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Court Update

TOWN OF BARTLETT V. EDWARD C. FURLONG

Amendment to RSA 676:17, I Applied Retroactively

New Hampshire Supreme Court No. 2014-0063, 9/22/2015

This case started when the defendant, Furlong, failed to obtain a building permit before beginning renovations on his property. Ultimately, the Bartlett Select Board filed a land use citation complaint in the district court under RSA 676:17, I, seeking the permitted fine: \$275 for the first day and \$550 for every day thereafter that the violation continued. In total, the fine was over \$300,000.

Although there was a somewhat complex procedural history and other issues were raised in the appeal, the pertinent issue was whether the court could retroactively apply a 2009 amendment to RSA 676:17, I to the defendant's case. Originally, RSA 676:17, I stated that "each day that a violation continues shall constitute a *separate violation*." The problem was that some fines may accumulate to total more than the district court's jurisdictional amount of \$25,000. Therefore, while most municipalities would enforce land use citations through district court rather than the superior court, the district court could not enforce fines totaling over \$25,000. Such was the result in the case of *Town of Amherst v. Gilroy*, 157 N.H. 275 (2008).

Due to this inefficient result, the legislature amended the statute to state that "[e]ach day that a violation continues shall be a *separate offense*." Now, because the amendment made each day is a separate offense, the fine for each day falls well below the district court's jurisdictional amount, making the total, cumulative fine irrelevant and remedying the problem.

This amendment was passed in July 2009 and took effect on September 11, 2009; the land use citation in this case was filed on December 12, 2008. The question for the New Hampshire Supreme Court was whether the amendment could be applied retroactively, thus giving the district court jurisdiction to impose a total fine that well exceeded \$25,000. If it could not be applied retroactively, then the district court had no jurisdiction to enforce the total fine.

The court summarized the law relative to retroactive application of statutes. If the statute is merely remedial or procedural in nature, it may be applied to cases pending at the time of enactment. If the statute affects substantive rights, then it cannot be applied retroactively. The court determined that this statute was merely remedial by looking at the legislative history, which revealed intent to fix the issue so that municipalities would not be required to go to superior court to enforce larger fines. Moreover, even before the amendment, the town had the ability to enforce the defendant's violation and obtain the same fine. The statutory amendment merely changed the forum within which the action must be brought. Therefore, the defendant's substantive due process rights were not affected.

Click Here to View Court Decision (<http://www.nhmunicipal.org/Resources/ViewDocument/494>).

Practice Pointer: This case provides an excellent discussion of the law of "retroactivity"—determining whether a statute can be applied retroactively or may only be applied proactively. The court's discussion is also relevant to the same issues arising out of municipal ordinances.

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Court Update

MERRIAM FARM V. TOWN OF SURRY

Variance Request Not Precluded by Building Permit Application
New Hampshire Supreme Court No. 2014-0702, 9/22/2015

In this case, the New Hampshire Supreme Court held that a denied building permit application did not preclude an applicant from subsequently requesting a variance.

The petitioner, Merriam Farm, first applied to the select board for a building permit to construct a single-family home on a Class VI road. The application was denied due to insufficient frontage, and the petitioner's appeal to the superior court was equally unsuccessful. Thereafter, the petitioner sought a variance from the frontage requirement. The variance was also denied.

On appeal to the superior court, Surry argued that the petitioner was precluded from seeking the variance because it was the same type of relief requested, and denied, through the building permit application. The superior court judge agreed that the unsuccessful building permit application precluded the ZBA from considering the variance application.

The New Hampshire Supreme Court disagreed and held that the variance request was not precluded. For Surry to establish that the legal doctrine of "claim preclusion" (also known as "res judicata") applied, it had to establish three elements: (1) the parties are the same or in privity with one another; (2) the same cause of action was before the court in both instances; and (3) the first action ended with a final judgment on the merits.

Because the parties agreed that elements one and two were met, the court needed to consider only whether the building permit application and the variance application were the "same cause of action" as required by element two. The court determined these were two separate claims because they did not arise out of the same transaction or occurrence. Here, it was impossible for the petitioner to add its variance claim to an appeal of the denied building permit, and establishing the statutory elements to obtain a variance is not part of the process for appealing a building permit. Furthermore, it is the ZBA, not the superior court, who must make the initial decision on a variance. Therefore, the petitioner's only option was to bring its variance request separate from its appeal from the building permit denial.

Click Here to View Court Decision. (<http://www.nhmunicipal.org/Resources/ViewDocument/496>)

Practice Pointer: Although it is true that an applicant cannot seek the same relief twice, this decision confirms that an applicant is not required to seek all different potential avenues for relief at the outset.

The court reasoned as follows:

If, based on res judicata, we were to bar a subsequent application for a variance after the denial of a building permit application, we would, as the petitioner notes, effectively require landowners to simultaneously apply for all potentially necessary land use permits, variances, and exceptions. Such would be costly and inefficient, and burden the zoning process by adding complexity to an already complicated process. Moreover, such a decision would contravene the statutory scheme, which explicitly establishes separate procedures for seeking exceptions to building permit requirements and seeking variances.

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