Vermont Bar Association
Seminar Materials

Municipal Law Year in Review

September 28, 2018
Equinox Resort
Manchester Village, VT

Speakers:

Brian Monaghan, Esq.
Christian Chorba, Esq.

Municipal Law Year in Review

Christian S. Chorba, Esq.
Monaghan Safar Ducham PLLC

Vermont Bar Association
2018 Annual Meeting

Case #1
In re Langlois/Novicki Variance Denial, 2017 VT 76, 175 A.3d 1222
April Term, 2017, issued 8/25/2017

FACTS: Homeowner owns property in Swanton Shoreland Recreational Zoning District. There, any land development requires permit (including enlargement of building or other structure), but no permit is required for one accessory structure, which must be no larger than 100 square feet, no greater than ten feet in height, and must be set back at least five feet from all lot lines.

Zoning administrator made social visit to homeowner's property, and homeowner asked administrator if permit would be necessary for pergola encompassing his large patio. Administrator said no permit was necessary. After contractor prepared sketch and quote for pergola construction, homeowner went to town office, administrator reviewed sketch, and again said no permit was necessary. Landowner made deposit for pergola and told neighbor. Neighbor initially consented, later emailed concerns, but never complained to town.

Landowner constructed over-sized pergola, Selectboard found out, Selectboard asked administrator to take corrective action, landowner filed for permit, and administrator immediately denied permit. Homeowner appealed to DRB, DRB denied variance, and homeowner appealed denial to environmental court. Then, administrator issued NOV, homeowner appealed to DRB, DRB upheld NOV, and homeowner appealed to Environmental Court. Town then brought enforcement action in Environmental Court, and court consolidated three cases. Court concluded that town was equitably estopped from enforcing its zoning regulations and that pergola could remain. Neighbor appealed.

TRIAL COURT: Court applied de novo review. Equitable estoppel doctrine has four elements: (1) party being estopped must know relevant facts; (2) party being estopped must intend that his or her conduct be acted upon; (3) party asserting estoppel must be ignorant of true facts; and (4) party asserting estoppel must rely to his or her detriment on estopped party's representations. Additionally, if asserting equitable estoppel agains government, must also demonstrate that "the injustice that would result from denying the estoppel outweighs the negative impact on public policy that would result from applying estoppel."

SUPREME COURT: Court held that (1) zoning administrator knew relevant facts (knew property, saw sketch, and was charged with knowing zoning regulations), (2) zoning administrator intended homeowner to act on advice, (3) homeowner didn't know true facts (his general knowledge and prior experience that permits are sometimes required was insufficient to put him on notice that one is required here); and (4) landowner relied on administrator's advice to his detriment (spent over $30,000 on pergola).

Also, even though equitable estoppel against government is "allowed only in extraordinary circumstances," it is appropriate here because homeowner was "reasonable in his actions and justifiably relied upon the misinformation he received," "is innocent," and "asked the right questions of the right government official." Even though it isn't fair to other town residents (including neighbor), if estoppel not applied here, then "we would

be hard-pressed to tell" neighbor what he was "required to do differently." Town will be more careful in future.

Case #2
In re Vermont Gas Sys., Inc., 2017 VT 83, 174 A.3d 1253
April Term, 2017, issued 9/22/2017

FACTS: Vermont Gas Systems filed with PSB to construct pipeline that would run through Geprags Park in Hinesburg, even though park was granted to town with covenant that it "shall be used only as a public park or school or for public recreational or educational purposes" and town wouldn't voluntarily convey easement to gas company. PSB issued certificate of public good for pipeline, and then gas company petitioned PSB to condemn easement through park after stipulation to do so with town.

Local residents banded together and opposed the easement, so gas company and selectboard revised stipulation so that pipeline would underground. Even though there was prior public use, PSB approved condemnation because (1) "the additional public use will not destroy or materially interfere with the prior public use," (2) alternative routes were inferior under industry best practices, and (3) it would not "unduly interfere with the orderly development of the region and scenic preservation" because pipeline would not be visible. PSB also imposed terms of easement limiting impact of maintenance.

SUPREME COURT: All previous similar cases have involved second uses that would destroy or materially impair prior public use. Here, there would be no material impairment, so this is case of first impression.

Court held that "prior public use doctrine does not prohibit condemnation of land devoted to a public use when the new use does not materially impair the prior use." No value judgment between two uses is needed; looking at entire affected property, if new use materially impairs prior use, new use is disallowed. This exception to general rule advances purpose of public use doctrine, which is "to protect public uses and to prevent land from being condemned back and forth between competing condemners, which would result in a lack of consistent public use of the land." It's also supported by case law from other jurisdictions. Fact that Legislature codified early version of doctrine through 30 V.S.A. § 110 does not mean Court can't amend doctrine.

PSB was correct in finding that installation of pipeline and terms of easement limiting impact of maintenance would not materially impair prior use. PSB was also correct in finding under 30 V.S.A. § 112 that "the condemnation of such property or right is necessary in order that the petitioner may render adequate service to the public." Standard is not whether no alternatives exist but "whether the proposed route is reasonably necessary in light of all relevant circumstances." Here, other routes would be longer, less linear, and less compliant with industry standards, so this route satisfied necessity requirement.

Case #3
Taylor v. Town of Cabot, 2017 VT 92, 178 A.3d 313
March Term, 2017, issued 10/6//2017

FACTS: In late 1980s, HUD issued $2 million grant to Cabot to fund loan for dairy cooperative warehouse. By 2003, dairy cooperative paid back loan in full to town, HUD allowed town to keep funds and use consistent with HUD regulations, and town has kept funds separate in its Community Investment Fund of Cabot. This fund gives grants and loans to local groups to "protect and enhance the quality of life and character of the town" and "improve community infrastructure, facilities, and services." Selectboard committee assess applications, and if selectboard approves, then town residents must approve on Town Meeting Day. Voters approved local historic church's application for $10,000.

TRIAL COURT: Group of residents sought preliminary injunction through Compelled Support Clause of Vermont Constitution. Town and church sought to dismiss them for lack of standing. Court determined they had standing under two independent bases: (1) as municipal taxpayers, because there is no way to separate the funds from effects on municipal taxation, and (2) through taxpayer standing, because claim was analogous to Establishment Clause violation. Court also awarded preliminary injunction agains church. Likelihood of success was high because town vote said grant was "for the purpose of repairing the steeple, stairwell and other interior sections" without restriction against repair interior religious areas. Irreparable harm was high because residents "will have suffered an irreparable affront to their values arising from unconstitutional use of government dollars," even if church could eventually pay back funds. Court granted interlocutory appeal.

SUPREME COURT: Residents have standing because "[m]unicipal taxpayer standing . . . encompasses claims that municipal assets have been improperly wasted." Also, "the grant funds here are municipal assets notwithstanding the fact that the funds originated from the U.S. Treasury" because HUD has authorized uses that "are so expansive that most expenditures within the Town's proper spending authority are likely authorized." Grant program allows for so many purposes that the funds "may supplant municipal general fund expenditures" to such an extent that they "cannot be meaningfully divorced from their effects on municipal taxation."

Court reviewed preliminary injunction for abuse of discretion and determined that trial court erred in issuing preliminary injunction because "it overestimated the plaintiffs' likelihood of success on the merits, and erred in concluding that plaintiffs would suffer irreparable injury in the absence of an injunction."

Regarding likelihood of success on the merits, Compelled Support Clause is distinct from Establishment Clause. With Compelled Support Clause, "the fact that the recipient of government support is a religious organization is not itself determinative . . . whether the funds are used to support religious worship is the critical question." Also important, "a refusal to afford religious organizations access to secular benefits generally available to like institutions on account of their religious affiliations may also trigger concerns under the Free Exercise Clause." Court contrasted Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (Missouri violated Free Exercise Clause by prohibiting

playground funds to churches) with Locke v. Davey, 540 U.S. 712 (2004) (Washington did not violate Free Exercise Clause when it denied scholarship funds to student pursuing devotional degree). Here, funds wouldn't go to supporting worship, and denying funds would likely violated Free Exercise Clause because this situation is more like Trinity Lutheran than like Locke.

Also, church repairs here are similar to those permitted under the Establishment Clause in Am. Atheists, Inc. v. City Of Detroit Downtown Dev. Auth., 567 F.3d 278, 282 (6th Cir. 2009). There, Detroit program gave out funds for refurbishing downtown exteriors and parking lots—including to churches—because "program allocate[d] benefits in an evenhanded manner to a broad and diverse universe of beneficiaries." Even though it concerns Establishment Clause, Am. Atheists, Inc. is relevant here: funds don't support worship when "available on a neutral and nondiscriminatory basis to a broad and diverse group of potential recipients in order to promote a squarely secular goal of the broader community"; "no indication that the funds are intended to or do advantage religious organizations or activity"; and "funds are used for structural repairs rather than, for example, erecting religious symbols."

Also, residents would not suffer irreparable injury in the absence of injunction because church would be able to repay funds. Although "in most cases the violation of a plaintiff's constitutional rights is itself a sufficient irreparable injury to support a preliminary injunction," here, "deprivation of liberty or constitutional freedom" can be undone through repayment of funds to town.

Case #4
Toensing v. Attorney Gen., 2017 VT 99, 178 A.3d 1000
June Term, 2017, issued 10/20/2017

FACTS: Plaintiff submitted public records request to then-Attorney General Bill Sorrell, requesting certain records and specifying that "these requests include, but are not limited to, communications received or sent on a private email account . . . or private text messaging account." AGO produced some requested records but withheld others on basis that they weren't public records or were public records exempt from disclosure under PRA. In response, plaintiff wrote letter that "emphasized that his request encompassed communications sent to and received from the private accounts of the identified state employees, but that it did not appear that the [] AGO employees had searched for and produced responsive emails and text messages from their personal accounts."

Plaintiff therefore requested that his letter be treated as appeal, and AGO denied appeal on the bases that (1) PRA "does not extend to private accounts or electronic devices that are not accessible to the agency"; (2) because it attempted to balance public accountability with privacy, Legislature never expected searches of officials' and employees' private accounts; and (3) even assuming that an agency may be obligated in some cases to attempt to search a private account, plaintiff did not provide sufficient justification for request in this case.

TRIAL COURT: Plaintiff appealed to trial court, which granted summary judgment in favor of the AGO because "the PRA only applies to public records of a public agency; "a record must be in the custody or control of the agency to be subject to search or disclosure"; and "subjecting personal accounts to the PRA would lead to the invasion of the privacy of state employees and officials."

SUPREME COURT: AGO abandoned position that records were not "public records" and instead argued that "it was not required to take any steps to identify potentially responsive public records found on private accounts of state employees, and that its process for responding to plaintiff's request was sufficient." Instead, it argued that there should be "burden-shifting test" similar to how some courts assess FOIA disputes. Under that test, agency is not required to search "every record system" but instead "must conduct a good faith, reasonable search of those systems of records likely to possess the requested records." If agency provides reasonably detailed affidavit, requester must produce " 'countervailing evidence' suggesting that a genuine dispute of material fact exists as to the adequacy of the search."

Court noted that "the PRA does not define 'public record' in reference to the location or custodian of the document, but rather to its content and the manner in which it was created." "Records produced or acquired in the course of agency business are public records under the PRA" so "regardless of whether the records are located on private or state accounts, the AGO's obligation to conduct a reasonable search includes asking those individual employees or officials to provide any public records stored in their private accounts that are responsive to plaintiff's request."

Agencies should have "policies in place to minimize the use of personal accounts to conduct agency business." A search is adequate if "the specified officials and employees are trained to properly distinguish public and nonpublic records, the agency asks them to in good faith provide any responsive public records from their personal accounts, and they respond in a manner that provides reasonable assurance of an adequate search." An affidavit is not necessary if "there is no evidence that an employee has public records in personal accounts." Instead, employee must provide "affirmation" that he or she "has not produced or acquired any records in personal accounts in the course of agency business, or that the employee has identified all potentially responsive records through a specified word search, and has segregated and disclosed all records produced or acquired in the course of agency business as opposed to communications of an exclusively personal nature."

Case #5
In re Confluence Behavioral Health, LLC, 2017 VT 112, 180 A.3d 867
September Term, 2017, issued 12/8/2017

FACTS: Thetford DRB issued conditional use permit and site plan approval to therapeutic community residence within town's Rural Residential zoning district. That district is intended to "maintain an area of low average density that is compatible with clusters of high-density, remaining primarily a district of open space, farms, residences, and woodlands, with scattered commercial uses that are either home-based or dependent

on natural resources." Health care facilities are allowed as conditional uses, but zoning ordinance doesn't define them. Therapeutic community residence is wilderness program for young men with mental health issues. Patients reside there for nine to twelve weeks and receive therapy from licensed practitioners. Site previously used by church for retreats.

DRB approved residence after determining that "intensity of the proposed use is consistent with, and possibly less intensive than, the intensity of the previous use of the property as a center for therapeutic retreats" and "proposed use will not have an undue adverse effect on the character of the area."

TRIAL COURT: Neighbors argued that (1) residence should not be allowed as a health care facility, and (2) the project impermissibly reestablished the church's abandoned nonconforming use. Environmental Court determined residence was permissible "health care facility," and neighbors appealed.

SUPREME COURT: Neighbors argue that (1) residence is not "health care facility" and is more akin to impermissible community residence or group living facility, (2) even if residence is "health care facility," its additional use as residential facility is not allowed, and (3) residence is reestablished, nonconforming use and must be prohibited.

First of all, Court overruled prior cases which afforded deference to the Environmental Court's interpretation of permit condition or local zoning ordinance. Going forward, there is no deference to Environmental Court interpretation of permit conditions and local zoning ordinances.

Use as therapeutic community residence is not mutually exclusive of its use as "health care facility." Because Bylaws don't define term "health care facility," Court must determine its meaning. Dictionary definitions indicate that facilities offering "trained and licensed professionals" are sufficient. Vermont statutes governing health care administration use terms like "institutions," "treatment," "inpatient," "two or more unrelated persons." Here, DAIL licenses residence, reinforcing idea that it is "health care facility." Also, recognizing it as "health care facility" comports with Fletcher Farm, Inc. v. Town of Cavendish, 137 Vt. 582, 409 A.2d 569 (1979), where "group therapy, work, recreation, family-style meals and other related programs" established that property was being used for health purposes.

Neighbors' argument that residence doesn't conform to town plan fails because town plan is simply overall guide to community development, and language is simply "aspirational and not binding." Neighbors argument that even if Project is "health care facility," its additional use as residential facility is not allowed fails because projects don't require conditional-use and site-plan approval for every use: "[w]here one use is a component of another allowed use, additional permitting via conditional-use and site-plan review is not necessary." Finally, argument that residence is merely reestablished, nonconforming use fails because residence seeks approval without reliance on prior nonconforming uses.

Case #6
In re Mahar Conditional Use Permit, 2018 VT 20, 183 A.3d 1136
January Term, 2017, issued 2/16/2018

FACTS: Jericho DRB applicant sought conditional use permit for detached accessory structure and apartment at his single-family home. Notice was published in local newspaper and fliers with notice were posted fifteen days before hearing at six public buildings and on Front Porch Forum. Also, notice was sent by first-class mail to nine of appellee's neighbors whose property abuts site of proposed apartment, but not sent to two neighbors owning land across road. After hearing, DRB approved permit but failed to mail to all neighbors.

TRIAL COURT: Group of neighbors appealed to Environmental Court after 30-day period had run. Applicant filed motion for summary judgment, arguing that (1) appeal was not timely because it was filed outside the thirty-day window prescribed by Vermont Rule for Environmental Court Proceedings 5(b)(1), and (2) neighbors were not interested persons because they had not demonstrated physical or environmental impact from construction.

Court dismissed appeal because (1) all neighbors either had actual or constructive notice of DRB decision more than thirty days before they filed their appeal, (2) this actual or constructive notice triggered the appeal period to start, and (3) all groups had failed to timely appeal. Regarding all neighbors, either had actual notice or constructive notice, reasonable efforts were made to provide notice to everyone potentially interested, and others weren't interested parties because didn't attend hearing.

SUPREME COURT: Environmental Court was wrong in determining that 30-day appeal period starts when individual seeking to appeal had constructive or actual notice of municipal panel's decision; really, it's triggered by the date of the decision, not the date of notice, so period begins to run when judgment is entered.

Neighbors across street filed within 90 days of judgment or within 7 days of receiving notice, whichever is earlier. They were entitled to receive notice because DRB was required to send copies of the decision to applicant and "every person or body appearing and having been heard at the hearing." 24 V.S.A. § 4464(b)(3), but they never received notice of hearing.

To establish interested-person status under 10 V.S.A. § 8504(b)(2), party must make two additional showings: (1) person owns or occupies property "in the immediate neighborhood of [the] property"; and (2) person "can demonstrate a physical or environmental impact on the person's interest." 24 V.S.A. § 4465(b)(3). First requirement met because neighbors are adjacent property owners. Second requirement met because neighbors allege that project would have adverse impact, citing effect on surrounding neighborhood, location and layout of structure, existence of second curb cut, and size of structure, among other things.

On remand, Environmental Court must determine whether there's prejudice to another party and has discretion to deny motion to reopen even where all requisite criteria are

met. Also, other neighbors could join appeal because under V.R.A.P. 4(a)(6) ("If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this rule, whichever period ends later.").

Also, 24 V.S.A. § 4464(a)(5) ("No defect in the form or substance of any requirements in subdivision (1) or (2) of this subsection shall invalidate the action of the appropriate municipal panel where reasonable efforts are made to provide adequate posting and notice.") is not applicable where no notice is given.

Case #7
Negotiations Comm. of Caledonia Cent. Supervisory Union v. Caledonia Cent. Educ. Ass'n, 2018 VT 18, 184 A.3d 236
October Term, 2017, issued 2/23/2018

FACTS: Caledonia school board created committee to negotiate new collective bargaining agreement with labor union. Committee and union held negotiations at duly warned public meeting in open session and discussed whether future meetings should be in open session or in executive session. Committee wanted all future meetings in open session. It then announced it would discuss issue in executive session, and then came out and said negotiations in executive session would only be allowed for sensitive issues. Union refused to continue in open session and ended meeting, saying all future negotiations had to be in executive session.

TRIAL COURT: Committee sought declaratory relief that OML requires it to hold meetings in public absent finding that premature public knowledge puts either party at substantial disadvantage. Union moved to dismiss for lack of subject matter jurisdiction, arguing that VLRB is proper entity with jurisdiction. Committee filed motion for judgment on pleadings. Trial court granted motion to dismiss.

SUPREME COURT: Applied de novo review. Trial court had jurisdiction because: (1) issue was ripe, and (2) OML issue is within purview of court. Although Legislature has specifically authorized VLRB to adjudicate certain labor claims, labor laws do not broadly provide that all matters relating to labor relations are solely within purview of VLRB. Also, although VLRB may consider OML in context of labor dispute, that law has potential application in many circumstances not involving labor relations within court's jurisdiction.

Plain language of OML is ambiguous whether "meetings" include collective bargaining negotiations, but statutory construction shows that negotiations between committee and union are not "meetings."

First, under OML, "meeting" means "a gathering of a quorum of the members of a public body for the purpose of discussing the business of the public body or for the purpose of taking action." Significant that (1) Legislature chose not to include "negotiations" in definition, and (2) statutory language implies "meetings" are intended for unilateral committee action (committee gathering to manage its own affairs), not bilateral

negotiations. Also, looking at entirety of OML and giving it "liberal construction," indicates that negotiations aren't meetings. OML specifically says executive session to consider "contracts [or] labor relations agreements with employees," and only "after making a specific finding that premature general public knowledge would clearly place the public body or a person involved at a substantial disadvantage." Also, given sensitive nature of negotiations, they should not be in public. Negotiations require joint participation from parties in equal bargaining positions, and if negotiations are "meetings," then that would give committee unfair unilateral ability to declare executive session.

Also, persuasive evidence from other sources: (1) PRA exempts records regarding negotiations from disclosure, (2) sections of Labor Relations for Teachers and Administrators Act suggests that negotiations between school board committee and teachers' association are private, and (3) custom indicates that negotiations between school board councils and teachers' associations and with VLRB generally are private.

Case #8
Hubacz v. Vill. of Waterbury, 2018 VT 37, 187 A.3d 367
October Term, 2017, issued 4/6/2018

FACTS: Police officer employed by Village of Waterbury applied for position in another town. During interview, he admitted to several acts indicative of very poor character and fitness. Therefore, State's Attorney "elected to no longer prosecute any cases involving [officer], whose duties included developing cases for prosecution and testifying in court." In response, village put officer on administrative leave and then trustees terminated him pursuant to 24 V.S.A. § 1932(a), which allows for suspension or termination of police officer for negligence, dereliction of duty, or conduct unbecoming an officer. Sole stated reason was that State's Attorney elected to no longer prosecute his cases.

Officer raised due process claim in federal court, and court treated it as V.R.C.P. 75 action. Court noted that trustees didn't make any independent findings regarding underlying character and fitness issues and merely based decision on State's Attorney's decision. Also suggested that 24 V.S.A. § 1931 could provide alternative basis for termination.

On remand, regarding 24 V.S.A. § 1932, trustees didn't assess underlying character and fitness issues but instead concluded that officer couldn't perform duties. Regarding 24 V.S.A. § 1931, trustees determined that State's Attorney's nonprosecution decision constituted "a legal and functional disability in that [petitioner] is unable to perform the requisite duties of a police officer" and compared this to officer's disability in Gadue v. Vill. of Essex Junction, 133 Vt. 282, 282, 336 A.2d 182, 182 (1975).

TRIAL COURT: Officer appealed pursuant to V.R.C.P. 75. Court found that 24 V.S.A. § 1932 termination was based solely on nonprosecution decision, not independent findings, and 24 V.S.A. § 1931 termination was invalid because that statute only applies when characteristic of officer makes him or her unable to perform duties.

SUPREME COURT: Village sought interlocutory appeal with certified question of "Is a State's Attorney's unilateral decision to refuse to prosecute any cases investigated by a particular municipal police officer, alone, a sufficient basis for termination of the officer pursuant to 24 V.S.A. § 1931?" Court said 24 V.S.A. § 1931(a) factors can be different from those delineated in 24 V.S.A. § 1932(a).

Court held that Gadue applied and "an officer may be terminated for cause in accord with 24 V.S.A. § 1931(a) without a showing that the officer has been negligent, derelict in his duties, or committed any conduct unbecoming an officer as required for termination pursuant to 24 V.S.A. § 1932(a)." If Gadue suggested that disability is required for 24 V.S.A. § 1931(a) termination, that is wrong; no "disability is necessary to show that an officer cannot fulfill his official duties such that he or she may be terminated for cause under § 1931(a)." What matters is that "police department or its governing body may terminate an officer for cause when the officer is unable to fulfill his or her official duties."

Two limits: (1) "a nonprosecution decision may only serve as the basis for termination for cause where the police department involved cannot reasonably accommodate the effect of the prosecutor's decision, whether by assigning the officer to alternate duties, ensuring that the officer's arrests are witnessed, or by some other means"; and (2) "a State's Attorney's decision not to prosecute a particular police officer's cases must be premised on valid grounds."

Regarding second limit, Brady v. Maryland, 373 U.S. 83(1963), held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Therefore, in case like this one, "a prosecutor may base a nonprosecution decision on the prosecutor's conclusion that Brady requires the disclosure of impeachment evidence concerning a police officer."

Case #9
Lorman v. City of Rutland, 2018 VT 64
November Term, 2017, issued 6/29/2018

FACTS: Old sewage system in Rutland that had been upgraded with slip-line backed up into basements of residents' homes during massive storm. This has happened to many of the residents before.

TRIAL COURT: Residents sued, arguing that City had been "negligent in the design, construction, and/or maintenance and repair of the City's public sewer lines." This claim alleged that City had not acted reasonably or prudently in designing lines and in deciding to slip-line them. Residents also argued that City had duty to keep and maintain lines in reasonably safe and proper condition. Also raised nuisance, trespass, and takings claims.

City moved for summary judgment, arguing that it "was entitled to summary judgment on numerous grounds, including immunity and plaintiffs' failure to establish causation for the negligence and nuisance claims." Court granted that motion.

SUPREME COURT: City is immune from plaintiffs' negligence, trespass, and nuisance claims because it was exercising discretionary, policymaking authority when it designed sewer lines and when it decided to slip-line them rather than replace them entirely. As to takings claim, agreed with trial court that residents failed to present sufficient evidence.

Immunity claim: Absent insurance coverage, governmental functions are protected by immunity but proprietary functions are not. General rule is that when municipality assumes management of sewer system, it must exercise reasonable diligence and care to ensure that it is not clogged, and can be liable for negligence if it fails to do so.

Also, courts recognize distinction between "a municipality's planning and design decisions regarding sewer and water systems and its acts of constructing and maintaining such systems." Ministerial maintenance can be subject to negligence action, but discretionary actions involving judgment cannot. In Hillerby v. Town of Colchester, 167 Vt. 270, 706 A.2d 446 (1997), Court wrote that "to preserve separate and coequal branches of government that best serve the public's interests, government officials must feel that they can use free and independent judgment, without the threat of liability hanging over them, regarding decisions involving the balancing of priorities or the allocation of resources."

Negligence claim: Here, decision to upgrade with slip line was discretionary decision (not poor maintenance) not subject to negligence liability.

Trespass claim: "[P]laintiffs' trespass claim is simply a restated version of their negligence claim," so City is immune.

Nuisance claim: Adopts theory that "a nuisance claim based on negligence is merely a negligence claim with harm to interests in use and enjoyment." 2 D. Dobbs, The Law of Torts § 400. Here, "logic dictates that the City is immune from plaintiffs' nuisance claim, which is essentially a restated version of plaintiffs' negligence claim."

Takings claim: "For a property loss to be compensable as a taking, the government must "intend[ ] to invade a protected property interest or the asserted invasion [must be] the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action." Ondovchik Family Ltd. P'ship, 2010 VT 35, ¶ 16, 187 Vt. 556, 996 A.2d 1179. Also, U.S. Supreme Court has distinguished between permanent physical occupation (takings claim) vs. temporary invasion (no takings claim). Here, backups have been intermittent and transient, so no takings claim.

Case #10
In re Laberge Shooting Range, 2018 VT 84
June Term, 2018, issued 8/17/2018

FACTS: Farming family operated shooting range that is open to public and accepts donations of money (goes to paying legal fees) and repairs to range but does not charge users. Neighbors requested Act 250 jurisdictional opinion from District Environmental Commission that, due to donations from municipalities, range was now operating for

commercial purposes such that construction of benches and berms brings range under Act 250 jurisdiction. In initial decision, Natural Resources Board upheld that decision. It then issued second decision that corrected typo. That decision said appeal period was 30 days from its issuance, and District Coordinator also said that.

TRIAL COURT: Family appealed second decision within 30 days of its issuance but after deadline for first decision. Environmental Court allowed appeal and ultimately found no Act 250 jurisdiction because cash donations aren't necessary for range to operate.

SUPREME COURT: First of all, Environmental Court didn't err in accepting untimely appeal. Reviewing for abuse of discretion, Court considered "the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Third element is most important. Erroneous advice generally doesn't satisfy that element, but here, second decision said appeal period was 30 days from its issuance, and District Coordinator also said that, so that element satisfied. Fact that motion to allow untimely appeal was filed at last minute doesn't matter.

Act 250 requires "commercial or industrial purposes" and Environmental Board rules define "commercial purpose" as "the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object or service having value."

In In re Baptist Fellowship of Randolph, Inc., 144 Vt. 636, 481 A.2d 1274 (1984), Court held that mandatory fee-for-service model or "quid pro quo" is not necessary to satisfy "in exchange for" element. In In re Spring Brook Farm Found., Inc., 164 Vt. 282, 285, 671 A.2d 315, 317 (1995), Court held that central issue was whether direct exchange between provider and recipient of services was required to satisfy finding that project was for commercial purpose. Exchange element was "intended to separate development for use by others from development for personal use" and it doesn't matter if those donating aren't recipients of services; contributions will satisfy de facto exchange analysis for commercial purposes requirement if organization relies on them to provide service. Can organization survive without donations?

Here, finding commercial purpose merely with use by public and presence of donations impermissibly lowers standard set by Act 250's text. Act 250 was compromise between protecting environment and avoiding administrative nightmare, so have to draw line. It "was not intended to apply to a family dairy farm that allows the community to target practice on its fields free of charge" and "environmental court rightly pointed out that the extremely low cost of maintaining the range's minimal infrastructure lend credibility to the assertion" that family would make range available to public even without donations.