs, an issue of growing concern in cities and towns with sizeable commercial districts. The plaintiff auto dealer applied for a permit for an electronic changeable copy sign to display messages advertising its vehicle inventory. The Concord sign ordinance prohibited "signs which make or create an illusion of movement ... and signs which appear animated or projected, or which are intermittently illuminated or of a traveling, tracing, or sequential light type, or signs which contain or are illuminated by animated or flashing light ...[.]" The express purposes of the sign regulations included promoting aesthetics and traffic safety. The application was denied by the city code administrator, the denial was upheld by the zoning board of adjustment and the plaintiff appealed to the Superior Court.

Applying the *Central Hudson* test, the trial court found that the plaintiff's advertising was entitled to First Amendment protection and that the city's concerns for public safety and aesthetics were substantial government interests. However, the trial court ruled that the ordinance was unconstitutional because the city had failed to satisfy the third and fourth prongs of the test. The court ruled that generalized concerns about accidents caused by distracted motorists and negative impacts of unsightly signage were unsupported by evidence. The trial court also found that the city could achieve its objectives by regulating the number, proximity and placement of electronic display signs instead of banning them completely.

The city appealed to the New Hampshire Supreme Court, which disagreed with the trial court's analysis. The Court cited *Taylor v. Town of Plaistow*, 152 N.H. 142, 145 (2005): "[Z]oning is a legislative function, and judging the wisdom of the legislation is not the function of this court." The Court then applied the deferential standard of review: "The City 'need not provide detailed proof that the regulation advances its purported interests of safety and aesthetics' [citation omitted], and we hold that the trial court erred in substituting its judgment for that of the City's that prohibiting animated, flashing signs containing commercial advertising will 'enhance the appearance and aesthetic environment of the City' and 'improve traffic safety.'" Likewise, the Supreme Court ruled that the city's ordinance was not broader than necessary. "The most effective way to eliminate the problems raised by electronic signs containing commercial advertising is to prohibit them."

A related issue was a provision of the ordinance that permitted electronic signs whose message was limited to indications of time, date and temperature. This provision was very vulnerable to the claim that it discriminated on the basis of the *content* of the speech. The city amended the ordinance to prohibit all electronic message centers including time, date and temperature signs. The amended ordinance has been upheld as content-neutral by the

United States District Court in *Naser Jewelers, Inc. v. City of Concord*, 2007 WL 1847307 (D.N.H. June 25, 2007), but the decision has been appealed to the First Circuit Court of Appeals.

## **Zoning Ban on Electronic Messaging Centers Held Not a Violation of Constitutional Right to Freedom of Speech—Again**

### **Naser Jewelers, Inc. v. City of Concord**

U.S. Court of Appeals, 1st Circuit, No. 07-2098, January 18, 2008

For the second time in ten weeks the City of Concord's complete ban on electronic changeable copy signs was upheld against a claim that it violates the guarantee of freedom of speech under the First Amendment of the United States Constitution. In *Carlson's Chrysler v. City of Concord* (No. 2006-367, November 8, 2007) (see *New Hampshire Town and City*, January, 2008, page 38), the New Hampshire Supreme Court held that the ordinance was a valid restriction on commercial speech. In this case, however, the Court held that the ordinance satisfies the general constitutional test for "content-neutral" restrictions on speech.

The Concord zoning ordinance was amended in 2006 to prohibit all electronic messaging centers (EMCs). The stated purposes of the sign ordinance include promoting traffic safety and aesthetics. Claiming that an EMC had boosted sales by 18 percent at its Dover store, Naser Jewelers, Inc. (Naser) sought and was denied permission to erect an EMC at its Concord store. Naser then filed suit in the United States District Court for the District of New Hampshire, claiming a violation of its First Amendment rights. The trial court rejected a request for an injunction against enforcement of the ordinance, and Naser appealed to the First Circuit (the federal appellate court for this region).

In its decision, the First Circuit panel first observed that billboards and other signs are protected by the First Amendment but also subject to regulation under the police power. A "threshold" question in challenges to government restrictions on speech is whether the restriction is "content-neutral" or "content-based"; that is, whether the regulation discriminates based on the message. Where a sign ordinance regulates on the basis of whether the message is commercial or non-commercial, a special analysis is required to determine if the discrimination is justified. The Concord ordinance, however, is "content-neutral" because it bans *all* EMCs, not just commercial EMCs.

"Content-neutral regulations are permissible so long as they are narrowly tailored to serve a significant governmental interest and allow for reasonable alternative channels of communication." The Court stated that "both traffic safety and community aesthetics have long been recognized to constitute significant governmental interests." Turning to the question of how "narrowly tailored" the ordinance is, the Court held that the City was entitled to rely on its legislative judgments as to traffic safety and aesthetics, and the most direct and effective solution to the problem is a total ban on EMCs. Finally the Court stated that Naser has alternative means of communication through conventional signage and other modes of advertising. "The maximizing of profit is not the animating concern of the First Amendment."

## **Federal Court Upholds ZBA Denial of Special Exception for Cell Tower as Out of Character with the Neighborhood**

### **Omnipoint Communications, Inc. v. City of Nashua**

U.S. District, D.N.H., CV-07-46-PB, February 6, 2008

For more than a decade, land use boards have faced litigation in federal court when they deny permission to build telecommunications towers. The Telecommunications Act of 1996 (TCA) is intended to facilitate the national growth of the wireless telecommunications industry, including a mandate to municipalities to accommodate construction of telecommunications towers. 47 U.S.C. 332 (c) (7). The TCA provides that land use control regulations may not "effectively prohibit" wireless service in any given area by excluding towers. (This is a case-by-case determination, which depends on topography and location of other towers and typically requires the analysis of experts.) The TCA also creates a federal requirement that any decision of a local land use board

denying a request to place a personal wireless service facility must be (1) in writing and (2) supported by “substantial evidence contained in a written record.” This resembles the standard under state law for judicial review of a zoning board of adjustment or planning board decision.

Omnipoint Communications, Inc. (Omnipoint), a wholly-owned subsidiary of T-Mobile, applied to the Nashua zoning board of adjustment for a special exception to construct a wireless tower on common land of a cluster-style residential development, by agreement with the homeowners’ association. The ZBA denied the special exception on the ground that the tower would “impair the integrity or be out of character with the district or immediate neighborhood where it is located...,” contrary to the zoning ordinance.

Omnipoint filed suit in the U.S. District Court asserting both that the decision (1) effectively prohibits wireless service in the area and (2) was not supported by substantial evidence in the record. Omnipoint also added (3) a conventional ZBA appeal under RSA 677:4. The Court addressed the “substantial evidence” claim and the ZBA appeal based on the ZBA certified record, as is typically done in zoning and planning appeals in the superior court. Under the “substantial evidence” test, the reviewing court defers to the decision of the local land use board “provided that the local board picks between reasonable inferences from the record before it.” The Court found that the specific testimony of neighbors concerning the impact on their property and the neighborhood in general constituted substantial evidence that the proposed tower would be out of character with the surrounding neighborhood visually, aesthetically and functionally. The Court granted summary judgment in favor of the ZBA on both the “substantial evidence” claim under the TCA and the state law appeal under RSA 677:4.

The Omnipoint decision is the latest in a growing body of cases demonstrating that a land use board decision to deny a cell tower can be sustained under the TCA “substantial evidence” standard in federal court, much like an ordinary appeal in the state superior court, if the decision is carefully written and based on a fair evaluation of the evidence in a written record.

### **Aircraft Takeoffs and Landings Can Be Regulated as Accessory Uses by Special Exception**

#### **Tonneson v. Town of Gilmanton**

No. 2007-202, March 13, 2008

Under traditional zoning principles, it was difficult to establish aircraft takeoff and landing facilities in residential districts. Aircraft takeoffs and landings were rarely mentioned in zoning ordinances, and most ordinances prohibit all principal uses not expressly permitted. Accessory uses must be customarily subordinate and incidental to the principal use, and landing strips and helipads were not commonly associated with dwellings. As a result of the application of these two rules, an accessory landing strip was denied in *Durrett v. Salem*, 125 N.H. 29 (1984), and an accessory helipad was denied in *Treisman v. Kamen*, 126 N.H. 372 (1985). In 1996 the legislature reversed these rules, enacting RSA 674:16, V, which provides that aircraft takeoffs and landings are deemed permitted accessory uses unless “specifically proscribed” by local land use regulations.

In this case the Gilmanton zoning ordinance prohibited aircraft takeoffs and landings in some districts and permitted them in other districts as an accessory use by special exception. Tonneson was denied a special exception and filed suit, claiming that a special exception could not be required under RSA 674:16, V. The Supreme Court ruled in favor of the town. The Court held that accessory uses in general may be made subject to a special exception, and nothing in RSA 674:16, V provides otherwise. In so ruling, the Court clarified language in *Fox v. Greenland*, 151 N.H. 600, 606 (2004), which seemed to have suggested that accessory uses could never be regulated by special exception. On the contrary, the Court stated, “[through the use of special exceptions, a town can protect the rights of landowners both in areas where aircraft takeoffs and landings are acceptable and in areas where they are not.”

## **Abutters Must Exhaust Administrative Remedy by Appealing Building Permit to ZBA**

**McNamara et al. v. Hersh et al.**

No. 2007-225, April 4, 2008

It is a familiar rule in administrative law that parties must “exhaust their administrative remedies” before resorting to litigation in the courts. The rule defers to administrative control and expertise and promotes judicial efficiency. It also assures interested parties that a decision is final unless a timely appeal is taken. A common example is the building permit process. Under RSA 674:33 and 676:5 anyone dissatisfied with a decision to issue or deny a building permit must appeal to the zoning board of adjustment within a reasonable time (determined by ZBA rule). The ZBA decides whether the permit should have been issued under the terms of the zoning ordinance, and the ZBA decision is then subject to further review by the superior court.

The requirement to exhaust administrative remedies does not apply to all zoning and planning disputes. The New Hampshire Supreme Court has held that the rule does not apply where the nature of the issue is beyond administrative expertise, such as a challenge to the validity of a zoning ordinance. In such cases plaintiffs are allowed to file suit in superior court without first seeking a ruling from the administrative official and appealing to the board of adjustment.

In this case the McNamaras did not appeal issuance of a building permit to the Hershes for a house on an abutting lot. Instead, ten months after construction began, the McNamaras filed in superior court for a declaratory judgment claiming that the house exceeded the maximum lot coverage permissible under the zoning ordinance. The trial court dismissed the suit for failure to exhaust the administrative remedy—an appeal to the board of adjustment.

On appeal the Supreme Court upheld the trial court for two reasons. First the Court pointed out that issuance of a building permit in violation of a zoning ordinance is precisely the sort of error a zoning board of adjustment is intended to correct. The Court also ruled that the declaratory judgment action could not be allowed “after the appeal period expired, as that would undermine the finality of the [building permit] decision and leave the Hershes subject to uncertainty as to their rights.”

This case is noteworthy because the opinion thoroughly discusses the doctrine of exhaustion of administrative remedies and reaffirms that exceptions to the rule are quite narrow.

## **Zoning Ordinance Ban on Halfway Houses Denies Equal Protection Under the Law Under Heightened ‘Intermediate Scrutiny’ Test**

**Community Resources for Justice, Inc. v. City of Manchester**

No. 2007-646, April 18, 2008

This is the second New Hampshire Supreme Court appeal within two years arising out of the effort by Community Resources for Justice, Inc. (CRJ), a nonprofit organization, to locate a halfway house in Manchester under a contract with the Federal Bureau of Prisons. In *Community Resources for Justice, Inc., v. Manchester*, 154 N.H. 748 (2007), CRJ appealed from denial of a variance and also claimed that the zoning ordinance denied CRJ equal protection of the laws under the New Hampshire Constitution by discriminating against halfway houses. In that decision the Supreme Court took the opportunity to revamp the test for determining whether a feature of a zoning ordinance is a violation of an owner’s constitutional right to equal protection of the laws with respect to the use of property. The Court articulated a more rigorous test for “intermediate scrutiny” with the following features:

The classification in the legislation must be substantially related to an important governmental objective.

The burden to demonstrate the important objective rests with the government.

The government may not rely upon justifications that are hypothesized or “invented *post hoc* in response to litigation,” nor upon “overbroad generalizations.”

The Court remanded the case to the trial court for further proceedings. (See *New Hampshire Town and City*, March, 2007, “Court Update,” page 29.)

Following remand, the trial court held a hearing. The City argued that the ban on halfway houses is valid because there is “no doubt” that halfway houses are an “undesirable” land use and “[p]reventing a concentration of undesirable uses, including correctional institutions, within the City of Manchester is an important governmental objective to which the City’s zoning restriction is substantially related.” CRJ had submitted written letters, reports and studies from police, community and religious leaders, and law enforcement experts as evidence that the halfway house would provide an important social benefit and not pose any threat to neighborhood safety or property values. The trial court discounted the City’s argument as speculation and, based on the pleadings, argument and evidence in the certified record, found that the zoning ordinance as applied to CRJ violated CRJ’s equal protection rights by discriminating against halfway houses as compared to “other similar residential facilities and institutions.”

The trial court then granted CRJ a “builder’s remedy,” a direct ruling that the project as presented is reasonable and may be built without further municipal interference. The “builder’s remedy” is a concept formulated in affordable housing litigation to reward a successful plaintiff who has invested substantial time and resources in litigation in pursuit of a worthy objective. See *Soares v. Atkinson*, 129 N.H. 313 (1987), and *Britton v. Chester*, 134 N.H. 434 (1991).

On appeal by the City, the Supreme Court affirmed the trial court’s decision, quoting with approval the trial court’s conclusion that “[t]he City’s reliance upon ... hypothesized and overly generalized justifications is insufficient to meet the demanding intermediate scrutiny standard,” and agreeing that “the record is devoid of evidence justifying the City’s absolute ban on CRJ’s use of its property as a federal halfway house.” The Court also upheld the builder’s remedy as the most likely way to assure that “transition housing for federal prisoners is actually built.”

This case illustrates the challenges presented by the new intermediate scrutiny equal protection standard. Every zoning ordinance contains numerous classifications that represent policy choices: lists of selected permitted and prohibited uses; zoning maps that draw district lines; dimensional standards that affect all parcels in precisely the same way. In contested cases, municipalities will need to justify particular classifications of these types by proving how they actually promote important government objectives.

### **Variations: Substitution of One Nonconforming Use for Another Is Not Necessarily Consistent with the Public Interest and Spirit of the Ordinance**

#### **Nine A, LLC v. Town of Chesterfield**

No. 2007-475, June 3, 2008

The applicant owned approximately 86 acres of land in Chesterfield. A six-acre section was located on the shore of Spofford Lake, and contains a vacant 90,000 square foot institutional building which was previously used as a rehabilitation facility. The remaining 80 acres was located on the other side of a state highway, but supported the six-acre parcel with a well and sewage treatment facility. The applicant sought to redevelop the property by substituting single-family housing for the institutional building. Although the proposed use was less intense, it did not meet minimum lot size and lot coverage standards that had been adopted in an overlay district to protect the water quality and aesthetics of Spofford Lake. The Chesterfield Zoning Board of Adjustment denied three separate requests for area variances, finding the proposal would be contrary to the public interest, and inconsistent with the spirit of the ordinance. After the Superior Court affirmed the decision, the applicant appealed to the Supreme Court.

The Court rejected the applicant’s argument that substitution of a nonconforming use with a different nonconforming use always meets the public interest test and spirit of the ordinance test if the proposed new use is less intense and

more conforming than the existing use. As the Court noted, if that were the case, the local zoning ordinance and much of the ZBA enabling statute, RSA 674:33, I(b), would be rendered meaningless. While a ZBA may, with sufficient evidence, find that substitution of one nonconforming use for another does meet these tests, it is not compelled to do so.

### **Suitability of Land for Cell Tower Under Federal Telecommunications Act of 1996, May Make Parcel “Unique” for Purposes of ‘Unnecessary Hardship’**

**Ryder Daniels et al. v. Town of Londonderry et al.**

No. 2008-047, July 15, 2008

An application for multiple area and use variances was approved by the Londonderry zoning board of adjustment to allow the installation of a wireless communications tower in an agricultural residential zone where such use is not permitted. Conditions were attached to the approval to regulate placement of the tower, its height, and visual screening from abutting properties. Several abutters appealed, arguing that the ZBA decision was unlawful and unreasonable because it had allowed the federal Telecommunications Act of 1996 to preempt its own findings under state law, and that the required variance criteria had not been met. The trial court affirmed the decision of the ZBA. On appeal, the Supreme Court also affirmed. Factually, it found that while the ZBA had considered the impact of the Telecommunications Act, it had not allowed its provisions to preempt its own findings.

As a matter of law, the Court announced an important new principle for ZBAs to use when evaluating the element of “unnecessary hardship” in requests for either a use or area variance. While the federal Telecommunications Act of 1996 does not expressly preempt all local zoning regulations and permit the installation of wireless communication towers in any location, it does preempt local regulations which have the practical effect of preventing the provision of wireless services. Thus, if evidence is presented that a request for a tower is filed to “fill a significant gap in coverage,” the suitability of the specific parcel of land for that purpose may constitute a situation which makes that parcel unique for the purpose of the “unnecessary hardship” element of a variance analysis. While the land may be similar to other parcels in the general area under ordinary circumstances, its suitability for wireless service coverage may make it unique as a result of the Telecommunication Act of 1996.

It remains to be seen whether this new principle will be restricted to the Telecommunications Act, or may eventually be extended to other state or federal laws that encourage the installation of socially valuable uses. It certainly encourages ZBAs to take a broad view of the usefulness of the intended use as it considers the uniqueness of the land in a variance analysis.

### **In Administrative Appeal, ZBA Does Not Defer to Decision Made by Historic District Commission**

**Ouellette et al. v. Town of Kingston**

No. 2007-589, August 15, 2008

A key role of the zoning board of adjustment (ZBA) is to decide appeals from decisions of the official or board who administers and enforces the zoning ordinance. RSA 674:33, I (a); RSA 676:5. As recently as the case of *McNamara v. Hersh* (Case No. 2007-225, April 4, 2008), the New Hampshire Supreme Court held that abutters could challenge a building permit only by appeal to the ZBA because of the statutory scheme that recognizes the value of ZBA administrative expertise. (Court Update, *Town and City*, May 2008, p. 39.) In this case, for the first time, the Court was called upon to determine whether the ZBA is required to defer to the judgment of the “administrative official,” in this instance the historic district commission (HDC).

Konover Development Corporation (Konover) sought approval to construct a supermarket in the Kingston historic district. Under RSA 676:8 and :9 no building permit may be issued in an historic district without a certificate of approval from the HDC, after its review of advice, reports and recommendations from various town officials, groups and individuals with expertise. The ordinance set forth various criteria for compatibility of new development with the character of the district. The Kingston HDC denied a certificate of approval, and Konover

appealed to the ZBA under RSA 677:17, which allows aggrieved persons to appeal HDC decisions to the ZBA in accordance with RSA 676:5. The ZBA held a public hearing and considered the case de novo, which means the ZBA made its own decision on the evidence without deference to the findings or decision of the HDC. The ZBA granted approval to Konover, and the plaintiffs, Kingston citizens, appealed to the superior court, which upheld the ZBA's decision.

On appeal to the Supreme Court the plaintiffs claimed that the ZBA had applied the wrong standard of review. First the plaintiffs pointed to the language of RSA 674:33, I (a), which provides ZBA power to decide appeals "if it is alleged there is error . . . by an administrative official . . ." They argued that the ZBA should not consider an appeal de novo but should uphold the administrative decision unless there is a "clear error." The Court, however, pointed to the language of RSA 674:33, II, which provides that the ZBA "shall have all the powers of the administrative official from whom the appeal is taken." The Court concluded that "the ZBA is authorized by statute to step into the shoes of the administrative official. Although the words 'de novo' do not appear in the statute, the authority to act as the HDC is its functional equivalent." The Court then reviewed cases from other states that adopt the same de novo standard of review for administrative appeals to the zoning board of adjustment.

Next the plaintiffs argued that appeals from decisions of historic district commissions are unique administrative appeals and should be entitled to a "clear error" standard of review because of the HDCs' "special qualifications" under the statutes establishing historic district commissions, ordinances and regulations. RSA 674:45 et seq. The Court acknowledged the special responsibilities of the HDC but rejected the argument that this created a different standard of review in ZBA appeals.

Applying the deferential standard of review in ZBA appeals, the Court upheld the trial court's ruling that the ZBA decision was not unlawful or unreasonable.

### **Zoning Administrator Did Not Violate Constitutional Duty to Assist Opponents of Project with Their ZBA Appeal Process**

**Kelsey et al. v. Town of Hanover**

No. 2007-702, August 20, 2008

Zoning and planning litigation frequently deals with the constitutional rights of property owners aggrieved by regulation of their land use. In this case neighbors opposed to proposed construction of a house claimed that their constitutional rights were violated in the way they were allegedly misled by the Town's zoning administrator.

The Stochlics acquired a certain house in November 2005, planning to raze it and replace it with a new house. The plaintiffs Kelsey and Holloway were neighbors concerned with house size and zoning setbacks on the small, irregularly configured lot. The Hanover zoning ordinance requires a zoning permit for proposed construction to signify zoning compliance. Under the ordinance, when a zoning permit is issued, a copy is posted in a public place, and an appeal may be taken to the zoning board of adjustment within 15 days of issuance. A zoning permit was issued to the Stochlics on April 28, 2006 and posted as required. Kelsey and Holloway did not appeal within 15 days but did meet with the zoning administrator later in May and had an opportunity to view the plans and permit at that time. The Stochlics demolished their old house in October 2006, and stakes for a new foundation were placed. On October 25<sup>th</sup> the plaintiffs filed an appeal with the ZBA, claiming a setback violation.

At the ZBA public hearing Holloway testified that she and Kelsey had met with the zoning administrator in the fall 2005 and left the meeting with the "understanding" or "feeling" that they would be notified directly if any permit were to be issued to the Stochlics. The zoning administrator testified that she could not recall ever telling anyone who came to the office that she would give them more notice of a matter than was required. The ZBA dismissed the appeal for lack of jurisdiction because it was untimely. The superior court upheld the ZBA, and the plaintiffs appealed to the Supreme Court.

On appeal the plaintiffs did not challenge the validity of the 15-day appeal period but claimed that the allegedly misleading behavior of the zoning administrator made it a denial of due process of law to hold them to the deadline. The Court did not reach this issue of constitutional law, simply ruling instead that it was reasonable for the trial court to deny the plaintiffs' claim because of the vague and conflicting testimony

The plaintiffs also claimed that the zoning administrator violated a constitutional obligation "to provide assistance to all their citizens" under Part I, Article 1 of the New Hampshire Constitution by failing to provide "basic information concerning an abutter's development plan and the basic permit and appeal process." The Court reviewed the line of cases, beginning with *Carbonneau v. Rye*, 120 N.H. 96, 99 (1980), which addresses the duty of municipalities to reasonably assist property owners with the approval process for development. The Court then stated: "While we have no doubt that the constitutional duty imposed upon municipalities to provide assistance to their citizenry has relevance when an abutter or interested resident inquires about a proposed project, we cannot accept the scope of the duty the petitioners seek to impose in this case." The plaintiffs did not allege that regulations or files were withheld, nor did they point to any particular question that the zoning administrator failed to help them with. "On this record, we cannot endorse imposing upon the zoning administrator a constitutional duty to have taken some initiative to educate Holloway and Kelsey about the pendency of the project and about the permit and appeal process."

Municipal officials and staff have been on notice for many years that they have a constitutionally based duty to assist property owners with the application processes for local land use approvals. This case points out that a corresponding duty exists for dealings with abutters and others interested in proposed projects.

### **Lack of RSA 236 Junkyard License Does Not Invalidate Nonconforming Use under Zoning Ordinance**

#### **Guy v. Town of Temple**

No. 2007-784, August 21, 2008

A common problem for towns is the regulation of junkyards that were established before enactment of zoning and operated for many years without junkyard licenses. This case addresses issues concerning the interplay of junkyard licenses and the law of nonconforming uses.

RSA 236:111 et seq., "Motor Vehicle Recycling Yards and Junk Yards," provides for two types of licensing from the board of selectmen. (See LGC publication *How to Regulate Junk & Junkyards*.) Newly established junkyards require prior approval of location based on the likely impacts on surrounding property. RSA 236:118, :120. Junkyards established before the effective date of the statute are deemed approved as to location. RSA 236:125. All junkyards, however, are subject to an annual license that involves review of the ongoing operation. RSA 236:121-23. A fundamental principle of zoning is that an existing use, including a junkyard, is exempt if the use was lawful when the zoning restriction was enacted. A valid nonconforming use, once established, remains exempt unless abandoned by the property owner.

Guy owns a junkyard in Temple that has operated since sometime in the 1960's. Zoning was adopted in 1972. In 1999 the zoning board of adjustment determined that Guy's operation was a valid nonconforming use. Guy, however, never applied for a junkyard license until 2006. The board of selectmen denied the junkyard license and then issued a notice of zoning violation ordering Guy to cease operation on the grounds that he had forfeited nonconforming use status for failure to obtain a junkyard license and also had improperly expanded the junkyard. Guy appealed first to the ZBA, which agreed with the selectmen, and then to the superior court. The trial court went one step farther and ruled that the junkyard had never been a valid nonconforming use because it never had the required junkyard license, i.e., it was not in *lawful* existence when zoning was enacted.

On appeal to the Supreme Court, Guy argued that the ZBA decision in 1999 was final and could not now be challenged. He also argued that a valid nonconforming use, once established, cannot be divested for failure to comply with a business licensing law. The Court reviewed numerous cases from other states holding that lack of a

business license does not affect nonconforming use status. The Court quoted one of these cases with approval: “[T]he failure to obtain a license does not render the use unlawful in the sense intended by zoning ordinances which preserve existing lawful uses.” The major exception to the rule is where a junkyard licensing regulation controls location of the junkyard “as a quasi-zoning ordinance.” In some cases in other states, lack of such a license for location has been held to preclude valid nonconforming use status when zoning is later enacted. Moreover, for the period *after* enactment of zoning, the Court stated that “it is at least conceivable that a licensing scheme could be so closely aligned with zoning regulations that failure to comply with its terms might rise to the level of an abandonment of a pre-existing nonconforming use.”

Turning to the issues posed by Guy, the Court first agreed that, whether or not Guy should have obtained junkyard licenses prior to 1999, the ZBA decision is final and cannot be reexamined at this point. As for the period since 1999, the Court noted that, since Guy’s junkyard predated licensing under RSA 236, it was exempt from licensing of its location. It was therefore unnecessary for the Court to decide whether failure to obtain approval of location would divest the junkyard of its nonconforming use status. The Court then held that failure to obtain the annual operating licenses did not forfeit the junkyard’s nonconforming use status. RSA 236 itself provides the remedies of fines and injunctive relief for failure to obtain these licenses. Finally the Court determined that the record was inadequate to resolve the issue of improper expansion of the junkyard and remanded that issue to the trial court.

This case indicates that lack of an annual junkyard operating license does not affect the valid nonconforming use status of a junkyard under zoning. On the other hand, when a junkyard is established after the effective date of the junkyard licensing statute and does not obtain a license approving its location, the junkyard may be ineligible for valid nonconforming use status. As with the *Guy* case, however, if a town has treated a junkyard as a valid nonconforming use for many years, it may not be possible to correct its status belatedly.