

Should Our Judges Strictly Interpret the Constitution?

Democrats and Republicans alike will attempt to answer this question over the coming months. Recent nominations to the United States Supreme Court appear to be setting up the polarizing debate of what we should expect from our judges. One side argues that judges should not legislate from the bench, but should strictly interpret the Constitution. The other side responds that our Constitution is a living, breathing document that must change with the times to guarantee basic rights.

Regardless of where one falls in the political spectrum, consider this: The Constitution, drafted over 200 years ago, includes seven articles and often fits on a poster sized piece of paper suitable for framing. Since then, state and federal legislatures have drafted laws, rules and regulations that when stacked in one place would not fit in the Pentagon.

As lawyers in New Hampshire, we ask our judges to treat our clients fairly, carefully review the evidence submitted and decide the case based on the current law without bias or prejudice. This fall the debate may rage on about the United States Supreme Court. Here in New Hampshire, we will do our best to ensure that our judges have all the information they need to address our clients' concerns. Whether our judges "legislate" or "strictly interpret," our goal is to win.

ANNOUNCEMENTS

Please join us in welcoming Elizabeth F. O'Boyle to our practice. She is a 2005 graduate of Franklin Pierce Law Center and is licensed to practice law in New Hampshire. She will be admitted to practice law in Massachusetts later this Fall. Ms. O'Boyle has a B.A. from Wellesley College and an M.B.A. from the University of Michigan. She brings a wealth of business experience to the firm, from real estate to corporate finance. You may contact her at eoboyle@croninbisson.com.

John G. Cronin has been elected president of the Apartment Association of New Hampshire. The Association is dedicated to promoting the interests of its members who collectively own approximately 13,000 apartment units throughout New Hampshire.

Manchester's Revaluation Update

As we discussed in our last newsletter, the revaluation process is moving along in Manchester. Data collectors are walking the streets of Manchester completing field inspections of the properties. The goal is to confirm the size and condition of properties throughout the city so that the revised assessment is effective as of April 1, 2006. According to New Hampshire law, this revaluation process must be undertaken at least every five years to ensure that the tax burden is distributed fairly among all properties in the city. After the data collection is complete, taxpayers will have an opportunity to review the preliminary information and confirm it for accuracy. There will likely be an opportunity to meet with representatives of the revaluation company to discuss the initial review.

The revaluation consultants generally consider sales from October 1, 2005 to September 30, 2006 in determining market value. Although the new assessment is effective as of April 1, 2006, the revised assessment will not appear until the December 2006 tax bill. When the bill comes in, the higher assessment does not necessarily mean a higher tax bill. In some revaluations, the total increase in value of all properties in the community results in a lower tax rate. When the final tax rate is determined and applied to the new valuation, the actual tax bill is determined. If you have concerns about what you see when you receive the preliminary information or the final bill, please do not hesitate to contact us to discuss eligibility for an abatement.

Do More Homes Mean Higher Taxes?

Anyone who has attended a Planning Board or Zoning Board meeting recently has heard the cry. "We can't have more single family homes because that means more school age children, which means more burden on the schools, which means higher taxes." The oft repeated refrain is that each new home generates two or more students. Each student costs the town \$10,000. Thus, unless the home generates \$20,000 in tax revenue each year, "growth doesn't pay." The alternative refrain is "open space pays." If towns do not allow new home construction, taxes will never go up. Therefore, "Ms. Developer, your subdivision application is denied." This argument seems to make sense. However, it is not true.

This past summer the New Hampshire Housing Finance Authority released a report entitled "Housing and School Enrollment in New Hampshire" which sets the record straight on the impact of new residential development on school enrollment. According to the study, demographics, such as age structure of the population, have a greater impact on school enrollment than new home construction.

Town planners point to recent experience in support of their view. However, the demographics of the last decade tell a different story. Overall, New Hampshire's population has been expanding. Between 1990 and 2000 the state added 125,000 residents for an 11% increase. During the same time, the number of school-age children increased by 17% and public school enrollment by 24%. If growth is the culprit, as town planners would have us believe, what explains the difference? According to the study, the Baby Boomers, and not new homes, are to blame.

During the 1990's, the Baby Boomers were the largest segment of the New Hampshire population, and grew at the fastest rate. Baby Boomers, those born between 1946 and 1964, are also the most likely to have school-age children. By 2000, the second largest population group in New Hampshire was the children of the Baby Boomers. During the same time, many public schools added kindergarten which shifted a number of students from private schools to public schools.

Between 1990 and 2000, the generation behind the Baby Boomers actually declined. Thus, there will be fewer parents with school-age children in the coming decades. The study reports that New Hampshire should "anticipate much less growth in school age population during the next several decades. Even though the state is projected to add more total population in the current decade than in the 1990s, growth in the school-age population will be much lower than in the 1990s and will actually decline in the decade following 2010."

So do we need more housing? According to Clair Monier, Executive Director of New Hampshire Housing, "New Hampshire is faced with a critical shortage of housing." She authored a letter to the Goffstown Planning Board in support of one of our client's projects. In the letter, she wrote "this shortage has led to increased home purchase prices and escalating rental costs, and has created a significant affordability challenge for many of our residents. . . . this shortage of housing threatens our ability to support and sustain continued economic growth and prosperity for all of our communities and citizens." Ms. Monier reviewed this summer's study and noted "One means of addressing this shortage is to en-

courage communities to be more receptive to residential development - particularly higher density housing like starter homes and apartments. We hope that this new data will help communities as they make decisions about housing development."

Before the next Planning Board meeting, as the ever more expensive team of presenters, including engineers, lawyers, traffic experts, appraisers and architects are preparing for the meeting, someone on the team should bring along a pile of copies of this report. When the discussion turns to school enrollment, as it inevitably will, let the numbers in the report do the talking.

Corporate Record Keeping

As 2005 comes to an end, our corporation and limited liability company clients should consider conducting annual meetings. To insure the benefit of limited liability that these entities provide, corporations and limited liability companies must treat themselves as entities separate and distinct from their owners. One important factor is an annual meeting where those charged with operating the companies for the benefit of the owners report on the health of the company and any extraordinary events of the past year. Shareholders of corporations should elect the board of directors and the board should elect officers. Members of limited liability companies may consider the appointment of management. A brief record of required elections and approval of the events of the past year signed by the secretary of the company is appropriate. The minutes of the meeting should be filed in the corporate book with a notation to do the same next year.

The Lease Term May Be Longer Than You Think

Perhaps the most critical component of a lease is its term. Lease agreements for residential tenancies typically last for a year. When the tenants holdover upon expiration of the term, the lease is deemed to convert to a month to month tenancy. One would expect that the landlord would be able to terminate the month to month tenancy with one month's written notice even if the tenant is not otherwise in default of the lease.

In *AIMCO Properties, LLC v. Dziejewicz*, the New Hampshire Supreme Court recently took a different view and determined that the "mere expiration of a lease" does not constitute "good cause" for an eviction of a residential tenant in "restricted property" under New Hampshire law. "Restricted property" includes most multi-family residential properties. Only owner-occupied properties of less than four units and single family homes, as

long as the owner does not own more than three, are exempt.

Under the landlord and tenant statutes, owners of restricted property must serve a tenant with a notice to quit stating a specific reason for the eviction. The statute lists several reasons for eviction, including "other good cause." Good cause "includes, but is not limited to, any legitimate business or economic reasons and need not be based on the action or inaction of the tenant, members of his family, or guests."

The Court was asked to determine whether the expiration of the term of the lease is "other good cause." Sounding somewhat like a page out of a Charles Dickens novel, the Court noted "were the mere expiration of a lease to constitute good cause, then tenants could be evicted arbitrarily from their homes through no fault of their own; such evictions, as the legisla-

ture undoubtedly realized, create substantial hardships for tenants. At worst, tenants may become homeless as a result." The Court characterized the landlord's eviction attempt as an effort to "replace one tenant upon the expiration of a lease with another tenant who will pay the same rent and occupy the same position as the tenant being evicted." Thus, the Court concluded that the expiration of the lease by itself is not sufficient basis to terminate a residential tenancy.

Many may disagree with this interpretation of the statute. However, unless the statute is amended, the Court's view controls. Legislation aimed at addressing this case is pending. The Apartment Association of New Hampshire, under the leadership of its new President, is reviewing the impact of this decision and is considering appropriate lobbying efforts. Let us know your thoughts.

The Change in the Land Use Change Tax

Under New Hampshire "current use taxation" laws, owners of undeveloped property that exceed ten acres can submit the property to the current use tax scheme and pay reduced real estate taxes. The purpose of the statute is to encourage the preservation of open space. Once development of the property begins, the property is said to be "taken out" of current use. When that occurs, the owner must pay the land use change tax, which is ten percent of the fair market value at the time of the change of use.

The timing of the change of use has always been critical. If a large property comes out of current use before a significant subdivision approval, construction of roads and other infrastructure, and before building lots are approved for sale, the fair market value of the property is less than its value as approved building lots. Thus, the change tax should be less.

The New Hampshire Supreme Court considered the land use change tax in *Woodview Development Corp. v. Town of Pelham*. In that case, the property owner began to construct roads on the property before obtaining subdivision approval. The owner attempted to force the assessment of the land use change tax at an earlier time before the lots were considered approved building lots. To the contrary, the town assessed the change tax after the approval based on the anticipated sales price of the subdivided lots.

Interpreting a recent amendment of the statute, the Court noted that the statute allows towns to "delay assessment of the land use change tax until any and all required permits or approvals have been secured . . . and may base the land use change tax . . . upon the land's full and true value at that time." The Court concluded that under the statute, towns are required to enhance a property's value with the value of the improvements. Thus, towns are authorized to determine the ten percent tax based on the absolutely highest value that the approved subdivision will have. Some understanding of how a town will assess this tax is crucial to the financial health of the project. The tax could send an otherwise profitable project to the brink of failure.