

Business Update

The Legal Newsletter For Maine's Business Community

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In this newsletter we have chosen to focus on municipal issues. In the current environment we find our clients having increasing contact with municipal issues. Our experience gives us insights from both side of the table. Not only do we represent clients in municipal matters, we have also represented municipalities. We have also gained experience and insight through our tradition of public service. David Perkins was selectman in North Yarmouth and a member of the board for S.A.D. 51. Richard Olson is in his second term on the Falmouth Town Council. Patrick Mellor is a member of the Union Planning Board and Gerald May is a member of the Brunswick Zoning Board of Appeals. We look forward to sharing our skills and experiences with our clients.

Effectively Persuading Local Officials

Maine has over 180 towns and cities, each with its own local government including mayors, selectmen, town councils, planning boards, conservation commissions, school boards, tax assessors, harbor commissions and so on. Maine has a strong tradition of local control which gives these local government organizations a level of importance which is vastly different from that of other states which rely far more on county or regional government.

At Perkins Olson we have significant experience dealing with all levels and types of local government. A substantial amount of that experience stems from our firm's commitment to community involvement. David Perkins has been a Selectman for the Town of

North Yarmouth as well as a member of the board of SAD 51. Patrick Mellor has served on the Planning Board for the Town of Union. Gerald May is a member of the Brunswick zoning board of appeals and I have served as a member and Chair of the Falmouth Town Council and Conservation Commission.

We have acted as special council to Towns and we have represented a variety of clients in matters pending before all levels of town government, thus giving us substantial insights from both sides of the process. This experience has led to a number of lessons for effectively persuading local officials:

1. Respect. Members of Planning Boards,

By Richard Olson



School Boards, Councils are all volunteers. Town Managers, Town Planners and Code Enforcement Officers are all paid generally modest salaries for the quantity and quality of work they do. These are all people who have been drawn to public service largely for the opportunity to serve the public. They often have a great deal of discretion and a large part of that discretion rests with how actively they

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Terminating Bad Cops



By David J. Perkins

As Maine's demographics change, many Maine communities face difficult challenges attracting good police officers and removing poorly performing police officers. The termination of employment of police officers requires particular care.

Under Maine law, police officers, including chiefs of police, may be removed for cause after notice and hearing. 30-A MRSA Section 2671(1). Police officers also may have additional rights under employee handbooks or town/city ordinances.

When a town manager receives complaints about police conduct that may lead to termination hearings, the manager needs to be very careful about opening him or herself up to charges of "bias." Many town ordinances require that the town manager make the decision regarding termination of employees, including members of the police department. The termination should be viewed as judicial in nature, and municipal officials involved must assume the role of a deliberate, unprejudiced tribunal and provide the officer with a full and fair hearing.

If the manager is the investigator on the issue of grounds for termination, then the manager will be acting as the prosecutor and judge at the termination hearing, which will likely lead to charges of bias.

Of course, managers will always have familiarity with the police officer and the issues

leading up to the termination hearing. The fact that the manager is familiar with, or even has formulated opinions about, the facts of the case prior to review is not in itself sufficient to disqualify the manager from serving as the hearing officer. *Plance v. Cumberland*, 1994 Me. Super. Lexis 13. But the process needs to ensure that the hearing officer has not prejudged the facts and the legal conclusions in advance of the hearing.

Separating the manager or hearing officer from all aspects of the investigation is critical to avoiding bias. If the manager has any issues about being able to preside at the hearing without prejudging the facts because of past contact with the officer, then the manager should disqualify himself and the Selectmen or Council should designate a substitute hearing officer.

The notice that precedes the hearing should comply with the Maine Administrative Procedures Act and should include: (1) a state-

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Abandoned Roads—Implications for a Landowner



Finally. You've found your piece of paradise: a 10 acre parcel with a cabin out in the sticks where you can get away from it all. The dirt road that takes you to your haven is fairly well-traveled, and the gentleman who sold you the property told you that he used the dirt road while he lived there with no problems. You understood when you purchased your property that the road was an abandoned town road and your deed says that you own to the middle of the old town road. There's a consensus amongst the neighbors that you do not want the hunters, ATV's and rubbernecks on the road without permission and you would like to exercise any rights that you have to that end.

How has this road been used in the past? You check with the town's road commissioner and he tells you that there hasn't been any town maintenance on the road since around WWII. Where does that

leave you? You must determine whether, in fact, the road has been abandoned by the town.

Abandonment.

There are two ways through which a town may be shown to have "abandoned" a public way; common law abandonment and statutory abandonment.

The common law of abandonment recognizes that rights in public ways may be lost through neglect. Under the doctrine of common law abandonment, "a presumption of a public intent to abandon a road may be raised by evidence of nonuse for twenty years or more, intentional and voluntary desertion of a road, or acquiescence, even for a few years, in the discontinuance of an old road combined with use of a new road." *Lamb v. Town of New Sharon*, 606 A.2d 1042, 1046 (Me. 1992). This presumption, once raised, may be rebutted by evidence of a contrary intent on the part of the public. It's not entirely clear what would be satisfactory rebuttal evidence; however, even occasional plowing by the town has been found to be insufficient. *Shadan v. Town of Skowhegan*, 1997 ME 187.

Further, at common law, when a town or county abandons a public way, all rights to the way pass to the owners of the land that abut the center line of the way. *Piper v. Voorhees*, 155 A. 556, 559 (Me. 1931).

Meanwhile, Maine statutory law, enacted in 1976, states that "a town or county way not kept passable for the use of motor vehicles at the expense of the municipality or county for a period of 30 or more consecutive years has been discontinued by abandonment." 23 M.R.S.A. § 3028. In addition to upping the time period to establish abandonment to 30 years, statutory abandonment hinges upon the issue of the municipality making expenditures to maintain a public way. In other words, Section 3028 merely codifies one aspect of the common law doctrine of abandonment "by raising the presumption of abandonment once evidence is shown of lack of town maintenance (and therefore lack of the public's asserting its rights in the road)." *Lamb v. New Sharon*, 606 A.2d 1042 (Me. 1992). Therefore, even if there has been public use of the road, one may assert that the municipality has "abandoned" the road by failing to maintain it.

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Avoiding the Confidentiality Landmines: Legal Issues with Maintenance and Disclosure of Municipal Personnel Records



If you pick up the Press Herald, Morning Sentinel or the Bangor Daily News on any given day, you are bound to see stories that relate to "personnel issues" with city and town employees. In many cases, these issues relate to investigations and possible discipline for misconduct. Whether they are town managers, fire chiefs, code enforcement officers, or some other kind of city or town official, personnel investigations raise some sensitive concerns, particularly relating to recordkeeping. As special investigative counsel for the Town of Monmouth concerning problems with the town's police department, Perkins Olson has recently been involved in researching and providing advice on legal issues related to employee personnel records, and the confidentiality of those records. This article provides a general overview of these legal issues, with an eye

to assisting municipalities in navigating around the confidentiality landmines which could lead to employee litigation.

Records on Employee Investigation and Discipline: A Class by themselves

Records relating to the investigation and discipline of city or town employees are a special class of documents which do not fall under the disclosure provisions of the Freedom of Access Act. 1 M.R.S.A. § 401. (The Freedom of Access Act is Maine's equivalent of the Freedom of Information Act (FOIA), which permits public access to a wide variety of government records.) Investigative records include complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. 30-A M.R.S.A. § 2702(1)(B)(5).

If a municipality takes disciplinary action against an employee on the basis of its investigation, the final written decision relating to that action is no longer confidential after it is completed, if it imposes or upholds discipline. The practical import of

this statutory scheme is that municipal officials have an obligation not to disclose any records relating to investigations of employee misconduct until the appropriate municipal body makes a formal finding of misconduct. If, upon completion of the investigation, no discipline is imposed, the records relating to the personnel investigation remain in the employee's file as confidential material.

Maine courts have considered the confidentiality of municipal personnel records, and specifically police records. An opinion by the Cumberland County Superior Court in *Portland Police Benevolent Association v. City of Portland* illustrates the line where confidentiality ends and public access begins:

The statutory language suggests that, when conduct is sufficiently serious to warrant a disciplinary investigation, information about that conduct will only be made accessible to the public once it has been thoroughly investigated and the veracity of the report confirmed. Public disclosure of unsubstantiated accusations of serious misconduct has the potential to permanently damage the reputation and credibility of a municipal employee. Section 2702 protects that information and the

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Early Action Makes for Better Results



By Kevan Rinehart

Out of Maine's 43,000 registered businesses, over 95% have fewer than 50 employees. Additionally, more than 58,000 Mainers are self-employed in sole proprietorships. As a law firm representing small businesses in Maine, it therefore follows that the vast majority of our clients are sole proprietors, small business owners or start-up companies. We enjoy representing businesses from formation through asset acquisition, refinancing and in all facets of growth. We welcome clients at any stage in their growth process, but encourage businesses and individuals interested in purchasing an existing business to seek our advice at the beginning of a deal for several reasons, including the opportuni-

ty to address municipal issues. Overall, when buying a business there are several issues regarding municipalities that arise, and this article will attempt to address and explain some of the more typical and significant ones.

As pointed out in other articles within this newsletter, municipalities and their employees are often overburdened, therefore providing them with pertinent information well before a closing occurs can contribute to create a seamless transition. Recently we represented a client purchasing a small hotel in a southern Maine coastal town, and due to regular communication between us, the client and the various municipal entities from initial interest to through closing, the transition was pleasant, and all parties were pleased with the result and the relationships created.

Mr. and Mrs. Pine were interested in purchasing a small hotel in Old Orchard Beach, which purchase would require attention to

zoning, licensing and code enforcement issues. Because the Pines contacted us early in the process, we were able not only to work with them to ensure a smooth transition from the sellers to the Pines, but also to ensure that in the event any significant municipal issues arose, the Pines would not be obligated to follow through with the purchase.

First, the Pines contacted us prior to executing a Commercial Purchase and Sale Agreement so that we were able to add key provisions. These included provisions (1) to ensure that they were free to assign the contract to corporate entities they formed prior to closing in order to (a) hold the real estate and (b) run the business, and (2) to ensure the closing would take place (a) prior to the summer season or (b) the Sellers would be obligated to open and operate the hotel if the closing was delayed. Freedom to assign the contract is important not only from the perspective of the municipality in terms of issuing the various licenses necessary

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will support or oppose your proposal. These are people who hear lots of complaints and have to deal with many issues in short amounts of time. Approach them with the assumption that they want to do what is in the best interests of their community.

2. Don't Make Enemies—or choose them carefully. Town officials often have long standing relationships with each other and while a councilor or board member is normally willing to vote against either town staff's or another councilor's position, that same councilor may reconsider in the face of a passionate argument. Personal attacks on municipal officials (or their friends) can lead to motions to table, quasi filibusters, unpleasant parliamentary maneuvers and technical issues. This is not to suggest you should not advocate vigorously, but it is far better to neutralize an opposing town official than to motivate him or her to vigorously oppose your proposal.

3. Provide Information. Remember that Town Officials have full plates. Make the presentation of information to them as clear and complete as possible with clear drawings, tables etc. Bring extra copies to any meetings to provide to people in the audience who may be following along.

4. Be Open to Changes. Many town officials have one or more pet projects or issues. If you can shape your proposal to address their concern without harming your position, and that change can get their vote, do it.

5. Meet one-on-one before public meetings if you can. Public meetings make people still and often stifle a genuine exchange of ideas. If you can meet with the town officials prior to the meeting you can understand their concerns and address them with explanations or changes.

6. Mobilize Community Opinion. Because Town Officials are trying to do what is in the community's best interest, it helps for them to hear from the community. Identify opinion leaders and meet with them to get their thoughts and inform them of your plans. Use their input and suggestions and encourage them to speak in your favor. While community and opinion leaders are important, it is also good to seek out people who are not the "usual suspects".

7. Seek Support from Community Organizations. Do your plans enhance open space, snowmobiling opportunities, create jobs...there are often groups who share those concerns and their support can help sway officials.

8. Avoid Threats. Most Towns in Maine have been in business since the eighteenth century and they will probably continue to be in business long after your project turns to dust. They generally do not fear the threat of litigation or "something worse" if your proposal is not approved.

In conclusion, remember that you are involved in a process that is, by its nature, political and therefore the tools you need to persuade involve marshalling fact, legal arguments and the opinions of a variety of people.

Entrepreneurs Seminar June 15

On June 15 at 5:00 p.m., 2006, Perkins Olson will be sponsoring a seminar entitled "Engaging Entrepreneurs" at the Farnsworth Museum in Rockland. The seminar is being presented by the Midcoast Magnet, a non-profit organization that develops innovative projects to support creativity and economic sustainability in Midcoast Maine. The goal of this seminar is to pull together creative minds to assist Maine entrepreneurs in moving their business models forward and to answer questions regarding every facet of the entrepreneurs' business. The panel will include Perkins Olson attorneys, accounting professionals, and entrepreneurs who have had success in developing their businesses in the Midcoast. For more information, please call Patrick Mellor at our Rockland office (594-6131) or the Midcoast Magnet (504-6444).

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to operate, but is also significant in terms of liability and taxation repercussions.

The timing of the closing is a tricky issue for several reasons. Old Orchard Beach, like many municipalities in Maine, will not issue the necessary operational licenses to do business until the property and/or assets have been transferred to the new owner. When an interest in real property is being transferred as part of a business purchase, whether through a deed or assignment of lease, most municipalities withhold licenses until the Code Enforcement Officer has had an opportunity to inspect the premises in order to ensure they are in compliance with all ordinances and codes. When a property is being transferred in the midst of a high season, this creates a problem unless such visit has been scheduled well in advance. For this reason, it is important to contact the municipality early and to keep it apprised of any changes in the closing timetable so that the Code Enforcement Officer is able to have a scheduled visit to the premises immediately upon closing to ensure there is no interruption of services. Operating without a license often results in fines well over \$100.00 per day, and does not act as inducement for the Code Enforcement Officer to place you at the top of her list, notwithstanding pleas of ignorance or loss of income due to the seasonal nature of a business.

Second, many lenders require zoning opinions from the purchaser/borrower's counsel. This requires counsel to research the applicable zoning ordinances in which a business property is located to ensure it is in compliance with all applicable laws and ordinances. While purchasing a so-called "going concern" would appear to be an indication that a property is in compliance, transferring a business often brings dormant violations to light. It is important such issues are uncovered within contingency periods established in the purchase contract; otherwise, the purchaser could be without recourse to negotiate the price, ask the seller to remedy the issues, or terminate the contract.

Overall, establishing an early rapport with municipal officers that you as the purchaser intend to ensure your business is always in compliance with local codes and requirements will do wonders important to create an excellent working relationship as a new member of the town's business community.

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Rights of Others to Use Your Road.

If you establish that the town has abandoned the road, you may still have to deal with the public seeking a right of way over your road through the common law precept of a pre-

scriptive easement, the requirements of which are similar to adverse possession. "The party asserting a prescriptive easement must prove continuous use, for at least twenty years under a claim of right adverse to the owner, with his knowledge and acquiescence, or by a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed." *Glidden v. Belden*, 684 A.2d 1306 (Me. 1996). The issue of the public's use of the road is very fact intensive and continuous public use is not determined by the frequency of the use, or the number using the way, but its use by people who are not separable from the public generally. *Stickney v. City of Saco*, 2001 ME 69.

Meanwhile, if you establish statutory abandonment, Section 3028 throws an interesting twist, which is this: If it is decided that the public way has been abandoned by the town under Section 3028, the way would be "relegated to the same status it would have had after a discontinuance pursuant to Title 23 § 3026, except that status is subject to an affirmative vote of the legislative body of the municipality making that way an easement for recreational use." *Martin v. Burnham*, 631 A.2d 1239 (Me. 1993) (citing 23 M.R.S.A. § 3026). Section 3026 provides that unless otherwise stated in an order by the legislative body approving the discontinuance order, a public easement is retained. 23 M.R.S.A. § 3026(1).

So it appears then, that you own the road, at least the part of it that abuts your property, but because members of the public have used the road over the years, they may be able to assert a public easement over the abandoned road. If you establish statutory abandonment of the road, the public easement will almost certainly be retained in the absence of an order from the municipality or court approving the abandonment.

Avoiding Confidentiality, *continued from page 2*

municipal employee while it undergoes internal scrutiny and consideration. When, however, the misconduct is confirmed and proves serious enough to warrant discipline, the Legislature has ensured the Public's right to know about it. In this way, the statute balances the public interest in open access to public records and the public interest in preventing unfair prejudice to public employees.

When (Ex) Employees Speak Out: Figuring out if a line has been crossed

Sometimes, however, this line is not so clear, especially when ex-employees speak out after the fact about the circumstances surrounding their departure. This usually arises where employees have resigned rather than go through the full municipal disciplinary process and a hearing. If the employee brings

up the substance of the charges and investigation, then he or she has effectively brought those investigative records into the public eye. Under those circumstances, a town or city has the right to disclose the charges and evidence of misconduct in the employee's personnel file.

Identifying when an employee has crossed the line is the tricky part. An example from Monmouth illustrates this point. As reported in the *Kennebec Journal*, a reserve police officer who was under investigation was suspended from duty, and then resigned her position. After her resignation, she told a reporter that the results of her polygraph test were the reason for her suspension and resignation. (Maine law requires police officer candidates to take lie detector tests as part of the pre-hire screening process). The officer did not reveal the contents of the results, but the newspaper article indicated that they contained a history of "a lawless adulthood" and "sordid details" about her past. By her discussion of the polygraph, and references to lawless conduct contained in those results, did the officer make the polygraph results a public record?

The answer is no. From a legal perspective, the general references to the polygraph as the basis for suspension, and the general references to a lawless past captured in that exam, are not sufficient to convert a confidential personnel record into a record subject to public disclosure. Had the officer discussed the actual content of the polygraph, and the specific conduct she admitted to under examination, then it would have been a different matter. Municipalities should temper their desire to release information defending their personnel investigations or actions with the knowledge that revealing too much creates liability for breach of confidentiality. When there is doubt about whether an ex-employee has said enough to warrant release of discipline-related personnel records, municipalities should err on the side of nondisclosure and consult counsel about their options.

Towns and cities can preserve the integrity of their investigative and disciplinary processes by respecting the limits on disclosure of personnel records. This respect should include preserving the confidence of these records until the imposition of discipline, or until the employee voluntarily and fully speaks out about the content of those records. How much can be revealed after an employee speaks out is a matter for careful review. Proper recordkeeping practice keeps the focus on the conduct of the employee, and not on the distracting issue of who had access to information about that conduct.

ment of the legal authority and jurisdiction under which the proceeding is being conducted, (2) a reference to the statutory authority for the action being considered, (3) a short statement describing the proceeding, (4) the time and place of the hearing, and (5) the manner and time within which evidence and argument may be submitted for consideration. 5 MRSA Section 9052. It is prudent to advise the police officer in advance that he/she can present their own evidence and cross examine witnesses and that they have the right to be represented by an attorney. Also, the nature of the claims and the evidence to be presented in favor of termination should be described in advance so that the officer can adequately prepare his/her defense.

A decision to terminate a police officer's employment must be supported by "substantial evidence." This means that a court reviewing the decision to terminate will examine the entire record "to determine whether on the basis of all of the testimony and exhibits before the [board] it could fairly and reasonably find the facts as it did." *Ryan v. Town of Camden*, 582 A.2d 973.

If the officer is being terminated for budgetary reasons or for reasons such as a town switching from a local police department to the county sheriff's department, then the "for cause" standard does not need to be met. *Durepo v Limestone*, 1996 U. S. Dis Lexis 11198.

When towns face questions on whether a police officer should be terminated, the town should consider appointing an outside investigator, such as a lawyer, to review the complaints, interview the officer and to develop a written report covering the evidence and recommendations as to termination. The report needs to be kept confidential until the hearing. But the report will educate both the manager and the police officer as to the charges and evidence, and will provide a useful focus to the termination hearing.

In many cases, a police officer who participates in an interview by outside counsel, and sees the evidence in writing, along with the recommendation of termination, will chose to resign, which is in the interests of all sides when termination is warranted.

Municipal Law Seminar: July 1, 2006

At the 2006 Maine State Bar Association Meeting, being held at the Samoset Resort on July 1st, David Perkins and Patrick Mellor will be presenting a seminar entitled "Municipal Law Strategies—Perspectives from Landowner's Counsel and Municipality's Counsel." This presentation will provide the perspectives of landowners' attorneys contrasted with the perspective of the attorney representing the municipality. The primary focus of this presentation is getting planning boards to make the right decisions in a timely and efficient manner, and to ensure that the boards' decisions are upheld in any subsequent litigation.