



2022 EDITION  
**COURT UPDATE**



A compilation of case summaries prepared by the  
New Hampshire Municipal Association  
for the period covering October 1, 2021 through September 30, 2022.

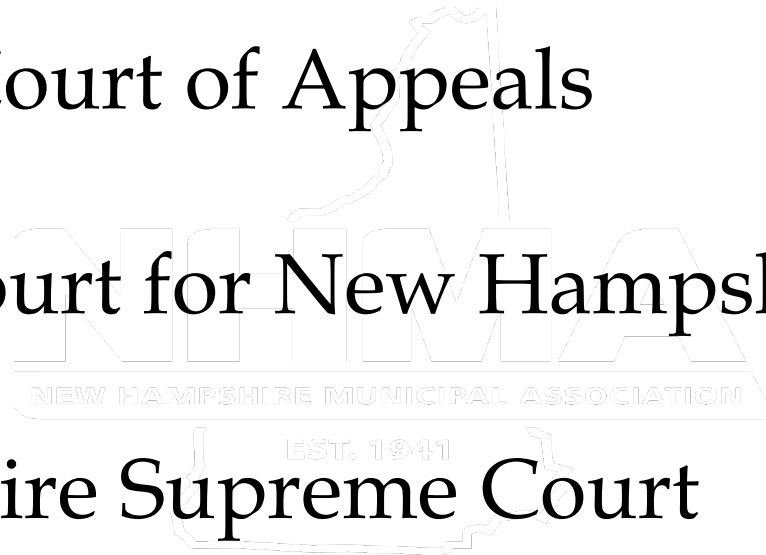


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# COURTS WE ACTIVELY MONITOR

- US Supreme Court
- First Circuit Court of Appeals
- US District Court for New Hampshire
- New Hampshire Supreme Court
- New Hampshire Superior Court
- Housing Appeals Board



# COURT UPDATES ON NHMA WEBSITE

The image is a screenshot of a web browser displaying the New Hampshire Municipal Association (NHMA) website. The browser's address bar shows the URL [nhmunicipal.org](http://nhmunicipal.org). The website's header includes the NHMA logo, the text "NEW HAMPSHIRE MUNICIPAL ASSOCIATION", and navigation links for "STORE", "CLASSIFIEDS", "PUBLIC NOTICES", and "MY ACCOUNT". A search bar is also present. The main navigation menu includes "ABOUT", "ADVOCACY", "LEGAL SERVICES", "EVENTS & TRAINING", and "RESOURCES & PUBLICATIONS". The "LEGAL SERVICES" menu is open, and "Court Updates" is highlighted with a red circle. Other items in the menu are "On-Demand Training" and "Right to Know Law". On the left side, there is a "MEMBER FEATURES" section with links to "50% Off Store Items", "Municipal Wage Data", "Webinar and Virtual Workshop Archive", "Manage Classifieds", "Manage Officials", "Manage Organization", and "Training Resources by Topic". In the center, there is a banner for "ONDEMAND" training, featuring the NHMA logo and the text "Check Out NHMA's VIRTUAL On-Demand Program". Below the banner, it states "NHMA attorneys are available upon request to NHMA member municipalities for on-demand training sessions. Only \$300!" and a "LEARN MORE!" button. The browser's address bar at the bottom shows the URL <http://www.nhmunicipal.org/legal-services>.

- LEGAL SERVICES
- Court Updates
- On-Demand Training
- Right to Know Law

View published New draft Moderate

Notice: This page is customized.

# Court Updates

Text Search  Topics  Date



- 10/02/2020 **The Exculpatory Evidence Schedule (a/k/a Laurie List) is Not Exempt from Disclosure as Police Personnel File under RSA 105:13-b, Nor is it Exempt Internal Personnel Practice, but Might be Exempt Since Disclosure Would Constitute Invasion of Privacy**  
*New Hampshire Center for Public Interest Journalism v. NH Dept. of Justice.*  
New Hampshire Supreme Court Docket No. 2019-0279
- 10/02/2020 **Secretary of State Shall Forward Absentee Voter Registrations Forms Directly to Applicants and Can No Longer Refer Voters to City or Town Clerks**  
*American Federation of Teachers v. Gardner*  
Hillsborough County Superior - Northern District Case No. 216-2020-CV-0570, 10/02/2020
- 09/25/2020 **New Hampshire Supreme Court Affirms Dismissal of a Dead End Town Request to RSA 224:49**

View Edit

*New Hampshire Center for Public Interest Journalism v. NH Dept. of Justice.*

New Hampshire Supreme Court Docket No. 2019-0279

Friday, October 30, 2020

**Case Summary**

The NH Center for Public Interest Journalism, along with five newspapers and the ACLU sought access to the Exculpatory Evidence Schedule (EES) containing the names of police officers who have engaged in misconduct that reflects negatively on their credibility as witnesses. The plaintiffs argued that the list must be made public pursuant to the Right-to-Know Law, RSA chapter 91-A, and Part I, Article 8 of the New Hampshire Constitution.

Formerly known as the Laurie List, the EES is currently maintained by the Department of Justice (DOJ). Under the NH Supreme Court decision in *State v. Laurie*, 139 N.H. 325 (1995) prosecutors have a duty to disclose information that may be used to impeach police officer witnesses. Originally only maintained by county attorneys, the Laurie list was converted to the EES by the Attorney General in 2017 and now consists of a spreadsheet containing five columns of information: (1) officer's name; (2) department employing the officer; (3) date of incident; (4) date of notification; and (5) category or type of behavior that resulted in the officer being placed on the list.

On appeal from a decision in favor of disclosure by the Superior Court, the DOJ argued that RSA 105:13-b precludes disclosure of the EES because it is a record whose disclosure is prohibited by statute. The Supreme Court rejected that argument because the express focus of RSA 105:13-b is on information maintained in the personnel file of a specific police officer. Because the EES is maintained by the DOJ, and the DOJ does not employ officers on the EES, the EES is not a personnel file within the meaning of RSA 105:13-b. The DOJ also argued that the EES is an internal personnel practice exempt from disclosure under the Court's decision in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993). However, since the Court overruled *Fenniman* in *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. \_\_\_ (decided May 29, 2020) (slip op. at 9) and *Union Leader Corp. v. Town of Salem*, 173 N.H. \_\_\_ (decided May 29, 2020) that argument was also rejected.

The case was returned to the Superior Court to determine under the customary balancing test whether disclosure of the EES would constitute an invasion of privacy.

**READ MORE IN COURT DECISION!**

**Link to Court decision**

Additional Information:

Practice Pointer: Information about a police officer that is not kept by the officer's employer in the officer's personnel file is not protected from disclosure under RSA 105:13-b. The Exculpatory Evidence Schedule (a/k/a Laurie List) is not a record exempt from disclosure as an internal personnel practice. Disclosure of the EES must be evaluated by examining whether disclosure would be an invasion of privacy using the privacy balancing test.

**Practice Pointer**



# First Amendment - *City of Austin v. Reagan National*

- ▶ US Supreme Court decision - How to apply ruling in *Reed v. Town of Gilbert* to off-premise signs.
- ▶ The City had modified its sign code to define an off-premise sign to mean “a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed.”
- ▶ The City Code prohibited the construction of any new off-premise signs but allowed pre-existing off-premise signs to remain as grandfathered uses.
- ▶ Reagan National sought to digitize some of its grandfathered, off-premise billboards and the City denied those applications. Reagan National filed suit claiming the code’s prohibition on digitizing off-premise signs but not on-premise signs violated the First Amendment.
- ▶ The Court concluded that the challenged sign code only requires reading a billboard to determine whether it directs the reader to the property on which it stands or to some other, offsite location. Since the Austin sign code did not discriminate based on the topic discussed or the idea or message expressed it did not trigger a level of legal scrutiny that would have voided the regulation

# First Amendment: *Houston Community College v. Wilson*

- ▶ US Supreme Court - Board of trustees for a community college system adopted a public resolution censuring board member Wilson for conduct not consistent with the best interests of the College and not only inappropriate, but reprehensible.
- ▶ Wilson sued the Board claiming that he was subject to retaliatory action for having exercised his freedom of speech protected by the First Amendment.
- ▶ The Court concluded that the verbal censure did not prevent Mr. Wilson from doing his job, and it did not deny him any privilege of office, and Wilson acknowledged the censure was not defamatory.
- ▶ Public bodies can censure fellow board members for conduct that is detrimental to the best interests of the public body, and such verbal censures would not violate the First Amendment, provided the censure did not deny a privilege of office, and did not prevent the censured member from doing their job as an elected or appointed official.

# First Amendment: *Shurtleff v. City of Boston*

- ▶ The U.S. Supreme Court has defined the difference between unconstitutional viewpoint discrimination and permissible control of the content of speech when government speaks for itself.
- ▶ Flag flying over Boston City Hall Plaza - Christian flag denied access - yet 50 other unique flags permitted.
- ▶ When government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it can choose what to say and what not to say. Thus, local government can select what points of view it wishes to promote and not run afoul of the First Amendment.
- ▶ However, when government does not speak for itself it may not exclude speech as that constitutes impermissible viewpoint discrimination.
- ▶ Municipalities can adopt policies that controls the content of signs and flags that are displayed at government venues



# Land Use: *Brady Sullivan Prospect Hill v. City of Lebanon*

- ▶ Housing Appeals Board (HAB) decision on the standards a planning board should use to decide if a land use project has good cause to extend the time for active and substantial development and substantial completion of improvements under RSA 674:39, IV.
- ▶ On appeal to the HAB the issue was whether the Planning Board denial of the Brady Sullivan's request to extend the time for substantial completion of Phase II was illegal or unreasonable.
- ▶ When judging “good cause” to extend commencement and completion deadlines established by a planning board under RSA 674:39, IV, the following factors merit consideration: 1) how regulatory changes since the original approval would necessitate significant revisions to approved plans; 2) the applicant's ability to commence active and substantial development considering the existing business conditions. The fact that the Applicant has previously requested and received plan extensions should not be factored into any decision making.

# Land Use: *GMR Holdings v. Lincoln*

- ▶ GMR Holdings sought to locate a wireless telecommunications site in Lincoln.
- ▶ GMR identified five suitable locations, and only one was truly available, but it required two waivers as part of the conditional use permit process before the planning board, one for height and the other for a fall zone requirement.
- ▶ After the waivers were denied by the board, GMR appealed to the US District Court claiming the board's decision was not supported by substantial evidence - all in violation of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B).
- ▶ To prevail on a claim of “effective prohibition” claim, a claimant must establish: (1) that there is a gap in cellular service coverage in the area of the proposed tower; and (2) that there are no feasible alternatives to the site proposed to, and rejected by, the Planning Board.
- ▶ Ultimately, the Court found that the planning board's rejection of GMR's application was in violation of the Telecommunications Act and ordered that the planning board issue all necessary permits to allow GMR to construct the tower, due in part to the lack of feasible alternative sites.

## Land Use: *Stergiou v. City of Dover*

- ▶ In 2019, a developer applied for permission to construct a mixed-use project in the City. The Planning Board issued an approval with instructions for the developer to provide the board with copies of the site plan in various formats within 90 days.
- ▶ The developer failed to meet this requirement and failed to ask for an extension. The developer then asked for “re-approval” in 2020 and it was granted with conditions that varied slightly from the original conditions. Abutters then sought to appeal the “re-approval.”
- ▶ Whether the abutters could appeal hinged on whether the planning board’s conditions were conditions precedent or conditions subsequent, as only a conditional approval imposing conditions subsequent constitutes a final decision appealable under RSA 677:15, I. The Court deemed the conditions subsequent and ruled the 2019 approval was final and the 2020 appeal untimely.
- ▶ RSA 676:3, I states that if an application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval.
- ▶ When granting land use board approvals with conditions, be clear whether those are conditions precedent or conditions subsequent. If a board intends to make final approval conditioned on the fulfillment of certain conditions precedent, be clear that the failure to comply with those conditions means there is no final approval.

# Right-to-Know: *ACLU v. City of Concord*

- ▶ The City of Concord adopted a budget that contained a police department line item for “Convert Communications Equipment.” When asked to disclose the nature of the equipment the City Manager only revealed it was not body cameras or drones but refused to answer the question.
- ▶ In response to RTK requests from the ACLU and the Concord Monitor the City provided a redacted version of a vendor agreement but declined to provide further details claiming the information was an exempt law enforcement record. The ACLU and Concord Monitor sued under RSA 91-A:8.
- ▶ The Trial Court ruled the redacted information was exempt from disclosure under FOIA standard (A) interfere with enforcement proceedings, (E) disclosure of law enforcement techniques and procedures and (F) could reasonably be expected to endanger the life or physical safety of any individual.
- ▶ The Supreme Court ruled that in cases involving the *Murray v. NH Div. State Police*, 154 N.H. 579 (2006) a trial court may exercise its discretion to hold an ex parte in camera hearing – but only after it has required the government to make as complete and detailed a public disclosure justifying exemption as possible and determined that the disclosure nonetheless fails to provide a sufficient basis for it to make a decision.
- ▶ The Court also ruled that when judging whether disclosure of a law enforcement record would result in circumvention of the law under Exemption E the government must only establish that disclosure might create a risk of circumvention of the law

# Taxation: *Merrimack Premium Outlets v. Town of Merrimack*

- ▶ After conducting a town wide revaluation of all taxable property in 2016, the town assessed the shopping mall owned by the Plaintiff at \$86,549,400. Later that same year, the town learned that the property had been used as collateral for a loan in 2013 at a value of \$220,000,000.
- ▶ Based on that information, the town reassessed the property for the 2017 tax year for \$154,149,500. The Plaintiff appealed, arguing that no changes to the property or affecting the property had occurred that would legally support a reassessment under RSA 75:8.
- ▶ The Court ruled that, based upon the plain language of RSA 75:8, I, some “change” to the subject property is a prerequisite to a municipality’s legal authority to adjust property values under RSA 75:8, I. The Court explained that the discovery of an extreme under-assessment of a property does not constitute a legal change under the statute.
- ▶ RSA 75:8, I was subsequently amended by the Legislature, effective August 6, 2022, to provide that the assessors or selectmen shall adjust assessments to correct any errors in existing appraisals.

# Land Use: Appeal of Chichester Commons, LLC

- ▶ A petitioner owned land in the town's commercial village district and proposed several different projects to the planning board, each of which required a waiver of the density requirements from the town.
- ▶ Each time the petitioner received a waiver and approval to move forward with their plans, they failed to proceed and then slightly altered the plans a few years later.
- ▶ The third time the petitioner changed their project, they sought an amendment of a previously approved plan. The town argued that this was not an amendment but a new proposal.
- ▶ Court's Ruling: If an applicant fails to act on a waiver or variance, they are not automatically entitled to the same benefit years later if the project or zoning ordinances have changed. They would need to file a new application.

# Land Use: *Avanru Devt. V. Town of Swanzey*

- ▶ The Zoning Board of Adjustments denied a special exception application for a proposed 76-unit multi-family dwelling.
- ▶ Grounds for denial were based almost entirely on the ZBA's determination that the aesthetics of the project did not fit the ordinance and the project was very unpopular with the community.
- ▶ The ZBA was required by the ordinance to identify "unique problems" a multi-family dwelling use may present if constructed, however the ZBA failed to do this.
- ▶ Failure to do this did not satisfy the standard of denial for the special exception which required the project to be injurious, obnoxious, or offensive to the neighborhood.
- ▶ Special exception provisions that permit additional uses in certain zoning districts in effect declare such special exception uses to be desirable subject to a determination that the location must be considered in light of special restrictions or conditions tailored to fit the unique problems which the use may present.

# Land Use: *Town of Lincoln v. Joseph Chenard*

- ▶ Defendant owned several pieces of property in the town's general use district which allowed junk yards only by special exception. His lots were littered with junk and ruled to be junk yards in violation of RSA 236:114. Defendant appealed.
- ▶ The defendant argued that his property did not rise to the definition of a junk yard under RSA 236:112 because he was not operating a business.
- ▶ The court disagreed and ruled that the definition implies that storage of junk is enough to make property a "junk yard" and the actual exchange of goods is not required.
- ▶ The town then sought an award of attorney's fees, however the court ruled that the town's zoning ordinance did not use the specific wording of RSA 236:112. Therefore, the court applied the dictionary definition of junk yard and found that the defendant was not knowingly in violation of the statute.
- ▶ Therefore, no attorney's fees were granted.



# Municipal Governance: *Hudson v. Hudson Budget Committee*

- ▶ The Hudson Budget Committee passed a bylaw provision that excluded the two ex-officio members from voting.
- ▶ The provision read, “votes will be limited to the nine elected or duly appointed members-at-large”.
- ▶ The statutes are clear about how ex-officio members are limited. When they are limited, it is expressly stated in the law. For example, they cannot serve as the chair of the board.
- ▶ In all other aspects, ex-officio members have the same powers as other members.
- ▶ It is against the law to restrict their voting ability and any decisions made while their voting abilities were restricted are void.

# Right-To-Know: *Provenza v. Town of Canaan*

- ▶ Officer Provenza sought to keep an internal investigation report regarding an allegation of excessive force against him private from a right-to-know request.
- ▶ He claimed that: this report was protected by his privacy interest and there was not a compelling enough public interest to warrant disclosure, and that this report was exempt under RSA 105:13-b.
- ▶ The court declined to engage in the 105:13-b analysis but instead ruled that this document was subject to the standard privacy/public balancing test.
- ▶ Here, there is a compelling public interest in knowing that the police department investigated this complaint appropriately and the document should be released.

# Taxation: *Shaw's v. Town of Windham*

- ▶ Shaw's Supermarket had a lease agreement with a landlord for the property where their supermarket was located. As part of the lease agreement, Shaw's agreed to pay the property taxes.
- ▶ Shaw's sought an abatement of the taxes and the town rejected this request on the grounds that Shaw's was not the owner of the property and did not have standing to seek an abatement.
- ▶ Under RSA 76:17, a "person aggrieved" by a tax assessment has standing to challenge that assessment. "Person aggrieved" is defined as the individual or entity who actually paid the taxes, especially if there is a contractual relationship involved which requires them to pay on behalf of the actual property owner.
- ▶ The town should have allowed Shaw's seek an abatement given the fact that Shaw's actually paid the bill and it was part of their lease agreement.

# NHMA's Legal Advisory Services



Open 8:30 a.m. - 4:30 p.m.

- Email: [legalinquiries@nhmunicipal.org](mailto:legalinquiries@nhmunicipal.org)
- Phone: 603-224-7447

Provide general legal advice

- Not comprehensive legal review of documents
- Not drafting individualized ordinances or charters
- Not reviewing specific applications before local boards
- Not settle intra-municipal disputes

Goal: Response w/in 48 hours



*for attending our  
annual Court Update  
workshop!*

## Mission Statement

The New Hampshire Municipal Association is a nonprofit, non-partisan association working to strengthen New Hampshire cities and towns and their ability to serve the public as a member-funded, member-governed and member-driven association since 1941. We serve as a resource for information, education and legal services. NHMA is a strong, clear voice advocating for New Hampshire municipal interests.



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