



WINTER 2005

Not Again! A Repeat Reminder

One of the most valuable pieces of advice we share with our clients relates to automobile insurance. Many people unknowingly drive with inadequate insurance. In New Hampshire, we do not have compulsory insurance and many drivers on the road have no coverage at all. Some statisticians report that the greatest risk of serious injury arises while driving your automobile. If you or your loved ones are injured in an auto collision, you may find that the responsible party has no coverage or insufficient coverage to pay for the loss. In that event, New Hampshire policyholders have the right to pursue recovery from the UNINSURED/UNDERINSURED MOTORISTS COVERAGE included in their own policy. With the increased cost of medical care and the devastating economic consequences that can result from injuries sustained in an auto collision, you can never have enough coverage.

We know we have raised this issue in prior newsletters, however, we repeat it here as we meet with more and more people with inadequate coverage. Please, call your insurance agent now and discuss the limits of your coverage. While you're at it, ask for a quote on umbrella liability coverage which provides additional coverage at more favorable rates. You may find these insurance products are the best investments you can make to protect you and your family.

Manchester Revaluation

If you own real property in Manchester, you will soon receive a knock on the door. Manchester has begun the citywide inspection of every property to collect data for the revaluation scheduled to take effect next year. You will see the difference in your June 2006 tax bill.

Once you receive notice of the updated assessment for your property, you will have the opportunity to meet with the revaluation company to correct any discrepancies. If you still believe your property is over-assessed, we would be happy to review the information and advise whether a tax abatement action is warranted.

Case Notes

Our Supreme Court has been busy shaping variance law. Before the 2001 decision of *Simplex Technologies, Inc. v. Town of Newington*, a property owner seeking a variance had to satisfy a five part test: (1) the variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; (4) substantial justice is done; and (5) the variance does not diminish the value of surrounding properties.

In *Simplex*, the Court addressed the hardship element of the test. The hardship standard could be satisfied by showing: (1) a zoning restriction as applied interferes with reasonable use of the property, considering the unique setting of the property; (2) no fair and substantial relationship exists between the purposes of the ordinance and the specific restriction on the property; and (3) the variance would not injure the rights of others. These factors are applied with the other four prongs of the test.

Recently, the Court created a distinction in the hardship analysis between a "use variance" and an "area variance" in the decision of *Michael Boccia v. City of Portsmouth*. A use variance is where the owner seeks to use property in a way not allowed by the zoning ordinance. On the other hand, an area variance provides relief from area requirements such as setbacks and density. For an area variance, hardship requires the following: (1) whether an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property; and (2) whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.

What Time Is It - In The Eyes Of Your Insurance Company

In today's world of million dollar verdicts, general liability coverage is critical. This insurance provides coverage for negligence based claims. By way of example, if someone slips and falls on ice entering the insured property, the injured person has a potential liability claim against the property owner and anyone charged with the duty to make the entrance safe. This may include a tenant in the property and a snow removal contractor. If the injured person can assert that someone knew or should have known about the hazard and did not address the hazard properly, liability is possible. Defending that case could cost thousands of dollars.

The general liability policy, which can be expensive, provides the insured with two types of coverage: the duty to defend; and the duty to indemnify. Under the duty to defend, the insurance company pays for the attorney and all costs associated with the defense. The duty to indemnify means that the insurance company will pay the verdict amount or the cost to settle the case.

Many general liability policies are called "claims made" policies. These policies provide coverage for claims that are made against the insured and reported to the insurer during the policy period. Thus, both the claim and the report of the claim must occur before the policy expires.

In most situations, the expiration of the policy period is not significant since the policy simply renews. However, when the policy is not renewed, the timing issue may take on new meaning. Catholic Medical Center in Manchester recently found out the hard way.

The Catholic Medical Center

policy was set to expire according to its terms at 12:01 a.m. on August 1, 2002. On July 31, 2002, the CMC risk manager forwarded notices of seven different claims to its insurer by overnight mail. The notice was received on August 1, 2002 at 9:03 a.m. True to form, the insurer denied coverage for all seven claims because the notice was received nine hours late.

The New Hampshire Supreme Court was asked to interpret a critical phrase in the insurance policy. Does an insured comply with a provision in a "claims made" liability insurance policy requiring the insured to "give written notice" of acts which may give rise to claims before the expiration of the policy if the notice is not received until after the expiration of the policy? CMC argued that it did what was necessary under the policy - **give** notice before August 1, 2002. CMC's insurer argued that the notice must actually be received before the expiration of the policy.

The Court first noted that it had never been asked to determine what is meant by "give notice." To answer the question, the Court relied on what it viewed as the common definition of "give." According to the Court, notice given "carries with it the implication of receipt of delivery. . . . It is not, therefore the sending, but the receipt, of a letter that will constitute notice." Thus, the notice received a mere nine hours late was not timely and the insurer had no obligation to pay for either a defense or indemnification. Despite years of insurance premiums, CMC was on its own.

The moral of this story is clear. Never take insurance coverage for granted and be aware of the critical timing issues under the policy.

Seminar Announcement

We are proud to announce that Attorney Ned Lucas will be hosting a National Business Institute continuing legal education seminar titled *Practical Guide to Zoning and Land Use Law in New Hampshire* on May 4, 2005 at the Holiday Inn in Concord, New Hampshire.

The program deals with issues that affect land use projects. The material that will be covered is useful to attorneys, real estate brokers, developers, appraisers, surveyors, civil engineers, and members of municipal planning and zoning boards. The information includes:

- Understanding how zoning ordinances and zoning maps are adopted.
- The process for obtaining approvals and permits;
- Understanding constitutional limits placed upon zoning actions.
- The procedural requirements for challenging negative zoning decisions.
- The administrative appeal process of zoning decisions.
- Avoiding ethical conflicts in zoning.

**Contact us for information
on how to register!**

PLEASE NOTE

Corporate and limited liability company annual reports are due at the New Hampshire Secretary of State by April 1, 2005.

Trial or Tribulation

A large component of our practice involves litigation. One of the more frustrating issues in our practice is declining to accept a meritorious case. In too many cases our preliminary research finds that the facts and the law are favorable to the client but the case is not worth pursuing. This commonly happens in cases where the best potential recovery is less than \$50,000.00. The cases are often declined due to the combined forces of legal costs, litigation expenses, opportunity costs, and collection risks.

In litigation it is difficult to control costs as you are obligated by court rules to respond to discovery requests and in many cases, provide expert testimony to support your case. If you are confronted with an aggressive adversary, discovery costs alone can be in the tens of thousands of dollars. With the advent of new expert disclosure rules, the cost to retain expert witnesses has exploded. Under prior rules, expert disclosure required an identification of the witness and a statement of the facts and opinions

that the expert would offer at trial. The new rules require the expert to prepare a comprehensive report prior to trial. A qualified expert's report adds a new and expensive layer of cost to the trial budget. In the average case, you can expect to pay an expert \$5,000.00 to \$15,000.00 to review the case, prepare the report and other required disclosures, and testify at trial. Under the "American Rule" all parties pay their own fees and expenses. When the expert fees are combined with the legal fees and costs for exhibits, deposition transcripts and other trial preparation costs, you must analyze whether the economics support pursuit of your claim. As we often tell potential clients, it is not a sound investment to pay \$35,000.00 in costs and fees with the hope of collecting \$50,000.00.

The other factors often overlooked in the initial litigation analysis are the litigation risk, opportunity cost, and collection risk. The litigation risk is the probability of success on the merits. In the best cases, there is always a risk that the

judge or jury will see the case differently. There is also the prospect that you prevail on liability, but the damage award is less than expected. The opportunity cost is subjective but is of great importance. The cost is then measured by the stress, inconvenience, and aggravation that arises from being a party in a litigation case. Opportunity cost also has an economic component. You must ask yourself how much you could make if the time and energy dedicated to litigation were focused on productive money making endeavors. Finally, the collection risk must be weighed carefully. What good is it to spend years and thousands of dollars to litigate a case to victory and never be able to collect the judgment? Although some may say it is worth it as a matter of principal, the psychological satisfaction of winning a case quickly rings hollow when you realize that it cost you thousands of dollars to prove a principal.

Before making the decision to file litigation, weigh the costs and benefits carefully.

Condominium Sellers . . . Did You Know?

On January 1, 2005 a new law went into effect regarding notification required prior to the sale of a condominium. N.H. RSA 477:4-f provides that prior to or during the preparation of an offer for the purchase and sale of any condominium unit, *the seller* shall provide *written notice* to the buyer that the buyer has the right to obtain the information listed in N.H. RSA 356-B:58(I), from the condominium unit owners' association. The information to be provided includes the condominium declaration, by-laws, any formal rules of the association, a statement of the amount of monthly and annual fees, and any special assessments made within the last 3 years. A buyer shall sign a copy of the notice required by this law to acknowledge receipt. N.H. RSA 356-B:58, mentioned above, already provided that in the event of any resale of a condominium unit, the prospective buyer has the right to obtain certain information from the owner's association, prior to the date of the sale. The information which a buyer has a right to obtain includes information about the financial stability of the association, the status of the association's reserve account, the status of any pending law suits or judgments in which the association is a party defendant, and a statement setting forth the insurance coverage provided by the association and the additional coverage a unit owner would normally secure.

Whether buying or selling a condominium unit, review these laws and understand your rights and obligations to insure a smooth and informed sale for all involved.