



CITY OF CONCORD

New Hampshire's Main Street™

City Solicitor's Office

James W. Kennedy
City Solicitor

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To: Concord City Council

From: James W. Kennedy, City Solicitor

Re: Overview of the Legal Department and Review of Civil Litigation and Real Property Matters as of July 1, 2018

Date: April 30, 2019

The City Solicitor serves as the Department Head of the City's Legal Department, which is comprised of a civil and criminal division. The City Solicitor's Office (civil division) consists of the City Solicitor, Deputy City Solicitor and a Paralegal. The Prosecutor's Office (criminal division) consists of the City Prosecutor, 3 Assistant City Prosecutors, 2 Administrative Victim Witness Advocates and 1 part-time Legal Secretary. The Prosecutor's Office is charged with prosecuting all misdemeanor and violation level offenses, which occur in Concord. The Prosecutor's Office also contractually provides prosecution services to the towns of Bow, Dunbarton and Loudon.

The City Solicitor's Office serves as in-house corporation counsel to the City of Concord. It provides legal counsel and representation to the Concord City Council, the City Manager, all City Departments, as well as all City Boards, Committees and Commissions.

The City Solicitor's Office provides legal counsel and legal representation involving a broad spectrum of the law including but not limited to labor and employment law, administrative law, taxation law, bankruptcy law, land use law, real estate law, contract law and tort law. The City Solicitor's office provides legal assistance in drafting ordinances and resolutions, contracts, agreements, leases, conveyances, easements and other legal instruments. Many of these matters appear on the City Council agenda and other City public body agendas on a monthly basis. The Office also addresses the City's compliance with state and federal laws including the First Amendment, the Americans with Disabilities Act, HIPPA and New Hampshire's Right-to-Know law. The Office also works closely with City staff on a daily basis to provide verbal and written legal advice when legal opinions are requested. Although the Office does not provide legal advice to members of the public, the Office may assist in sharing information about local laws and procedures that apply in the City.

In the litigation arena, the City Solicitor's Office represents the City in state and federal courts, as well as state administrative hearings. The Office also oversees the hiring of outside legal counsel for insured claims and assists in managing each case.

Below is a list of the City's civil cases, tax abatement cases, arbitration cases, and litigated bankruptcy cases. Also included are administrative and investigatory matters, as well as land transactions which includes purchases, sales and lease transactions and conservation easements and other protective easements. Additional information regarding the Legal Department is set forth in the service indicators of the annual budget.

Civil Cases open as of July 1, 2018:

- 1) *Hirsh-Dickinson, et al v. City of Concord (Zoning Board of Adjustment)*. This matter is an appeal of a decision of the Zoning Board of Adjustment ("ZBA") to the Merrimack County Superior Court. The appeal was filed by Paul T. Fitzgerald, Esq. on behalf of Spencer Dickinson, Donna Crisp and Sally Hirsh-Dickinson regarding the ZBA's approval of variance request submitted by the Morrill Farm Dairy, LLC to construct a new dairy barn at its property located at 33 Penacook Street, Concord, NH. The variance request was heard and approved by the ZBA on May 2, 2018. Plaintiffs appealed to the Merrimack Superior Court. The Superior Court subsequently decided in favor of the Morrill Farm and the City. Plaintiffs filed an appeal to the New Hampshire Supreme Court on January 31, 2019.
- 2) *Appeal of Northern Pass Transmission, et al.* This matter is an appeal of a decision of the Site Evaluation Committee ("SEC") to the New Hampshire Supreme Court regarding a request for a certificate for the construction of a 192 mile transmission line through New Hampshire. On March 30, 2018, the SEC issued an Order denying the application for a certificate. On July 30, 2018, the SEC denied the applicant's request for a rehearing. The Applicants filed an appeal to the New Hampshire Supreme Court on August 10, 2018. The briefing was completed on April 10, 2019. Oral Arguments are scheduled before the Supreme Court on May 15, 2019.
- 3) *John Radley v. City of Concord*. This matter is an appeal of a decision of the ZBA to the Merrimack County Superior Court. The appeal was filed by Philip M. Hastings, Esq. on behalf of John Radley, regarding the ZBA's denial of Mr. Radley's variance request for the reconstruction of his property located at 159 Rumford Street, Concord, NH. This matter was heard and denied by the ZBA on December 5, 2018. Plaintiff appealed to the Merrimack Superior Court. A hearing on the merits is presently scheduled to be heard on May 22, 2019.
- 4) *City of Concord v. Stantec Consulting Services, Inc. f/k/a Fay Spofford & Thorndike, Inc. and T. Buck Construction, Inc.* Concord filed this civil action against Stantec and T. Buck in Merrimack County Superior Court. This matter arises out of the construction of the bio-filter and the bio-tower at the waste water treatment plant and the alleged problems that were discovered following the construction. The parties settled the dispute. The parties expect the remediation work to be completed during the summer of 2019.

- 5) *Dean E. Wilber v. City of Concord (Zoning Board of Adjustment)*. This matter is an appeal of a decision of the ZBA to the Merrimack County Superior Court. The appeal was filed by Paul T. Fitzgerald, Esq. on behalf of Dean E. Wilber regarding the ZBA's approval of variance request submitted by Ms. Gualtieri on or about July 27, 2018, to construct an addition on her home located at 99 Oak Hill Road, Concord, NH. This matter was heard and approved by the ZBA on September 5, 2018. Plaintiff appealed to the Merrimack Superior Court. The Superior Court subsequently decided in favor of the Ms. Gualtieri and the City. The Plaintiff filed a Motion to Reconsider on February 21, 2019, which was denied by the Court. On April 4, 2019, the Plaintiff filed an appeal with the New Hampshire Supreme Court.

Tax Abatement Cases – Board of Tax and Land Appeal (“BTLA”) open as of July 1, 2018:

- 6) *77 Merrimack Street LLC v. City of Concord*. This matter arises from a Petition for property tax abatement for the 2017 tax year pending before the BTLA which was filed by Property Tax Advisors, Inc., on behalf of the property owner. The parties are conducting discovery in preparation for trial. A hearing is scheduled before the BTLA on June 4, 2019.
- 7) *James Douglas Bell v. City of Concord*. This matter arises from a Petition for property tax abatement for the 2017 tax year before the BTLA which was filed by Property Tax Advisors, Inc., on behalf of the property owner. On December 20, 2018, following negotiations, the parties settled the disputed assessment.
- 8) *Big Step v. City of Concord*. This matter arises from a Petition for property tax abatement for the 2017 tax year pending before the BTLA which was filed by Property Tax Advisors, Inc., on behalf of the property owner. The Parties are conducting discovery in preparation for trial. A hearing is scheduled before the BTLA on October 30, 2019.
- 9) *Capital Hotel Company VI, LLV v. City of Concord*. This matter pertained to a Petition for property tax abatement for the 2017 tax year before the BTLA which was filed by Draper Tax Counseling, on behalf of the property owner. On January 29, 2019, following negotiations, the property owner filed a Withdrawal of Appeal, which was granted by the BTLA on February 1, 2019.
- 10) *Mary Ann Hyder-Ward v. City of Concord*. This matter pertained to a Petition for property tax exemption for the 2017 tax year before the BTLA which was filed by the property owner. Following discovery, the property owner notified the City that a Withdrawal of Appeal would be filed with the BTLA, which was granted by the BTLA on April 10, 2019.
- 11) *Morrill Mill Pond LLC v. City of Concord*. This matter pertained to two separate Petitions for Land Use Change Tax (LUCT) abatement for the 2017 tax year before the BTLA, which was filed by the property owner. On November 16, 2018, following negotiations, the parties settled the disputed LUCT abatement.

- 12) *New Life Fellowship of Concord v. City of Concord*. This matter pertained to a Petition for a religious property tax exemption for the 2016 tax year before the BTLA which was filed by the property owner. The parties conducted discovery, including interrogatories and depositions, in preparation for trial. On August 22, 2018, following negotiations, the parties settled the disputed tax exemption for the 2016 tax year.
- 13) *Newspaper of NH Inc. v. City of Concord*. This matter pertained to a Petition for property tax abatement for the 2017 tax year before the BTLA, which was filed by Property Tax Advisors, Inc., on behalf of the property owner. The parties conducted discovery in preparation for trial. On February 15, 2019, following negotiations, the parties settled the disputed assessment.
- 14) *Joanne M. Spaulding Revocable Trust v. City of Concord*. This matter arises from a Petition for property tax abatement for the 2017 tax year pending before the BTLA which was filed by Joanne Spaulding. A hearing is scheduled before the BTLA on May 29, 2019.
- 15) *Andrew and Robert Surette v. City of Concord*. This matter arises from a Petition for property tax abatement for the 2017 tax year pending before the BTLA which was filed by the property owners. A hearing is scheduled before the BTLA on October 15, 2019.
- 16) *Byron J. Thresher and Carolyn Angel Thresher v. City of Concord*. This matter arises from a Petition for property tax abatement for the 2017 tax year pending before the BTLA which was filed by Commercial Property Tax Management, LLC, on behalf of the property owners. A hearing is scheduled before the BTLA on May 29, 2019.
- 17) *Wal-Mart Real Estate Business Trust v. City of Concord*. This matter pertained to a Petition for property tax abatement for the 2017 tax year pending before the BTLA which was filed by Bruce Stavitsky, Esq., on behalf of the property owner. On February 13, 2019, following mediation, the parties settled the disputed assessment. On February 14, 2019, the property owner filed a Withdrawal of Appeal for the disputed assessment for the 2017 tax year, which was granted by the BTLA on February 25, 2019.

Tax Abatement Cases – Merrimack Superior Court open as of July 1, 2018:

- 18) *Capital Commons LLC v. City of Concord*. This matter pertained to a Petition for property tax abatement for the 2016 tax year before the Merrimack County Superior Court, which was filed by Alec L. McEachern, Esq., on behalf of the property owner. The parties conducted discovery in preparation for trial. On July 24, 2018, the property owner filed a Motion of Voluntary Nonsuit against the City, which was granted by the Court on August 15, 2018.
- 19) *Concord Regional Visiting Nurse Association (VNA) v. City of Concord*. VNA brought this action in Merrimack County Superior Court, challenging the Assessing Department's decision to deny its request for a charitable exemption for the 2017 tax year. The City is in the process of conducting discovery in preparation for trial. A trial date will be scheduled by the Court.

- 20) *Dantuc LLC v. City of Concord*. This matter arises from a Petition for property tax abatement for the 2017 tax year before the Merrimack County Superior Court, which was filed by John F. Hayes, Esq., on behalf of the property owner. The City is in the process of conducting discovery in preparation for trial. A trial date will be scheduled by the Court.
- 21) *M&G Equities v. City of Concord*. This matter arises from a Petition for property tax abatement for the 2017 tax year before the Merrimack County Superior Court, which was filed by John F. Hayes, Esq., on behalf of the property owner. The City is in the process of conducting discovery in preparation for trial. A trial date will be scheduled by the Court.
- 22) *Northern New England Telephone Operations (Fairpoint) v. City of Concord*. This matter arises from a Petition for property tax abatement and/or exemption for the 2011, through 2017 tax years before the Merrimack County Superior Court and involves the taxation of FairPoint's use of the City's right-of-ways, poles, conduit and real property. The Superior Court consolidated this case with more than 600 similar lawsuits FairPoint filed against approximately 180 New Hampshire municipalities raising the same constitutional and tax abatement claims for each of the tax years. In 2015, the City prevailed against FairPoint regarding its constitutional claims. With respect to the tax abatement claims, the Superior Court held a trial involving two municipalities to serve as test cases. On July 20, 2018, the Superior Court issued a decision on the test cases. The decision has been appealed to the New Hampshire Supreme Court.

Out of State Civil Litigation Open as of July 1, 2018:

- 23) *City of Concord, New Hampshire, et al v. Purdue Pharma L.P., et al*. On April 24, 2018, the City filed an action in the Federal District Court of New Hampshire against manufacturers and distributors of prescription opioids. Robbins Geller Rudman & Dowd, LLP is the law firm that represents Concord in this matter. In May 2019, Concord's case was transferred to the Northern District of Ohio Federal District Court and joined the Multi-District Litigation ("MDL") with similar claims brought by state and local governments against the manufacturers and distributors of prescription opioids. Judge Dan Aaron Polster in the Northern District of Ohio (federal court in Cleveland) has been presiding over the MDL since he was assigned in early 2018. To date, the MDL docket lists more than 1,340 cases – the vast majority of which were filed outside of the Northern District of Ohio and transferred to Judge Polster.

The schedule below relates mainly to the cases which have been selected as Track One and those cases are proceeding to trial in October. The Track One cases include Cuyahoga and Summit Counties in Ohio, as well as the Cities of Cleveland, Akron and other local municipalities.

Judge Polster has compressed the timeframe for discovery and trial, and stated the rationale for this schedule is that people continue to die daily as a result of the opioid epidemic. He aims to drive a resolution to the litigation that abates the epidemic as soon

as possible. The Court has engaged three Special Masters to assist with legal issues, which includes the issuance of rulings on discovery disputes and settlement.

The Court initially scheduled a trial date in March 2019 for the Track One cases, but, in January 2019, rescheduled it for October 21, 2019. The Court has stated that it will be firm on maintaining the new trial date. As noted below, much of the fact discovery for Defendants and the Track One Plaintiffs has been completed. Plaintiffs are now in the process of completing their disclosure of experts, and depositions of Plaintiffs' experts are being scheduled. The key dates currently scheduled are as follows:

- May 10, 2019 Defendants' Expert Reports Due
- June 28, 2019 Dispositive (Summary Judgment) and "*Daubert*" Motions Due
- July 31, 2019 Responses to June 28 Motions Due
- August 16, 2019 Replies on June 28 Motions Due
- September 5, 2019 Hearing on June 28 Motions (if necessary)
- September 25, 2019 All trial materials due
- October 21, 2019 Trial begins

All Plaintiffs in the MDL were granted leave to file complaints that conform to the Court's orders and to incorporate facts learned in discovery, especially data from the federal ARCOS database that closely tracks controlled substance sales in geographical areas. In order to avoid the filing of complaints under seal, the Court provided that non-Track One Plaintiffs could adopt the allegations made (and filed under seal) in the Track One cases, and adopt the relevant ARCOS data without making it public in the filing. Accordingly, Concord in March 2019, Concord filed a short form amended complaint adding Defendants for whom ARCOS data suggested it was appropriate, and adding the Sackler family members who directed Purdue's operations. (Purdue is solely owned by the Sacklers).

Insured claims against the City open as of July 1, 2018:

- 24) *Patrick Baker v. City of Concord/Beaver Meadow Golf Course*. This matter arises from a personal injury claim at the golf course against the City before the Merrimack County Superior Court, which was filed by Andrew J. Harmon, Esq., on behalf of Patrick Baker. The City is represented by Gary Burt, Esquire. The case is in discovery and is scheduled for trial in September 2019.
- 25) *James Marhan and Kathleen Marhan v. City of Concord, et al.* This matter arises from a negligence action against the City for sewer damages before the Merrimack County Superior Court, which was filed by Michael Bedard, Esq., on behalf of the property owners. The Superior Court held a hearing on the City's Motion to Dismiss on March 29, 2019, and decided in favor of the City. The City was represented by Charles L. Bauer, Esquire.

Arbitration Matters open as of July 1, 2018:

- 26) *Concord Fire Fighters Association, IAFF Local 1045 v. City of Concord*, PELRB Case No. G-0164-4 (Arbitration). This case involves whether the City is authorized to change a prescription drug benefit within its health insurance plans offered to IAFF under its Beneflex Program, without negotiating that change with IAFF. On June 23, 2018, Arbitrator John Hansen ruled in favor of the City finding that the IAFF's grievance was not subject to arbitration and therefore, dismissed the grievance. This case is pending a potential appeal to the New Hampshire Superior Court.
- 27) *Concord Fire Supervisor's Association, IAFF local 3195 v. City of Concord*, PELRB Case No. G-0201-4 (Arbitration). This case involves whether the City is authorized to change a prescription drug benefit within its health insurance plans offered to IAFF under its Beneflex Program, without negotiating that change with IAFF. The parties have agreed to stay this matter pending the outcome of the IAFF Local 1045 matter.
- 28) American Arbitration Association (AAA) (Arbitration – Confidential as per AAA Rules).
- 29) American Arbitration Association (AAA) (Arbitration– Confidential as per AAA Rules).
- 30) *Concord Fire Fighters Association IAFF Local 1045 & City of Concord*, PELRB Case No. G-0165-5 (Arbitration). This arbitration involves a personnel matter pertaining to the discipline imposed on an employee.
- 31) *Concord Police Patrolman's Association v. City of Concord*, PELRB Case No. G-0127-5 (Unfair Labor Practice Complaint). This arbitration involved whether the City properly applied its policy governing wage continuation for employees after filing a workers' compensation claim. This matter was settled and CPPA withdrew its complaint on August 20, 2018.
- 32) *Concord Fire Fighters Association, IAFF Local 1045 v. City of Concord*, PELRB. This arbitration involves whether the City properly applies its policy that governs the manner in which the Fire Department administration notifies staff of the opportunity for overtime.

Litigated Bankruptcy Matters open as of July 1, 2018:

- 33) *In re James Babson and Catherine Babson*, 18-10849-BAH. Concord objected to the Chapter 13 Plan in this case to preserve its statutory lien on real estate. Following the submission of briefs and oral argument, the Court issued an Order which preserves the City's lien.
- 34) *In re Bath Ann Bowen*, 18-10795-BAH. Concord objected to the Chapter 13 Plan in this case to preserve its statutory lien on real estate. Following the submission of briefs and oral argument, the Court issued an Order which preserves the City's lien.

- 35) *In re Shannon Emery*, 18-10509-BAH. Concord objected to the Chapter 13 Plan in this case to preserve its statutory lien on real estate. Following the submission of briefs and oral argument, the Court issued an Order which preserves the City's lien.
- 36) *In re Amanda Jene Griffin*, 18-11087-BAH. Concord objected to the Chapter 13 Plan in this case to preserve its statutory lien on real estate. Following the submission of briefs and oral argument, the Court issued an Order which preserves the City's lien.

Administrative and Investigatory Matters open as of July 1, 2018:

- 37) *ADA Investigation of City Elections Regarding Accessible Ballots*. On February 11, 2015, the United States notified the City that it had opened an investigation in response to a complaint filed with the Department concerning the failure of the City to provide an accessible ballot to a person who is blind. The complainant alleged that the City failed to provide him with an accessible voting system that offered privacy and independence in local elections and, instead, offered only a paper ballot and assistance in completing the ballot. Following discovery and negotiation, on February 21, 2019, the City reached a Settlement Agreement with the United States. In the Agreement, the City agreed to provide an accessible voting system for voters who are blind or visually impaired in future City Elections unless furnishing the auxiliary aids and services would fundamentally alter the nature of voting or cause undue financial and administrative burdens. By way of further information, the City has collaborated with the New Hampshire Secretary of State's Office to provide accessible voting systems in each of its elections since 2015.
- 38) *New Hampshire Healthy Families Medicaid Audit*. This matter pertained to an audit performed by NH Healthy Families and Centene Management Company which alleged that the City of Concord failed to provide sufficient documentation to support full payments received by the City for ambulatory services provided by the City's Fire Department. The audit further alleged that the City received an excess of \$36,043.24 in "overpayment" of billed services, which would require reimbursement from the City. On September 6, 2018, the City appealed this decision and responded to NH Healthy Families wherein it produced its appeal documents and provided sufficient basis to support full payment for all services rendered. On October 3, 2018, the City participated in an administrative hearing with NH Healthy Families. On January 23, 2019, NH Healthy Families rendered a decision, which reduced the City's reimbursement liability to \$2,162.82. The City appealed this decision. On February 21, 2019, NH Healthy Families withdrew its \$2,162.82 request for overpayment and the matter was closed.

Real Estate – Purchases, Sales and Leases as of July 1, 2018:

- 39) Bartlett Farm Dairy, LLC Lease Agreement: This Agricultural Lease Agreement pertains to the City of Concord's real property located off of West Portsmouth Street in the City of Concord, NH. This office is assisting in the preparation of a Renewal Lease to the Bartlett Farm for the purposes of utilizing the City's land, comprised of approximately 60.5 tillable acres, for agricultural use.

- 40) Caleb Development Corporation Option to Purchase Agreement: This real estate transaction pertains to the City of Concord's conveyance of the City's real property known as "Penacook Land" or the "Former Allied Leather Tannery" located at 11-35 Canal Street in Penacook, NH. This office is assisting in the preparation of the Option to Purchase Agreement, together with all relevant closing documents.
- 41) Concord Northeast Baseball and Softball League, Inc. Agreement: This Agreement pertains to the League's right to use and occupy the City of Concord's real property none as "Dillon Field" for the purposes of operating a youth softball program. This office is assisting in the preparation of the Agreement.
- 42) Country Hill Estates Property Amendment to Purchase and Sales Agreement: This real estate transaction pertains to the City of Concord's acquisition of real property known as "Country Hill Estates Property" located along a portion of the discontinued section of District No. 5 Road in Concord, NH. This office is assisting in the preparation of the Purchase and Sales, review of title issues and will be assisting with all relevant closing documents.
- 43) Global Signal Acquisitions II, LLC Sublease Agreement: This Agreement involves a sublease with Crown Castle for the lease of space by the Police Department at a telecommunications facility in Penacook, NH.
- 44) Dol-Soul Properties LLC Purchase and Sales Agreement: This real estate transaction pertains to the City of Concord's conveyance of the City's "Former New Hampshire Employment Security Property" located at 32-34 South Main Street and 33 South State Street to Dol-Soul. This office is assisting in the preparation of the Purchase and Sales Agreement for the purpose of Dol-Soul's construction of a mixed use development featuring a 120,000SF +/- mixed use development featuring approximately 100 market rate apartments and a 5,000SF +/- restaurant, together with parking lots, landscaping, and related infrastructure.
- 45) Fisk Road Purchase and Sales Agreement: This real estate transaction pertains to the City of Concord's acquisition of real property situated near Fisk Road in the City of Concord, NH. This office assisted in the preparation of the Purchase and Sales Agreement, together with all relevant closing documents.
- 46) Former Water Tower Lot Option to Purchase Agreement: This real estate transaction pertains to the City of Concord's conveyance of real property known as the City's "Former Water Tower Lot" situated in the Village of Penacook in Concord, NH. This office is assisting in the preparation of an Option to Purchase Agreement, together with all relevant closing documents
- 47) Friends of Concord Crew Renewal Land Lease Agreement: This Agreement pertains to the City of Concord's real property located at 19 Loudon Road, Concord, NH. This office assisted in the preparation of the Renewal and First Amendment to the Parties Land Lease.

- 48) Global Tower Assets, III Tower Facility Agreement: This Agreement involves an agreement with Global Signal for the lease by the Police Department for a communication center at Plausawa Hill Road in Pembroke, NH.
- 49) Granite Center LLC Quitclaim Deed: This real estate transaction pertains to the City of Concord's conveyance of the City of Concord's property known as the "Dixon Avenue Public Parking Lot." This office assisted in the preparation of the Quitclaim Deed, together with all necessary Licenses, and Declaration of Covenants, to Granite Center for the purpose of constructing a Private Plaza.
- 50) Knowlton Woods Purchase and Sales Agreement: This real estate transaction pertains to the City's acquisition of real property situated near Oak Hill Road in the City of Concord, NH. This office assisted in the preparation of the Purchase and Sales Agreement, together with all relevant closing documents.

Conservation and Other Protective Easements as of July 1, 2018:

- 51) Five Rivers Conservation Trust – Amend, Replacement and Additional Conservation Easement Deed: This Amendment to a Conservation Easement is proposed to include land purchased on Fisk Hill Road from Peter Martin, Lee Martin, Mark Martin and the Philip C. Martin and Gloria W. Martin Revocable Trust.
- 52) Declaration of Buffer Easement - Carter Hill Road Open Space Subdivision: This protective Buffer Easement pertains to the proposed Cluster Development and Subdivision Plans along Carter Hill Road, Concord, NH submitted by the property owner. This office assisted in reviewing and drafting an easement to protect the buffer area.