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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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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 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

CUTTING ET AL. V. CITY OF PORTLAND, MAINE

Ordinance Banning Activity in Medians not Narrowly Tailored

United State Court of Appeals, 1st Circuit, No. 14-1421, 9/11/2015

The City of Portland, Maine enacted an ordinance that prohibited “standing, sitting, staying, driving or parking on median strips.” A “median strip” was defined as a “paved or planted area of a public right-of-way, dividing a street or highway into lanes according the direction of travel.” In enacting the ordinance, the City cited safety concerns, both for pedestrian traffic on medians and for vehicular traffic on the roads. Three individuals brought a lawsuit, seeking a declaration that the ordinance was unconstitutional because it violated the First Amendment, both “as applied” and “on its face.” The U.S. District Court and the Court of Appeals for the First Circuit ultimately agreed that the ordinance was unconstitutional, but reached the result in different ways.

The Court of Appeals determined that the ordinance was unconstitutional because it was not narrowly tailored. In reaching this conclusion, the Court confirmed that the medians here were traditional public fora—those that historically have been held open for the purposes of assembly and public communication. The Court concluded this based on the fact that the City did not really dispute it, and two other circuit courts had previously held medians to be public fora.

The Court disagreed with the district court’s conclusion that the ordinance was content based. The Court found the ordinance to be content neutral because it restricted speech on the basis of “where it takes place.” It did not “take aim at” or “give special favor to” any particular message.

Therefore, the Court had to review the ordinance under the “intermediate scrutiny test”: whether the ordinance was narrowly tailored to serve a significant governmental interest. Essentially, the “narrow tailoring test” assesses how burdensome the ordinance is in light of the interests it is seeking to promote, asking whether the interests justify the burden. In addition, under this test, a court must look at whether there were less restrictive means that could have been implemented to serve the same interests.

The Court found the ordinance to be overly “encompassing.” It not only prohibited virtually all activity on median strips, but the definition of “median” was so broad that the prohibitions applied to nearly every median, even those large enough—and consequently safe enough—for pedestrian traffic. Similarly, the ordinance did not consider that traffic patterns, and therefore the safety concerns, may be different in some areas of the City than others, making the prohibition overly broad. In fact, the evidence produced by the City showed that the potential danger to drivers applied to a limited number of median strips. Therefore, the ordinance banned substantially more speech than necessary to serve City’s stated interests, and the burden on speech could not be justified in light of the City’s stated safety concerns.

Finally, the Court determined that there were less restrictive means available for the City to address the true safety concerns: enforcing stricter consequences to laws that prohibit disruptive activities in roadways; prohibiting the types activities that increased the likelihood of danger, like intoxication and belligerent behavior; limiting activities at night; or even limiting the prohibition to just the most dangerous medians in the City.

As a result, the Court held that the ordinance was not narrowly tailored.

Click Here for the Court's Decision. (<http://www.nhmunicipal.org/Resources/ViewDocument/489>)

Practice Pointer: *The Court noted that although “[t]he City may have been motivated by a perfectly understandable desire to protect the public from the dangers posed by people lingering on medians strips,” this particular ordinance was unconstitutional because “the City chose too sweeping a means” of trying to address its concerns. Importantly, this Court reaffirmed that a flat ban on speech in a particular forum (here, almost all City medians) can fail narrow tailoring even if other forums are left open (like parks). Interestingly, the City did not contest the district court’s determination that the medians were traditional public fora. As a result, the Court here noted that because the medians had the status of traditional public fora, they were presumptively suitable for the purposes of First Amendment conduct.*

Take Note: *In a footnote, the Court also states that the Massachusetts panhandling case that was recently held to be constitutional by the First Circuit—*Thayer v. City of Worcester*, 755 F.3d 60 (1st Circ. 2014)—was vacated and remanded to the district court to be reconsidered in light of the recent United States Supreme Court case *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015).*

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