



# LEGAL MATTERS

JANUARY 2003

## *New Hampshire Has a New Building Code*

As of September 1, 2002, the International Building Code (IBC) became the new State building code, replacing the Building Officials and Code Administrators (BOCA) Code. The IBC will replace the BOCA code for all municipal and commercial construction commencing September 1, 2003.

The State building code is a minimum code and municipalities are free to adopt any code or provision that is more strict than the IBC, however, if a town does not adopt a code, the IBC will apply to all construction codes in that town. In the case of a conflicting provision between the IBC and local codes, the more strict code will prevail. The statute, RSA 155-A, which was enacted to change the code, specifically excludes the IBC single and two family codes from the legislation, so there is still no State building code relative to this type of construction.

Enforcement of the State building code lies with local code administrators. In the event that there is no local code administrator in a particular town, the State Fire Marshal is responsible for administration of the Code.

There are some significant differences between the current BOCA code and the IBC. These changes will impact the preparation of specifications for many types of construction, as well as the cost of doing certain types of work. Anyone involved in non-residential construction should carefully review the new code prior to submitting bids or preparing specifications. The change to the IBC should help to eliminate code interpretation problems and standardize construction methods. Familiarity with the new code will be the key to a successful project.

## **Words of Welcome**

Please join us in welcoming Edward D. Philpot, Jr., Stacie Sirois and Dawn Perry to the firm. Ed lives in Laconia and has practiced law there since 1987. He received his law degree from Franklin Pierce Law Center and his undergraduate degree in history from Rutgers University. Ed has developed an expertise in construction law and litigation, building on his fifteen years of experience in the construction industry prior to his legal career. He is often invited to present legal education seminars on the topic. Ed also has an active corporate, business, and personal injury practice and supports alternative dispute resolution, providing services as a mediator and arbitrator.

Stacie is a life-long resident of the Lakes Region and currently lives in Laconia. Stacie has extensive experience as a legal assistant and paralegal. She has been employed with Concord and Lakes Region law firms for the past fourteen years and has worked with Ed for the past five years.

Dawn is a graduate of Hesser College in Manchester and has been working with Ed and Stacie as a secretary for the past two years. She will continue as the "voice" of the Lakes Region office.

Ed, Stacie and Dawn will provide services from the firm's new Laconia office.

## *Case Notes*

On January 10, 2003, the New Hampshire Supreme Court issued an opinion revisiting the issue of how to get a variance from the application of local zoning ordinances. Historically, the property owner seeking a variance was required to establish hardship by showing that the ordinance at issue prevented "any reasonable use of the land" in light of some unique condition on the land. With that standard in place, variances were not often granted because "some" limited use of the property always existed. In 2001, the Supreme Court redefined the standard and relaxed the hardship requirement. The most recent case further defines the new standard. Now, a property owner seeking a variance can establish hardship by showing that "special conditions on the land render the use for which the variance is sought reasonable." Although the words used by the Court are similar, the odds of obtaining a variance appear to have increased.

## *Associations Have the Right to Collect Unpaid Assessments*

According to New Hampshire law, condominium unit owners must pay for any expenses lawfully incurred by the unit owners' association for the repair, renovation, restoration, or replacement of any condominium common area. But what if the unit owner fails to pay these assessments? What can the association do? The association has a number of options.

First, as a preventive measure, the association may collect up to 6 months of assessments in advance from a unit owner, place it in an escrow account, and apply it to the

unit owner's future balance due. Second, after appropriate written notice and if permitted by the condominium documents, the board of directors may terminate the overdue unit's common privileges and stop supplying it with any and all services normally supplied or paid for by the association. Third, after complying with the procedure set forth in the condominium act, the association may collect rent from any tenant living in a delinquent owner's unit and apply it to the past due amounts of that owner. Finally, the association may file a lien in the

amount of the unpaid assessments against the unit owner.

Because of the dramatic impact that the failure of a unit owner to pay assessments may have, associations should consider a comprehensive collection procedure which incorporates all available options. An effective collection procedure will address the requirements of the association and the particular concerns of the unit owners within the condominium community. Fair enforcement of the policy will keep overdue balances low, which is in the best interests of all involved.

## *Planning and Zoning Decisions*

In December 2002, the New Hampshire Supreme Court devoted significant time and energy to resolving land use and planning cases. A brief review of the recent decisions may be helpful.

In Hudson, a developer sought approval of an elderly housing project. During the application process, the Town determined an impact fee which was included in the application. However, the fee was never assessed or paid. After the application but before approval, the Town enacted a growth management ordinance preventing the project.

In New Hampshire, a newly adopted growth management law will not affect any development which has already paid or been assessed impact fees. However, according to the recent decision, a preliminary estimate of an impact fee is not assessment or payment. Thus, the developer must comply with the subsequently enacted growth maintenance ordinance.

In another case, the Court addressed the statutory 4-year exemption available to developers after site plan approval. The exemption provides that site plans already approved are exempt for a period of 4

years from subsequent changes in all ordinances except those related to protecting the public health, as long as active and substantial development has begun on the site within 12 months of approval. In March 2000, the Town of Litchfield authorized a change in its impact fee schedule increasing fees by approximately 400% in August 2000.

A developer applied for building permits after the increase in connection with a site plan approved and recorded before the ordinance change. The Court concluded that the exemption allows the developers to rely on the state of the law at the time the site plan is recorded. Thus, the developer must be entitled to the 4-year exemption on the issue of impact fees.

This same 4-year exemption was raised by a Rochester developer. The developer received approvals for 18 single family homes and 59 condominium units. Within 3 years of approval, the developer constructed 6 of the homes and spent \$250,000 in public improvements and impact fees. Meanwhile, the city enacted a growth management ordinance which rendered this developer's project non-

conforming. Thus, when the developer attempted to resume construction and applied for further permits, the City denied the request.

The Court concluded that vesting rights do not depend upon the percentage of the total project completed during the 4 years. Rather, the correct standard for "substantial construction" vesting considers construction measured against the entire plan, and also whether the amount of completed construction is *per se* substantial in amount, value or worth. Whether construction is substantial thus depends upon the facts and circumstances of each case. Here, the Court concluded that the standard was met.

Last, in Fremont, developers sued for damages caused by the temporary taking of their property from the time building permits were denied under a defective growth management ordinance until the permits were finally issued. The Court concluded that the ordinance was invalid due to improper enactment, but was not unconstitutional. Thus, there was no taking. The developer's only remedy was reversal of the decision and not money damages.

## *Toxic Mold - A "Growing" Concern*

The hot topic in real estate circles is "toxic mold." The scope of due diligence in real estate transactions is always expanding. Gone are the days when real estate investment decisions were based only on a property's curb appeal. In addition to buried oil tanks, radon gas, inadequate wells and septic systems, toxic mold is an issue that should be at the top of your due diligence checklist.

Toxic mold is a condition that develops as a result of moisture. For example, slow leaks from plumbing, inadequate perimeter drainage, improper seals in building materials or poorly designed gutters can result in moisture being trapped within the confines of a building. The proper combination of mois-

ture, temperature, light and other environmental conditions can create a perfect breeding ground for mold.

Mold, a living organism, starts small and continues to multiply if not eradicated. Mold problems are often hidden behind, under or between building materials. As a result, it is difficult to find the problem early enough while it is growing to allow for complete eradication. If not treated early, mold is difficult, and sometimes impossible, to remove.

Mold can be a toxic allergen that may cause sickness, respiratory distress and, in severe cases, even death. Current legal periodicals include an alarming number of reports about mold cases requiring the demolition of entire buildings. In

one newsworthy case, Ed McMahon of Hollywood fame is involved in toxic mold litigation. In his case, it was necessary to destroy his \$10 million home due to the development of an uncontrollable mold problem.

Because of the growing number of cases with severe financial consequences, insurance companies are attempting to limit or eliminate coverage for mold damage from standard policies. We suggest that you consult with your insurance representative to determine whether your existing policies include coverage for mold damage. When considering the purchase of real estate, we recommend that you add a "mold test" to your due diligence agenda.

## *The Internet In The Workplace*

According to recent polling by the Gallup Organization, Inc., 90% of all large companies, 64% of mid-sized companies and 42% of all small businesses use the internet and e-mail. That equates to a conservative estimate of 40 million workers having access to the internet at work. If employees have access to the internet, employers should be aware of the risks.

The easiest way to address issues raised by employee use of e-mail and the internet is to prohibit its use entirely. In today's environment, the easy response is not a practical response. However, the risks of unlimited access are many. They include the following:

Sexual harassment and discrimination: what are employees looking at, downloading and saying on the internet?

Defamation: employee messages to others can be attributed to the company. Thus, the company could be liable in defamation for employee comments published on the web.

Intellectual Property Infringement: are employees copying trademark or copyright protected information from other websites?

Computer viruses: are employees visiting places and bringing back viruses which could infect the entire system?

Breach of Corporate Confidentiality: anything sent out can be monitored by others.

Lost productivity: how much personal correspondence and research goes on each day that does not further the interests of the employer?

Each of these issues is a significant concern which should be addressed in an internet and e-mail use policy. Employees should be told that the e-mail system is company property including all data within the system. In addition, employers should set forth appropriate limits on use. Finally, employers should expressly reserve the right to monitor all aspects of the employees' use of the system.