

"Administrative Gloss"

Plan-link posting on 7/4/05 from Neil Faiman (Wilton ZBA)

[DHB, INC. v. TOWN OF PEMBROKE & a.](#)

Argued: February 9, 2005

Opinion Issued: June 14, 2005

"The plaintiff next argues that it should have been allowed to speak at the meeting because the Board's past practice of allowing applicants to speak at meetings regarding the completeness of an application cast an "administrative gloss" over the issue. We disagree.

The doctrine of administrative gloss is a rule of statutory construction. An "administrative gloss" is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference. If an "administrative gloss" is found to have been placed upon a clause, the municipality may not change its de facto policy, in the absence of legislative action, because to do so would, presumably, violate legislative intent. Nash Family Inv. Prop. v. Town of Hudson, 139 NH 595, 602 (1995). Since there is no ambiguity in the statute or the Board's procedural rules, the doctrine of "administrative gloss" does not apply."

The decision itself pretty much explains it.

If there's some ambiguity in a law (including a Zoning Ordinance), and the relevant administrative officials have consistently acted as though it had a particular meaning over the years, then, in effect, that interpretation -- the "administrative gloss" -- becomes a binding interpretation of the law.

For example, suppose that the Zoning Ordinance requires "a 20 foot setback", but doesn't explain how it should be measured. If the Building Inspector has always measured from the edge of the traveled way (rather than from the edge of the right-of-way), then his interpretation might become an administrative gloss. If someone then challenges that interpretation in court, the court might well defer to that administrative gloss, rather than reinterpreting the Ordinance itself. Furthermore, if he changes his mind and starts measuring from the right-of-way, someone might well argue that he was improperly changing the rules.

In this case, the applicant claimed, "The Planning Board has always allowed applicants to speak at the meeting where it decides if applications are complete; that policy of allowing applicants to speak at such meetings has acquired the status of an administrative gloss, and the Planning Board therefore did not have the right to deny us to speak (and because they did, the decision is procedurally invalid)." The Supreme Court said, "No, there is no such requirement in either state law or town regulations, there is no ambiguity, and therefore no room for administrative gloss."

Basically, the Supreme Court clarified that administrative gloss functions to clarify existing laws, not to make new ones.