



APPROVED-07-23-18  
*Amended on 04-15-19*

## Board of Selectmen Town of Gilmanton, New Hampshire

Meeting

July 09, 2018

**Approximately 3:30-pm.** Gilmanton Academy

**(1) Non-Public Session per RSA 91-A:3, II (b) - Hiring**

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to go into Non-Public Session per RSA 91-A:3, II(b). (3-0 Voice Vote – Chairman McWhinnie– yes, Selectman Wilson–yes, and Selectman Bishop– yes).

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to come out of Non-Public Session. (3-0 Voice Vote – Chairman McWhinnie –yes, Selectman Wilson–yes and Selectman Bishop – yes).

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to seal the minutes of Non-Public Session. (3-0 Voice Vote – Chairman McWhinnie–yes, Selectman Wilson –yes, and Selectman Bishop – yes).

**Public Meeting opens-Approximately 6:06-pm.** Gilmanton Academy

**Present:** Chairman Stephen McWhinnie, Selectman Michael Wilson, Selectman Marshall Bishop, and Assistant Town Administrator-Heather Carpenter  
Also present please see attached sign in sheet.

Chairman McWhinnie opened the meeting, took attendance of those present and voting (Chairman McWhinnie, Selectman Wilson and Selectman Bishop) and led the Pledge of Allegiance.

Public Meeting opens at approximately 6:06 p.m.

**Public Comment open at approximately 6:08 p.m.**

*The following people participated in public comment and the following items were discussed.*

**Mr. Barbara Swanson-**

- Bio-solids- Stockpiling and Spreading
- Zoning ordinance that was voted in March; The Town banned the use of bio-solids in Gilmanton, the Warrant Article left no room for grandfathering or vested rights
- Complaint that she submitted

**Chairman McWhinnie-**

- Recommendation of legal counsel
- Thayer vs Town of Tilton- *Bio-solids court case*

**Mr. Don Guarino-**

- Bio-solids
- Setting precedence

- Health and General Welfare
- Natural Resources

*\*see attached document labeled Upton and Hatfield LLP from which Mr. Guarino read from.*

**Mrs. Sandi Guarino-**

- Bio-solids
- Reads the Petition Warrant Article from the March Election with a vote of 542-yes votes and 277-no votes
- Voters are sovereign
- Banned on a health issue
- Studies done by EPA

*\*see attached document labeled EPA*

- Chairman's conflict of interest and recusal

**Mrs. Elaine Rosato-**

- Bio-solids and the health ramifications from letting them continue in Gilmanton\
- The contamination of the water source
- The ability to live in a pristine environment compared to living in a polluted one
- Manure vs Bio-solids and the issue of industrial waste
- The ban on bio-solids should be upheld
- Biggest Issue- the fact the Board is making decisions related to her health

**Mrs. Sandi Guarino-**

- Wants where the attorney's sourced their information pertaining to Bio-solids to form their recommendation to the Board.
- Is it still a rule that the Chairman can make decisions on any thing without the other two members?

**Chairman McWhinnie** stated that he can make decisions on some things and it is still in effect.

**Assistant Town Administrator-** Clarification needs to be made for the public, the Chairman can make decisions on only two topics, not all things such as Bio-solids.

**Mrs. Sandi Guarino-**

- A special meeting should be held on the topic of Bio-solids

**Public Comment closed at 6:39 p.m.**

Discussion between Board members pertaining to the information of Bio-Solids, legal recommendation, the health issue and the Boards responsibility.

**Approval of Minutes**

Assistant Town Administrator reminded the Board about the complaint received on the minutes and if there were any changes needed or move forward with approval.

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Wilson it was voted to approve the minutes of June 18, 2018. (3-0 Voice Vote – Chairman McWhinnie-yes, Selectman Wilson -yes, Selectman Bishop – yes).

**Consent Agenda/Signature File**

Move to open the consent agenda for discussion

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted to open the consent agenda for discussion. (3-0 Voice Vote – Chairman McWhinnie-yes, Selectman Wilson -yes, Selectman Bishop – yes).

- ***\*Consent agenda expanded due to Budget Freeze***
- Purchase Order: Pro Quip, additional 1-month Excavator rental, \$3,750.00 +/-, 01-4319-731
- Purchase Order: Albert Morse, Roadside Mowing, \$10,000.00 +/-, 01-4312-650
- Purchase Order: Core & Main, Culvert pipe, \$2,283.80 +/-, 01-4312-670
- Purchase Order: New England Barricade, Speed Bumps, \$587.93, 01-4311-690
- Intent to Excavate: Map 417 Lot 13
- Septage Agreement: Winnepesaukee River Basin Program/ NHDES, updated to reflect passage of warrant article #4 restriction & maintain compliance with RSA 485 A:5-b

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted to approve the consent agenda. (3-0 Voice Vote – Chairman McWhinnie-yes, Selectman Wilson -yes, Selectman Bishop – yes).

- **Bio Solids Zoning Ordinance cont'd...***The Board addresses how Bio Solids will be addressed going forward, as discussed over the last few meetings.*

**Mr. Swanson-** Request for a letter to be sent to residence to stop using Bio-solids.

Board consensus is to follow legal counsel, the Chairman stated to Mr. Swanson that by the next meeting there will be an answer whether or not there will be any letter produced.

### **New Business**

- Nuisance Ordinance Discussion: Kevin Quigley - *Mr. Quigley has asked to speak with the Board about preparing a possible Nuisance Ordinance for the next Town Election, he is agreeable to researching other town's ordinances to help (as emailed). As seen with previous discussion on a Noise Ordinance, moving forward this should include Public Hearings etc.*

Discussion tabled until next regular meeting.

- Coverage Details, Pittsfield: Chief Joe Collins –

Chief Collins of Pittsfield has asked to discuss coverage details in the Town of Pittsfield and the shift that would need to be covered, possible 1-2 shifts a week. Other Towns are helping, charging regular rate, not a long-term issue.

Chairman McWhinnie concerns are if the Gilmanton Police Department can help because the Chief has stated that we are short staffed.

Chief Currier stated that it would only be filled with Officers on their days off, Gilmanton comes first.

Discussion of rates, and cost of patrol vs detail.

The Board will take it under advisement and discuss it later tonight.

### **Old Business**

- Budget Review –

Chairman McWhinnie asked all board member if they reviewed the budget; all members agreed they had. The Chairman calls for a motion to move monies from the following lines;

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted to move money from lines;

01-4210-116- \$45,550.00

01-4210-150-\$1,927.00

01-4210-225- \$688.42

01-4210-230-\$13,972.48

01-4210-210-\$9,220.00

01-4210-211-\$402.00

01-4210-2145-\$357.00

To be put into line 01-4153-320, for the total amount of \$72,116.90. (2-1 Voice Vote – Chairman McWhinnie-yes, Selectman Wilson -no, Selectman Bishop – yes).

Discussion on changes within budget to reallocate funds, patrol, shifts, and overtime. Selectman Wilson's overall concern is where the money is coming from for shift coverage because they are down an officer. Chairman McWhinnie stated that in order to respond to specifics of Selectman Wilsons request, he would need a non-public.

- Deputy Treasurer – Treasurer Glen Waring has submitted his appointee as Deputy Treasurer, Heather Carpenter, for Board of Selectmen approval.

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted to approve the Treasure's appointment of Heather Carpenter as Deputy Treasurer for a one (1) year term. (3-0 Voice Vote – Chairman McWhinnie-yes, Selectman Wilson -yes, Selectman Bishop – yes).

Discussion on the possible conflict of the Deputy Treasurer filling in the capacity of the Town Administrator, where the conflict would lie and how the office has changed procedure in order not to have a conflict. The conversation will need to be brought up again in the future while hiring a new Town Administrator. The Town Administrator will need to be capable of working with the finance software, the procedure of payroll/payables in order to be a backup for Finance Director.

- 805 Province Rd Clean Up – Chairman McWhinnie reported back to the Board about the information on a licensed, insured vendor.

Consensus of the Board is to move forward with scrapping as long as he has insurance with additionally insured as a part of that coverage and a copy needs to be given to the office. *[A company name was not given at the time of the meeting.]*

#### **Select Board Items**

- Draft Audit- *Melanson Heath has submitted a draft audit, Finance is reviewing and requests Board accept this draft so they may continue the process.*

Discussion tabled until the following regular meeting.

- Academy Building Mechanical Upgrades: *Chairman McWhinnie has been working to obtain quotes for the new generator now that the size needs have been obtained.*

Discussion on the quotes received so far and what those include, still waiting for one additional quote.

Selectman Wilson would like Chairman McWhinnie to reach out to Central Maine Diesel for a quote on the specs received.

Selectmen Wilson asked if doing this not as a sealed process was normal

Assistant Town Administrator -if the Board is doing sealed bids in the future you don't want one of the Selectmen taking the lead on the discussion, the office should be doing it in order to maintain the process

Selectmen's Rules- will be placed on the agenda for the following meeting.

Security- Camera's nothing, Front doors tomorrow.

*Mr. Brett Currier interjection from the public*

**(2) Non-Public Session per RSA 91-A:3, II (c)- Reputation**

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to go into Non-Public Session per RSA 91-A:3, II (c). (3-0 Voice Vote – Chairman McWhinnie-yes, Selectman Wilson -yes, Selectman Bishop – yes).

7:32 p.m.-Recess-Chairman McWhinnie calls for a ten (10)minute recess, seconded by Selectman Wilson(2-0)

7:48 Motion by Chairman McWhinnie, and seconded by Selectman Bishop(3-0).

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to come out of Non-Public Session. (3-0 Voice Vote – Chairman McWhinnie-yes, Selectman Wilson -yes, Selectman Bishop – yes).

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to seal the minutes of Non-Public Session. (3-0 Voice Vote – Chairman McWhinnie-yes, Selectman Wilson -yes, and Selectman Bishop – yes).

**(3) Non-Public Session per RSA 91-A:3, II (a) - Personnel**

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to go into Non-Public Session per RSA 91-A:3, II(a). (3-0 Voice Vote – Chairman McWhinnie– yes, Selectman Wilson-yes, and Selectman Bishop– yes).

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**(4) Non-Public Session per RSA 91-A:3, II (a)- Personnel**

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to go into Non-Public Session per RSA 91-A:3, II (a). (3-0 Voice Vote – Chairman McWhinnie– yes, Selectman Wilson-yes, and Selectman Bishop– yes).

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to come out of Non-Public Session. (3-0 Voice Vote – Chairman McWhinnie -yes, Selectman Wilson-yes and Selectman Bishop – yes).

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to seal the minutes of Non-Public Session. (3-0 Voice Vote – Chairman McWhinnie-yes, Selectman Wilson -yes, and Selectman Bishop – yes).

**(5) Non-Public Session per RSA 91-A:3, II (I)- Legal**

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to go into Non-Public Session per RSA 91-A:3, II (I). (3-0 Voice Vote – Chairman McWhinnie– yes, Selectman Wilson–yes, and Selectman Bishop– yes).

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to come out of Non-Public Session. (3-0 Voice Vote – Chairman McWhinnie –yes, Selectman Wilson–yes and Selectman Bishop – yes).

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to seal the minutes of Non-Public Session. (3-0 Voice Vote – Chairman McWhinnie–yes, Selectman Wilson –yes, and Selectman Bishop – yes).

**(6) Non-Public Session per RSA 91-A:3, II (I)- Legal**

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to go into Non-Public Session per RSA 91-A:3, II (I). (3-0 Voice Vote – Chairman McWhinnie– yes, Selectman Wilson–yes, and Selectman Bishop– yes).

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to come out of Non-Public Session. (3-0 Voice Vote – Chairman McWhinnie –yes, Selectman Wilson–yes and Selectman Bishop – yes).

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to seal the minutes of Non-Public Session. (3-0 Voice Vote – Chairman McWhinnie–yes, Selectman Wilson –yes, and Selectman Bishop – yes).

**(7) Non-Public Session per RSA 91-A:3, II (c)-Reputation**

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to go into Non-Public Session per RSA 91-A:3, II (c). (3-0 Voice Vote – Chairman McWhinnie– yes, Selectman Wilson–yes, and Selectman Bishop– yes).

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to come out of Non-Public Session. (3-0 Voice Vote – Chairman McWhinnie –yes, Selectman Wilson–yes and Selectman Bishop – yes).

**MOTION:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to seal the minutes of Non-Public Session. (3-0 Voice Vote – Chairman McWhinnie–yes, Selectman Wilson –yes, and Selectman Bishop – yes).

The meeting room was opened to the public. The Board noted the Non-Public Session minutes were sealed.

**Adjournment:** On a Motion by Chairman McWhinnie and seconded by Selectman Bishop it was voted unanimously to adjourn at approximately 9:15 p.m. (3-0).

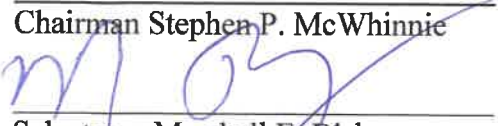
*\*time not captured by audio*

Respectfully Submitted,



Heather Carpenter  
Assistant Town Administrator

**Approved by the Board of Selectmen**

  
Chairman Stephen P. McWhinnie

  
Selectman Marshall E. Bishop

  
Selectman Michael J. Wilson

{Audio recordings are available at the Selectmen's Office and for free as a link on the Town website through SoundCloud}

Attach. to minutes  
of 7-9-18



**Targeted National Sewage Sludge Survey**  
**Sampling and Analysis Technical Report**

**January 2009**



## Section 4 Sample Analyses

### 4.1 Analytes of Interest

The TNSSS was designed to do two things: 1) obtain updated occurrence information on nine pollutants of potential concern, and 2) obtain occurrence information on a number of contaminants of emerging interest identified by EPA and the National Research Council (NRC).

As discussed in Section 1, EPA identified nine pollutants (shown in bold in Table 5) for further evaluation of occurrence in sewage sludge. This evaluation was based on an assessment of chemical pollutants for which EPA had adequate data (e.g., human health benchmark values, and information on fate and transport in the environment).

Given the national scope of the survey, EPA expanded the list of analytes to reflect the Agency's interest in collecting concentration data for other chemicals (see Tables 5 and 6). The expanded list included 24 additional metals that could be analyzed at little extra cost at the same time as the four metals (barium, beryllium, manganese, and silver) included in the list of nine pollutants above; molybdenum because of the Agency's interest in determining the need for a revised numeric standard for it in land-applied biosolids; and other analytes because of their widespread incidence and use and emerging concern. The latter category included:

- benzo(a)pyrene (found in coal tar, automobile exhaust fumes, tobacco and wood smoke, charbroiled food, and burnt toast);
- 2-methylnaphthalene (found in nonstructural caulking compounds and sealants, synthetic resins, rubber adhesives, and wall coverings);
- bis (2-ethylhexyl) phthalate (widely used as a plasticizer in manufacturing of items such as cosmetics, toys, tools, and laboratory equipment);
- fluoride (used in topical and systemic therapy for preventing tooth decay, as well as many other uses);
- water-extractable phosphorus (correlated with phosphorus concentration in runoff from soils amended with manure and biosolids and an indicator of loss that may contribute to algae buildup in surface waters);
- 11 polybrominated diphenyl ethers (PBDEs). Four of the PBDEs were of most interest because of available human health information that may be useful for future risk evaluation efforts. PBDEs are used as flame retardants in a wide array of products, including building materials, electronics, furnishings, motor vehicles, plastics, polyurethane foams, and textiles; and
- 97 pharmaceuticals, steroids, and hormones because of broader emerging interest in these analytes.

## Executive Summary

This Sampling and Analysis Technical Report ("Technical Report") describes the sampling and analysis activities conducted by EPA in support of the Targeted National Sewage Sludge Survey (TNSSS). The TNSSS was designed to: 1) obtain updated occurrence information on nine analytes of potential concern, and 2) obtain occurrence information on a number of contaminants of emerging interest identified by EPA and the National Research Council (NRC). The objective of the survey was to obtain national estimates of the concentrations of these pollutants in sewage sludge for use in assessing if exposures may be occurring and whether those levels may be of concern.

Final sewage sludge is defined as the liquid, solid, or semi-solid residue generated during the treatment of domestic sewage, receiving secondary treatment or better, in a treatment works, which may include sewage sludge processed to meet land application standards. The publicly owned treatment works (POTWs) included in the survey were selected without consideration of their sewage sludge use or disposal practices.

For this survey, EPA focused its efforts on POTWs that treat more than one million gallons of wastewater per day (MGD). This group of facilities collectively generates approximately 94 percent of the wastewater flow in the nation. To be eligible for the survey, EPA also required that a POTW be located in the contiguous United States and employ secondary treatment or better. From the 3,337 POTWs that met the criteria, EPA statistically selected 74 facilities in 35 states for the survey and collected biosolids samples from those facilities. Whether the facility recycles the sewage sludge to land or disposes of it via incineration or surface disposal was not a consideration for selecting a facility for inclusion in the survey. By using statistical methods, the concentration measurements can be extrapolated to the entire population of 3,337 POTWs.

EPA collected samples between August 2006 and March 2007. EPA collected 84 samples of sewage sludge from 74 facilities, one from each of 64 POTWs, as well as two samples at the remaining ten facilities (either because the facility had more than one treatment system and produced two types of final sewage sludge, or for quality assurance purposes). EPA conducted analysis of sewage sludge samples for 145 analytes, including four anions (nitrite/nitrate, fluoride, water-extractable phosphorus), 28 metals, four polycyclic aromatic hydrocarbons, two semi-volatiles, 11 flame retardants, 72 pharmaceuticals, and 25 steroids and hormones.

The survey used both well-established multi-laboratory validated EPA procedures as well as three analytical methods that were developed or updated for the survey. The two new methods are single-lab validated methods for pharmaceuticals (EPA Method 1694), and steroids and hormones (EPA Method 1698). The updated multi-lab validated method is for flame retardants (EPA Method 1614).

EPA took steps to ensure that the results were comparable across all of the facilities sampled. The percent solids in the various sewage sludge samples range from 0.14 to 94.9. To ensure comparability of results, all sample results are reported on a dry-weight basis.

EPA subjected all of the analytical results generated by the laboratories to data review procedures. These procedures used review protocols to ensure that the results met EPA's objectives for data quality.

This Technical Report includes the number of samples in which each analyte was reported, along with minimum and maximum measurements. Reported concentrations and frequency of detects are limited by the sensitivity of the analytical methods used. Some analytes were found in all 84 samples, while others were found in none or only a few of the sewage sludge samples. The minimum concentration is the lowest value reported as present in any sample. EPA did not report a minimum or maximum value for those analytes that were not detected (i.e., a situation that occurred for some of the pharmaceuticals, steroids and hormones). For these situations, EPA used "ND" to indicate that the minimum and maximum values were "not detected." The maximum concentration is the highest value reported as present in any sample.

Briefly, the survey found:

- The four anions were found in every sample.
- 27 metals were found in virtually every sample, with one metal (antimony) found in no less than 72 samples.
- Of the six semivolatile organics and polycyclic aromatic hydrocarbons, four were found in at least 72 samples, one was found in 63 samples, and one was found in 39 samples.
- Of the 72 pharmaceuticals, three (i.e., ciprofloxacin, diphenhydramine, and triclocarban) were found in all 84 samples and nine were found in at least 80 of the samples. However, 15 pharmaceuticals were not found in any sample and 29 were found in fewer than three samples.
- Of the 25 steroids and hormones, three steroids (i.e., campesterol, cholestanol, and coprostanol) were found in all 84 samples and six steroids were found in at least 80 of the samples. One hormone (i.e., 17 $\alpha$ -ethynyl estradiol) was not found in any sample and five hormones were found in fewer than six samples.
- All of the flame retardants except one (BDE-138) were found every sample or all but one sample.

It is not appropriate to speculate on the significance of the results until a proper evaluation has been completed and reviewed. EPA plans to evaluate the pollutants identified by the survey as being present in sewage sludge. As its first priority, using the survey information, EPA has begun assessing the nine pollutants identified from the 2003 biennial review as needing updated concentration information and molybdenum to determine whether additional action may be necessary. Later this year, EPA expects to initiate evaluations of other pollutants in the survey that may warrant further consideration. The evaluations will depend on the availability of data needed to conduct the evaluations.

Attach. to min. of 7-9-18

Upton & Hatfield LLP

## The Doctrine of Vested Rights – A Brief Survey

July 21, 2012 by Upton & Hatfield

### INTRODUCTION

"[A] property owner has no right to the continued existence of any particular zoning classification of his property, because all property is held in subordination to the police power of the municipality."<sup>1</sup> Indeed, in balancing the interests of the property owner and a municipality, the latter is afforded significant authority to adopt ordinances and regulations to protect the health, safety, morals and general welfare of the community.<sup>2</sup> RSA 674:16, I provides a municipality with authority, for example, to adopt zoning ordinance provisions to "regulate and restrict . . . [l]ot sizes, the percentage of a lot that may be occupied, and the size of yards, courts and other open spaces . . . [and] location and use of buildings, structures and land used for business, industrial, residential, or other purpose." These regulations are designed "to secure safety from fires, panic and other dangers; to promote health and the general welfare; to prevent the overcrowding of land; to avoid undue concentration of population; [and] to assure proper use of natural resources."<sup>3</sup>

Nevertheless, private property ownership rights have been recognized as fundamental rights under the New Hampshire and United States Constitutions.<sup>4</sup> Part I, article 12 of the New Hampshire Constitution provides that "no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people."<sup>5</sup> The same principle is embodied in the Fifth Amendment to the Constitution of the United States, which provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."<sup>6</sup> One way in which a municipality may take private property is through the adoption of zoning ordinances or other regulations that have the effect of significantly limiting a landowner's use of property.<sup>7</sup>

To combat this potential deprivation of constitutional rights, a property owner is protected, or vested, from the retroactive application of a zoning ordinance provision, or other regulation, that may operate to prohibit a use of property that the owner has in good faith, begun to develop in the absence of the regulation. This is not to be confused with the doctrine of non-conforming uses, which is defined as:

A use of land which, at the time a restriction on that use went into effect, was established (or 'vested'), and has not been discontinued or abandoned, can continue indefinitely, unless it includes activity which is a nuisance or harmful to the public health and welfare; but the use cannot be changed or substantially expanded without being brought into compliance.<sup>8</sup>

Like the doctrine of vesting, the doctrine of nonconforming uses evolved for the purpose of protecting property rights that antedated the existence of an ordinance from what might be an unconstitutional taking.<sup>9</sup> While the doctrines of vested rights and non-conforming uses are interrelated, they are mutually exclusive concepts, on a temporal level. Thus, at the point a particular project is deemed vested, the doctrine of non-conforming use takes over and governs the continuation of that use.

Developed in common law, the doctrine of vesting serves to insulate a property owner who has begun

the task of developing his or her property for a use that was permitted at the time he or she received a building permit, or subdivision or site plan approval. In 1975, the New Hampshire legislature adopted RSA 674:39 (formerly RSA 36:24-a), which the New Hampshire Supreme Court has held codified the common law doctrine of vested rights. This statute, which has been the subject of only a handful of Supreme Court opinions, has been amended numerous times since its adoption. The purpose of this article is to track the evolution of the vesting doctrine, with a particular focus on RSA 674:39, to its present form. In examining both the common law and RSA 674:39, this article will question some of the Supreme Court's opinions and attempt to harmonize what some may consider to be an inconsistent jurisprudence.

## THE EVOLUTION OF THE COMMON LAW DOCTRINE OF VESTED RIGHTS

### The Beginning

In 1956, the doctrine of vested rights was adopted by the New Hampshire Supreme Court in *Winn v. Lamoy Realty Corp.*<sup>10</sup> In that case, the question presented was whether a property owner, who had received a permit to build a commercial store in the City of Nashua, lost the right to develop the property as planned after the City adopted an amendment to its zoning ordinance prohibiting the project, 14 days after the landowner received the permit.<sup>11</sup> The Supreme Court, having not previously recognized the vesting doctrine, properly looked to holdings from other jurisdictions for guidance.<sup>12</sup> In examining these cases, the Supreme Court noted that "[t]he decisions in the different states . . . [were] by no means harmonious and even appear conflicting in some instances within the same jurisdiction."<sup>13</sup> Nonetheless, the cases did seemingly share the common ingredient that a landowner was deemed vested from a later zoning amendment if he or she incurred substantial expenditures or legal obligations relying in good faith upon the permit.<sup>14</sup>

Although the state had not previously adopted the vested rights doctrine, the Court found that its precedent supported, indirectly, the rationale of vested rights.<sup>15</sup> It is the seriousness of the restriction upon the private right, the Court recognized, that is to be considered in balance with the expediency of the public interest.<sup>16</sup> It is for this reason that the Court, in adopting the vesting doctrine, expressly rejected the suggestion in some cases that actual construction must be commenced before vesting relief may be granted.<sup>17</sup> The Court characterized this actual construction standard as "too rigid," and that in many instances the policy may deny relief where the owner has suffered great detriment because of his or her reliance on the permit, and allow it where his or her damage was slight.<sup>18</sup> Following the guidance of the out-of-state decisions, as well as its own precedent, the Supreme Court held that a landowner is vested from a later-enacted zoning ordinance amendment or other regulation that would prohibit the use, if "the owner, relying in good faith upon a permit and before it has been revoked, ha[d] made substantial construction on the property or ha[d] incurred substantial liabilities relating directly thereto, or both, the permit may not be cancelled."<sup>19</sup>

Applying the newly adopted standard to the facts before it, the Court held that the landowner had not achieved vested status because he had incurred expenses and liabilities of less than \$1,000.<sup>20</sup> Further, actual physical construction was not started until four days after the amendment was passed, and the landowner's purchase of the lot was not based on receiving the permits.<sup>21</sup> The Court decided that the landowners' expenditures and legal obligations were small in relation to the very substantial total cost of the proposed store and, therefore, he was not vested from the City of



**SELECTMEN'S OFFICE  
TOWN OF GILMANTON**

PO Box 550, Gilmanton, NH 03237

Ph: (603) 267-6700 Fax: (603) 267-6701 Website: [www.gilmantonnh.org](http://www.gilmantonnh.org)

**ATTENDANCE SIGN-IN**

**PRINT NAME**

**SIGNATURE & DATE**

July 9, 2018

Bernadette Gilmant

Laurel Robbuck

William Goulter

Barbara Swanson

Laurel Robbuck

Brett Currier

Leonard Swanson

Kristi Laurendeau

Dustin Milliken

Sandi Guarino

JANICE McWHIRLIE

DON GUARINO

Robert Carpenter

Bernadette Gilmant

Laurel Robbuck

William Goulter

Barbara Swanson

Laurel Robbuck

Brett Currier

Leonard Swanson

Kristi Laurendeau

Dustin Milliken

Sandi Guarino

JANICE McWHIRLIE

DON GUARINO

Robert Carpenter