

LEX LOCI: Recent New Hampshire Supreme Court Decisions Charles A. DeGrandpre

Two recent advisory opinions of the New Hampshire Supreme Court point up the extraordinary role that the Supreme Court of our State plays in the legislative process through its advisory opinion function. This responsibility is given to the Court by Article 74, Part II of the New Hampshire Constitution that empowers each branch of the Legislature as well as the Governor and Council to require opinions of the Justices of the Supreme Court "upon important questions of law and upon solemn occasions." New Hampshire is only one of less than a dozen states that have such a provision and it gives our New Hampshire Supreme Court broad and far-reaching powers. The advisory opinion of the Supreme Court entitled "*Opinion of the Justices*" decided May 24, 1985 is a unique example of this rare species. The Court was asked by the House of Representatives to advise on proposed legislation to cure the present procedural and financial inadequacies of the statutes relating to sovereign immunity, as the Supreme Court had suggested to the legislature in its earlier opinion, *State v. Brosseau*, 124 N.H. 184 (1983). The Court's advisory opinion concerning the proposed legislation is an excellent and intelligently written opinion that carefully and delicately discusses the differences of approach to the doctrine of sovereign immunity amongst the members of the Court. The opinion points out that some members would find the doctrine of sovereign immunity presumptively unconstitutional while others would allow sovereign immunity with certain restrictions. The Court's skillful opinion finds all five justices unanimous except on one point. Justice Douglas dissented solely on the point that he would find unconstitutional any dollar limit on recovery. The opinion should be read by all lawyers. The Court found many of the provisions of the proposed legislation to be constitutionally defective, while four of the five justices approved of the \$250,000 per claimant and \$2,000,000 per incident dollar limitations on recovery.

In another important advisory opinion, *Opinion of the Justices*, decided May 10, 1985, the Supreme Court was asked to advise the House of Representatives concerning an appropriations bill in light of the constitutional amendment adopted in 1984 banning budgetary footnotes. The Justices of the Supreme Court unanimously advised the House of Representatives that many of the footnotes violated the new constitutional provision, the Court holding that the new "constitutional amendment was proposed to prohibit footnotes or sections altering general statutory law from being inserted into budget bills."

The case of *Murphy v. Financial Development Corporation* decided May 24, 1985, is mandatory reading for all bank attorneys who work in the mortgage foreclosure area. The Supreme Court had before it a mortgage foreclosure in which the foreclosing mortgagee properly complied with all the statutory notice requirements concerning the sale. The mortgagor had not moved quickly to protect his substantial equity interest in the property nor did he seek an injunction to stay the foreclosure proceeding as allowed by RSA 479:25. The mortgagor had paid all the arrearages but had not paid a small amount of costs. After the sale, the mortgagor claimed that the bank had not used every reasonable effort to obtain a fair and reasonable price under the circumstances. This

allegation was based on the facts that the mortgagee was the only person at the sale, the mortgagee had not had the property reappraised prior to sale, the mortgagee made the only bid at the sale at a figure which represented the amount owed on the mortgage plus costs and interest but which was below the mortgagee's original appraisal of the property. To cap these facts, the mortgagee, later on the same day of the sale offered to sell the property to a third party at a substantially higher price than it had purchased the property for at the foreclosure sale and entered into a contract to sell the property two days later at a substantially higher price. A divided Supreme Court speaking through Justice Douglas recognized that even though a mortgagee may act in good faith, he still may fail to exercise due diligence in obtaining a fair price for the property, the two issues (good faith and due diligence) being separate. The Court set as the measure of damage where a mortgagee fails to exercise due diligence in obtaining a fair price as being the difference between a fair price for the property and the price obtained at the foreclosure sale. This damage test is different from that in eminent domain proceedings where fair market value at highest and best use is the measure. A fair price is not necessarily a fair market value of the property which may be a figure in excess of a fair price but rather is "the price arrived at as a result of due diligence by the mortgagee." Many banks were already following the procedures suggested by the Court (e.g., a reappraisal, setting an upset bid, etc.) and the Court's opinion may simply result in making these procedures standard.

Two recent cases involving municipalities should be reviewed by all municipal counsel with their clients. In the first, *Irwin Marine, Inc. v. Blizzard, Inc., et. al.*, decided March 20, 1985, a divided Supreme Court judicially established guidelines for the sale of property by municipalities. The majority of the Court speaking through Chief Justice King recognized that "as a general rule, absent a competitive bidding statute, cities and towns are free to exercise discretion in determining what property to sell and how to sell it." However, once the municipality begins a public sale process, even in the absence of a competitive bidding statute, its actions "must be bounded by notions of fairness in order that the public interest and public confidence in governmental actions be upheld." The Court upheld a lower court's voiding of a sale by a municipality to a party where the municipality had engaged in a public bidding procedure but had used a process that put certain bidders on an unequal footing with others. Justice Souter, speaking in dissent, took a conservative stance, holding that the Court should not create a judicial remedy even if a broader public benefit might accrue by the holding of the majority. Justice Souter tartly pointed out that such a benefit could have been obtained for the public by the enactment of a legislative act or city ordinance requiring a competitive bidding procedure that the city and state had not elected to do. In a second municipal law case, *Treisman v. Kamen*, decided April 18, 1985, Justice Souter speaking for a unanimous Court, took a careful look at a zoning ordinance in the context of a question whether or not a residential heliport was allowed under the ordinance. The owner of the heliport and town officials had taken the position that a residential heliport was not prohibited by the zoning ordinance. The landowner obtained a building permit, built his heliport that he used for commuting to work, and then was sued by an abutting neighbor under a theory of public nuisance. The heliport owner won at the superior court level but the Supreme Court reversed stating that its review of the zoning ordinance resulted in the

conclusion that the heliport was not a permitted use under that ordinance. This position was reached as a result of a finding that the zoning ordinance in question fell into that class zoning ordinance called "permissive" ordinances in which all uses except those expressly permitted "or incidental to uses so permitted" are prohibited. Since the heliport was not an expressly permitted use, the Court's analysis was to determine whether or not such a use was incidental or accessory to the principal permitted use as a residence. The Court held that when the legality of a defendant's conduct is to be judged under a zoning ordinance, "the defendant who claims the benefit of the accessory use doctrine has the burden to raise it by his pleading." Since the defendant had not met that burden the case was remanded for further hearings on this issue. This case is an extremely; good analysis of the grey area of accessory and incidental uses which is often misunderstood and confused by local officials. It should cause all town counsel for suburban communities to consider specific amendments to their community's zoning laws either permitting or prohibiting heliports and other such unusual accessory uses of land found in our modern society.

There are several important cases that should be noted in passing. In *Gould v. Concord Hospital*, decided April 18, 1985, the Supreme Court held that the two-year statute of limitations for death actions was a constitutionally impermissibly short statute of limitations period and it overturned the dismissal of a wrongful death action brought after the expiration of the two-year statute of limitations. In the companion cases of *Chamberlain v. Kingston* and *Waters v. Hedberg*, decided May 14, 1985, the Supreme Court had before it the issues whether a release by an injured party from liability of an employer whose liability is based solely upon the negligence of the employee bars a subsequent suit for negligence against the employee, and vice versa. The Court considered the effect of RSA 507:7-b which reverses the common law rule and which now provides that the release of one joint tortfeasor does not discharge any other tortfeasors from liability, although any recovery must be reduced by the amount received from any tortfeasor. The Court held that although the actions before it involved the employer-employee relationship and the doctrine of respondeat superior, which are based on vicarious liability and which is not technically joint tortfeasance, the Court held that the same principle should apply since the two were akin to each other. In *State v. Brodeur*, decided April 19, 1985, the Supreme Court for the first time recognized that the New Hampshire Constitution, which the Court has interpreted _impose more stringent requirements than the U.S. Constitution in some instances. Did not prohibit "investigatory stops" by the police under the very limited conditions recognized by the U.S. Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). In *Ritzman v. Kashulines*, decided March 20, 1985, the Supreme Court made clear that a storekeeper landowner has no duty to remove a natural accumulation of snow from a public sidewalk even where the sidewalk area is plowed by the landowner and used as a parking area by customers using his store. In *Appeal of Plantier*, decided May 23, 1985, the Court, in an important administrative law case of first impression, held that the doctrine of laches applied to administrative proceedings. Furthermore, the Court held that a doctor, in a proceeding before the Board of Registration in Medicine, had a right to demand an open hearing and the doctor's right to an open hearing superceded the provisions of the New Hampshire right to know law (RSA 91-a:3) which would have allowed the Board of

Registration to meet in executive session. *State v. Labonville*, decided May 6, 1985, provides the Supreme Court a forum to again emphasize the provisions of the New Hampshire Code of Professional Responsibility that clearly forbids contingent fee arrangements in criminal cases. The Court held that the attorney's contingent fee arrangement with the defendant was improper but that the fee arrangement had not prejudiced the defendant by providing her with ineffective counsel. The Court made clear that it was entirely proper to charge a higher hourly rate for court time. In *State v. Abet*, decided May 6, 1985, the Court reversed the conviction of the defendant where a prosecutor had improperly asked a witness a question whether the victim of the crime had been asked to take a polygraph test. The Court reiterated its strongly held position that the unreliability of such tests warrant their inadmissibility and that the introduction of the issue by the prosecutor was prejudicial to the defendant. In *Estate of Butterfield*, decided April 18, 1985, the Court held that the exemption from the inheritance tax law for stepchildren (RSA 86:6-b) which was adopted in 1983, applied to the survival rights of a stepchild in a bank account as well as to property passing to the stepchild by will. In *Petition of Atkins*, decided May 28, 1985, the issue before the Supreme Court was the proper basis upon which a probate court is to determine whether issues in an action involving the validity of a will should be certified to the superior court. The Court adopted the practice of the Massachusetts probate courts that "have developed a standard resembling the summary judgment standard for determining whether to frame factual issues for an advisory jury trial." Thus, the Supreme Court left it to the probate court to determine whether a genuine issue as to any material fact exists and if there are no such issues, the probate court's action in refusing to certify such issues will not be disturbed.

Roberts v. Ward, decided April 18, 1985, presented a lamentable situation in which a child born out of wedlock and custody of which was retained by the natural mother was placed by her in no less than ten homes and five schools in her ten-year life. The mother eventually married and she and her husband moved to restrict access to the child by the grandparents. The grandparents of the child brought a petition seeking visitation rights with their grandchild and the superior court dismissed the petition since there was no marital action pending. The Supreme Court reversed. The Court's opinion authored by Justice Douglas who is an expert in this area, is surprising. Previously the Court, in a long series of cases had stated unequivocally that the jurisdiction of the superior court in questions of custody of children was statutorily based and unless specifically allowed by statute there is no authorization for the court to act in such situations. The legislature had moved to recognize the rights of grandparents in 1979 by the passage of RSA 458:17 VI that recognized the interest of grandparents to visitation rights with grandchildren in divorce situations. In the present case, the Court was not constrained by its earlier decisions and in an unsupported leap of logic which appears to be based mainly on societal and familial factors, held that "it makes little sense to consider the child's interest by according grandparents visitation rights under RSA 458:17 VI when a two-parent family dissolves, but to withhold such rights in a case, such as the one before us, where a traditional two-parent family has never existed." Although the Court's statement may be true, the real question is whether or not the legislature has granted jurisdiction to the superior courts to recognize such rights. The Court went on to

establish criteria by which the superior court could balance a child's "rights to know and associate with her grandparents against the parent's right to custodial autonomy."

In the continuing battle over the Seabrook Nuclear Plant, the Supreme Court, again divided three to two, gave the Public Service Company another victory in its effort to complete its scaled-down version of the Seabrook nuclear plant, now referred to as Seabrook I. The original project envisioned two nuclear generating plants (Seabrook I and Seabrook II) but the second reactor is in mothballs. The epic struggle to construct a nuclear generating facility at Seabrook has spanned a dozen or more years and has taken on some of the aspects of a Norwegian Saga. In *Appeal of Seacoast Anti-Pollution League*, decided April 12, 1985, the Court had before it the very important issue whether securities issued pursuant to a PUC order which has been appealed to the Supreme Court but has not been suspended pending appeal, would remain validly issued in the hands of purchasers even if the Supreme Court later found that the order of the PUC allowing for issuance was improper and the securities should not have been issued. A narrow three-judge majority of the Supreme Court (Justices Brock, Douglas and Souter) hinged its decision on a Wisconsin Supreme Court opinion which appeared to be based on a vastly different statute, and held that "securities issued pursuant to an unsuspended financing order are valid in the hands of purchasers when issued by the utility, and will not be invalidated by any reversal of the order on appeal." The minority opinion of Chief Justice King and Justice Batchelder vigorously assaulted the reasoning of the majority. The dissenters appear to have the better of the argument, reciting some four specific reasons where the majority had fallen into error. The most telling argument of the dissenters is that the majority's holding is premature and that there was no factual basis to support the majority's finding that the securities would be rendered unmarketable unless the Supreme Court moved to protect the purchasers. The dissenters based their attack on the seemingly solid argument that the PUC had never considered this issue and as a result "the majority's discrimination against these parties [the anti-Seabrookers] without a legitimate factual basis for doing so denies them equal protection of the laws." This decision, along with the several decisions that preceded it all seem to be in the nature of hors d'oeuvres since the real blockbuster issue is heading up to the Supreme Court as the result of the PUC's recent approval of the public need basis for the issuance of the financing to complete Seabrook. This latest PUC decision is on appeal to the Supreme Court. There are many who say that the ultimate fate of Seabrook will be decided by commissions and courts in states other than New Hampshire, but to the author's weary eye, it would appear that it will be make or break for the Public Service Company in the up-coming appeal. Bystanders and onlookers can "pay your money and pick your choice" but the author is unwilling at this point to predict whether or not the Public Service Company's recent winning streak in the Supreme Court will continue in the forthcoming appeal. The decision of our five member Supreme Court is as economically important to the citizens of New Hampshire as any ever faced by the Supreme Court in the 200-year history of our State. It is a unique aspect of American jurisprudence that the confidence of our citizens has rested the decision of such important matters upon our judicial system.