THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2018 TERM

DOCKET NO. 2018-0495

DENIS GIRARD and FLORENCE LEDUC

v.

TOWN OF PLYMOUTH

APPEAL FROM AN ORDER OF THE

GRAFTON COUNTY SUPERIOR COURT

BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

Contents

TABLE OF CASES

Cases

TABLE OF STATUTES AND OTHER AUTHORITIES

Statutes

QUESTIONS PRESENTED

1. Whether the Trial Court erred in upholding the Planning Board's decision where the Town of Plymouth ("Town") has no specific regulation governing wetlands and it was uncontested that the Department of Environment Services would have approved a driveway in the proposed location. Appendix at 11.
2. Whether the Trial Court erred in failing to find that the Planning Board's interpretation of the Town's subdivision regulations violated the doctrine of preemption. Appendix at 48-50.
3. Whether the Trial Court erred in failing to find that the Planning Board's interpretation of the Town's subdivision regulations consisted ad hoc rulemaking in general and in particular under RSA 674:51. Appendix at 44-47.
4. Whether the Trial Court erred in failing to find that the Planning Board's interpretation of the Town's subdivision regulations was an unreasonable restriction under RSA 672:1.Appendix at 48.
5. Whether the Trial Court erred in failing to find that the Planning Board's interpretation of the term "Natural Resources" as used in the Town's subdivision regulations was overly broad. Appendix at 49-50.
6. Whether the Trial Court erred in failing to find that the Planning Board improperly interfered with the petitioners' substantive property rights. Appendix 51-52.
7. Whether the Trial Court erred in failing to find that the Planning Board's decision was unreasonable, and an unreasonable interpretation of the Town's subdivision regulations. Appendix at 44-58.

8. Whether the Trial Court erred in failing to find that the Planning Board violated RSA 676:4. Appendix at 54-55.
9. Whether the Trial Court erred in failing to find that the Planning Board had prejudged the petitioners' application. Appendix at 55-57.
10. Whether the Trial Court erred in failing to find that the Planning Board improperly relied upon the report of Deborah Hinds. Appendix at 82-83.
11. Whether the Trial Court erred in upholding the Planning Board's decision to deny the subdivision application at issue. Appendix at 44-58.

STATUTES AND ORDINANCES INVOLVED

Article IV, E of the Plymouth Subdivision regulations, See appendix for text

Article VI, M (27) of the Plymouth Subdivision regulations, See appendix for text

Article VI, M, 12 of the Plymouth Subdivision regulations, See appendix for text

Article VIII, B of the Plymouth Subdivision regulations, See appendix for text

Env-Wt 100-900, See appendix for text

RSA 482-A, Fill and Dredge in Wetlands, See appendix for text

RSA 541-A, Administrative Procedure Act, See appendix for text

RSA 674:44, Local Land Use Planning and Regulatory Powers, See appendix for text

RSA 674:55, Wetlands, See appendix for text.

RSA 676:4, I (d) (1) Administrative and Enforcement Procedures, See appendix for text

STATEMENT OF THE CASE AND FACTS

This appeal concerns a minor subdivision application for a 249-acre undeveloped parcel of land in the Town of Plymouth depicted at Tax Map 207, Lot 1 on the Plymouth Tax Map (the "Property"). Certified Record ("C.R.") at 1. In 2009, Denis Girard and Florence Leduc (a husband and wife), William and Elizabeth Batchelder ("Batchelder"), and Frederick and Katharina Kelsey ("Kelsey") were owners of the Property with each couple owning an equal one-third interest. No longer wishing to be co-owners of the Property with Kelsey and Batchelder, in 2009 Denis and Florence filed a Petition to Partition the Property in the Grafton County Probate Court.

In November of 2009, the parties to the Petition to Partition attended a mediation. At the mediation, the parties reached and signed an agreement that the Petition to Partition would be resolved by subdividing the Property into a 50-acre parcel and a 199-acre parcel along a certain boundary line and as depicted on a map of the Property accompanying the signed agreement. After the Property was subdivided, Denis and Florence would receive the 50-acre lot (20% of the Property's total acreage) and Kelsey and Batchelder would receive the 199-acre lot (80% of the Property's total acreage). C.R. at 56-61.

The written settlement agreement specifically limited the access to the Kelsey/Batchelder 199-acre parcel to be via a "Woods Road" that was depicted in a particular location on the settlement map. C.R. at 58 ("The Respondents' access over K3 shall be in the form of a "woods road."") (internal quotations in original). The Woods Road would have frontage on Fairgrounds Road and be located within a particular corridor. The parties'

settlement was approved, and made order of, the Grafton County Probate Court in December of 2009. C.R. at 63.

Thereafter, Kelsey and Batchelder refused to honor the terms of the settlement agreement, requiring Denis and Florence to file a motion to enforce settlement. The Probate Court held a trial on the motion. At the trial, the Probate Court heard evidence on the facts and circumstances under which the parties' settlement agreement was reached, the suitability of the Property for subdivision in the fashion contemplated in the parties' settlement agreement, and the suitability of the placement of the Woods Road[1]. After the trial, the Probate Court found that the parties had reached an enforceable settlement agreement and that Kelsey and Batchelder were to proceed with the subdivision as contemplated in the parties' Settlement Agreement. C.R. at 65-68. The Court's order was very specific as regards the location of the Woods Road. C.R. at 67.

Kelsey and Batchelder continued to refuse to comply with the Settlement Agreement, requiring Denis and Florence, in October of 2016, to file a motion for contempt. The Probate Court did not find Batchelder and Kelsey in contempt, presumably based upon their attorney's representation that "… the parties had finally agreed upon a subdivision plan which was drafted by the surveyor and ready to be submitted to the planning board. C.R. at 71. However, the Court ordered Kelsey and Batchelder to file the subdivision application in accordance with the settlement agreement with the Plymouth Planning Board no later than December 1, 2016. C.R. at 70-74.

[1] The Court heard testimony from Tom Hahn (the surveyor who presented the Application to the Board) Frederick Kelsey and Denis Girard.

Accordingly, a minor subdivision application (the "Application") was submitted to the Board to subdivide the Property in accordance with the parties' settlement agreement. The Application showed the Woods Road as it was depicted in the settlement agreement. The Application also depicted the location of wetlands on the Property in the area of the Woods Road as identified by a wetlands scientist, Deborah Hinds. The Application called for a simple subdivision of the property, which was located in the Town's agricultural zone. There was no development contemplated in the Application[2]. C.R. at 1.

The use of the "Woods Road" was restricted by the order of the Probate Court to exactly what the name suggests - use consistent with a woods road. C.R. at 58 (para. 5). The uncontested evidence before the Board was that the existing woods road on the Property had been historically used for sustainable timber harvest once every ten years during winter months- when wetlands would not be affected. April 20, 2017 Transcript at 19-20. There was no evidence before the Board that use of the "new" Woods Road would be any different-the evidence was in fact that it would continue to be used for forestry and recreational purposes. C.R. at 95.

The uncontested evidence before the Board was that there are over 1,000,000 square feet of wetlands – over 23 acres - on the property. C.R. at 41 and 76. Even if the Woods Road was developed (which would be a violation of the Probate Court order) such development would only affect

[2] The Application included DOT driveway permits which showed two options for the access road (i.e. the Woods Road) west of the wetlands. See Plymouth's November 6, 2017 Motion to Modify the Certified Record.

approximately 750 square feet of wetlands – .00075 of one percent of the total wetlands on the property. C.R. at 41. Sharon Penney, the Town's Planner, recommended approval of the Application as submitted. C.R. at 35.

A hearing was held on the Application on February 16, 2017. See generally February 16, 2017 Transcript. Despite the Probate Court orders requiring Kelsey and Batchelder to implement the settlement and prosecute the Application, and despite their legal obligations to act in good faith as regards a Court order and settlement agreement, Katharina Kelsey and the Kelseys' and Batchelders' attorney, John McCormack, spoke in opposition to the Application. February 16, 2017 Transcript at 11-15, 24, 36-37.[3] At the conclusion of the hearing, the Board asked the owners to consider reconfiguring the subdivision such that the Woods Road was in a new location. Id. at 52-53. This would involve moving the agreed-upon boundary line and altering the acres awarded to each party in the Probate Court proceedings. It would have devalued the property the Probate Court Order awarded to Denis and Florence. It would have also eliminated an access road that the Probate Court orders awarded to the petitioners. April 20, 2017 Transcript at 23-25; C.R. at 78.[4]

Given, among other things, the years of litigation Denis and Florence underwent to have Batchelder and Kelsey comply with their obligations under the settlement the parties reached in the Probate Court,

[3] It is the petitioners' position that Attorney McCormack's representations to the Board did not accurately reflect how the parties' Settlement Agreement came to be. See April 16, 2017 Transcript at 4-14.

[4] The new boundary proposed by the Board is represented by the faint yellow line that commences between the "sms" and "smf" notations at the bottom of the page at C.R. 78.

Denis and Florence did not want to alter the agreed-upon and court-ordered subdivision plan. At the next Planning Board meeting on April 20, 2017, the parties informed the Planning Board that they could not reach agreement on a different subdivision plan. Counsel for Denis and Florence made a presentation in support of approval of the subdivision application as submitted. See C.R. at 55-78. At the conclusion of that presentation and while the Board was contemplating the need for further evidence, one Board member stated "…so if we are thinking – and this is a minor subdivision and it does conform to our subdivision regulations – so what's the purpose of these additional steps?" Transcript of April 20, 2017 meeting at 56-57.

The Board took a view on May 10, 2017[5] and then again considered the application on May 18, 2017. Again, the Board demanded that the parties reconfigure the Application and move the Woods Road to a different location. May 18, 2017 Transcript at 16-17. The Board proposed three alternative locations for the Woods Road. These alternative locations would have involved shifting the agreed-upon and Court-ordered boundary line, granting an easement, or otherwise requiring Denis and Florence to forego rights they had obtained through the Probate Court proceedings. Id. Furthermore, at least one of the alternative locations for the Woods Road also impacted wetlands. Id. at 12. During the meeting, the Chairman of the Planning Board stated that if the parties continued to prosecute their application as submitted ". . . it's going to be trouble." Id. at 16-17. At that meeting, the Board Chairman asserted that the Plymouth Master Plan gave

[5] The Minutes of the May 10, 2017 Site Walk are silent as to any findings or discussion on the part of the Board. C.R. at 79.

the Board "responsibility" for wetlands. Transcript of May 18, 2017 Hearing at 12-13.

At a public meeting held on June 1, 2017 the Planning Board substantively discussed the Application. See June 1, 2017 Transcript. No notification had been provided that the Application was going to be a topic discussed at the June 1, 2017 meeting. C.R. at 101. At the time, the Board had not closed public comments as indicated by the fact that public comments were taken at the June 15 hearing on the Application. C.R. at 119 ("public hearing opened at 6:35 pm"). At the time of the June 1, 2017 hearing, the Board had not begun its deliberations on the Application.

A final hearing was held on the application on June 15, 2017. At that hearing, counsel for Denis and Florence explained the substance of a previously submitted Memorandum which explained this Court's common law prohibition of a Board relying on a Master Plan as though it were a regulation. C.R. at 111-114. Batchelder's and Kelsey's attorney argued his opposition to the Memorandum and presented, for the first time, a new map with "alternative" access that had never been shown to Denis or Florence. Transcript of June 15, 2017 Hearing at 15-23.

The Chairman then read a portion of an e-mail from Town Counsel that stated that the Board could deny the Application under Article VIII, B of the Plymouth Subdivision regulations (C.R. at 118, 121), which provides:

> The Board may impose requirements upon the subdivider in order to preserve and protect the existing features, trees, scenic points, views, brooks, streams, rock out-croppings,

water bodies, stone walls, boundary markers, other natural resources and historic landmarks.

This was the first time at a properly noticed hearing that there was ever any suggestion made that Article VIII, B could be used as a basis for denial, or that "natural resources" included "wetlands". Without any further discussion of Article VIII, B and little other discussion of the Application, the Board passed a motion to "not approve the application" without giving a specific reason. The Chairman stated that he, along with the Town Planner, would write a denial letter based on the "attorneys'" suggestions and bring it back to the Board for Approval. Transcript of June 15, 2017 Hearing at 27-28. A written decision ultimately did issue; however, there is no evidence in the Certified Record or otherwise that it had been approved by the Board.

The written decision states "The applicant rejected moving the driveway away from the wetlands. The Board feels that wetlands comprise 'other natural resources' as specified in Art. VIII, B, which they are charged to protect." C.R. at 126-127. The Board did not find, nor could it be reasonably argued, that the Application as submitted violated any of the Regulations' specific requirements for subdivision. See Regulations at Article VIII; C.R. at 96-98.

During the course of the hearings described above, the uncontroverted evidence before the Board was that DES would grant a "Permit by Notification" for timber harvesting on the 199-acre lot. February 16, 2017 Transcript at 10. It was also uncontroverted (and the Board acknowledged) that, if the Application were approved, and in the event a future owner of the 199-acre Lot were able to overcome the judicial

restriction limiting the nature of the use of the Woods Road, DES would allow development of the Woods Road. See e.g. February 16, 2017 Transcript at 9-10; June 15, 2017 Transcript at 9-10 and 25-26.

Denis and Florence appealed the Board's decision to the Grafton County Superior Court. After hearing, and in a written decision dated June 5, 2018, the Superior Court upheld the Board's decision. This appeal follows.

SUMMARY OF THE ARGUMENT

By reading the word "wetlands" into a subdivision regulation where said word did not exist, the Board engaged in impermissible ad hoc rule making and decision making. This is true generally, but it is particularly true given that New Hampshire law requires municipalities to use the word "wetlands" in ordinances purporting to restrict or affect development based upon wetlands.

Additionally, New Hampshire has a comprehensive and orderly regulatory scheme governing the permitting of projects in wetlands. This Court has allowed municipal regulation regarding the permitting of development in areas adjacent to wetlands to survive preemption challenges. However, your petitioners urge this Court to find that the permitting of development in wetlands is the sole province of the State and cannot be a subject of municipal regulation under the preemption doctrine. Even if that is not the case, under the facts described above the Board clearly ran afoul of the preemption doctrine by creating a rule, in an ad hoc fashion, that operated as an outright ban on development that affects wetlands in any manner whatsoever. Such a ruling stands in stark contradiction to the State's well developed permitting process which allows

development in wetlands. Indeed, the record demonstrates that the Board's stated purpose for denying the Application was to make sure DES could not perform its regulatory function.

The Trial Court placed particular emphasis upon a letter by a wetlands scientist, Deborah Hinds, in upholding the Board's decision. However, there is no evidence in the record that the Board actually relied upon that letter in making its decision. Moreover the letter ignores the abundant (and often uncontroverted) evidence that the Application in no manner violated the Town of Plymouth's subdivision regulations. Per this Court's recent decision in Trustees of Dartmouth College v. Town of Hanover, this constitutes reversible error.

While the Application was pending, and before the public hearing had closed, the Board had a substantive discussion regarding the Application during a June 1, 2017 Board work session. No notice had been given to the applicants or the public that the Application was going to be a topic covered at the work session. This lack of notice was a direct violation of RSA 676:4,I(d)(1).

Finally, given the evidence before it, the Board's decision was simply not lawful or reasonable. The overwhelming evidence before the Board was that this very simple, two lot minor subdivision application, which proposed no development whatsoever except the installation of a "Woods Road", would never effect wetlands on the Property. The Town of Plymouth's subdivision regulations in no manner list "wetlands" as a criteria the Board could consider in weighing the merits of a subdivision application. Even if the woods road were to affect wetlands, it would affect less than one one-thousandth of a percent of the overall wetlands on the

site. The Board's decision was clearly improper under the law and the product of the individual board members' opinions and biases. The Trial Court's decision should be reversed and the Board should be ordered to approve the Application as submitted.

ARGUMENT

I. Overly Broad Regulation and Ad Hoc Rule Making.

A. The Board impermissibly used a broad and vague regulation to engage in an ad hoc decision and rule making process.

The Trial Court did not specifically address the petitioners' arguments that the regulation in question, and in particular the Board's interpretation of that regulation, was overly broad and led to the Board engaging in an ad hoc decision and rule making process. The Trial Court seemed to lump these arguments into a general statutory interpretation/preemption analysis. See Decision at 5, 1st paragraph (omitting any reference to petitioner's arguments regarding the overly broad nature of the regulation in question as well as the ad hoc rule making that the Board engaged in).[6] Using that analysis, the Trial Court found that interpreting the term "natural resources" in Article VIII, B to include "wetlands" (a term not used in the ordinance) was reasonable. Therefore, according to the Trial Court, the Board had the authority to deny the Application based upon the remote possibility that its Woods Road might someday disturb a tiny fraction of wetlands on the site.

[6] These arguments were raised below in the petitioners' memorandum of law. See Appendix at 44-58.

First, the Trial Court incorrectly interpreted Article VIII, B. The Trial Court held that the regulation's "…specifically enumerated "features" reasonably constrain the term's [natural resources] meaning". Decision at 6. In other words, the Trial Court read Article VIII, B as authorizing the Board to consider a "specifically enumerated" list of "natural features" - such as scenic points, views, rock outcroppings, brooks, streams, and water bodies. From there, the Trial Court reasoned that "natural resources" could be read to include wetlands because wetlands are similar to brooks, streams, and water bodies.

However, that is simply not how the regulation reads. Were that the case, the regulation would state that "The Board may impose requirements upon the subdivider in order to preserve and protect the existing features **such as** trees, scenic points, views…" (language in bold added to original.) The regulation does not enumerate specific "existing features". Instead, "existing features" is just one item in a list of items that the Board may consider in deciding whether to approve a subdivision application. In reality, Article VIII, B (when read correctly) gives the Board carte blanche to deny a subdivision application for any reason the Board deems fit as any development whatsoever is going to disturb some type of "existing feature".

Irrespective of whether the Trial Court properly interpreted Article VIII, B, had the Trial Court focused specifically on how the Board in fact used a criteria (wetlands) that is not mentioned anywhere in the relevant regulation to deny the petitioners' application, and how doing so led to an ad hoc rule and decision making process by the Board, it is inconceivable that the Planning Board's decision would have been upheld.

Site plan review in New Hampshire should strive to ensure a site's compatibility of use and that development occurs in a manner that will not endanger or injure abutting property owners or the general public. "Site plan review is designed to ensure that uses permitted by a zoning ordinance are constructed on a site in such a way that they fit into the area in which they are being constructed without causing drainage, traffic or lighting problems." Summa Humma Enterprises v. Town of Tilton 151 NH 75, 78 (2004) (internal citations and quotations omitted). Site plan review is intended to ensure that "… sites will be developed in a safe and attractive manner and in a way that will not involve danger or injury to the health, safety or prosperity of abutting property owners or the general public." Id. (quotation omitted). Summa Humma Enterprises acknowledges that site plan review is limited. It "… does not give the planning board the authority to deny a particular use simply because it does not feel the proposed use is an appropriate use of the land. Whether the use is appropriate is a zoning question." Id.

New Hampshire law also requires specificity in site plan regulations. While a municipal ordinance need not "precisely" apprise an applicant of the standards by which an administrative board will make a decision, the ordinance "… must be framed in terms sufficiently clear, definite, and certain, so that an average man after reading it will understand when he is violating its provisions." Town of Freedom v. Gillespie 120 N.H. 576, 580 (1980). Regulations must specify the general standards and requirements with which the proposed development shall comply, including appropriate reference to accepted codes and standards for construction. Derry Sr. Development, LLC v. Town of Derry, 157 N.H. 441, 448 (2004) (quoting

RSA 674:44). Moreover, a Court or other interpreting adjudicative body should not guess at the meaning of a regulation, or add words that the drafters of the regulation did not see fit to include. Anderson v. Motorsports Holdings, LLC, 155 N.H. 491, 495 (2007).

The reason a planning board cannot make decisions based simply on members' opinions and why regulations cannot be vague or overbroad is simple: New Hampshire law abhors the idea of a legal framework under which an adjudicative body can engage in ad hoc rule making or ad hoc decision making. See Ltd. Editions Properties v. Town of Hebron, 162 N.H 488, 497 (2011) (board may not deny approval on an ad hoc basis because of vague concerns); Derry Senior Development, LLC, 157 N.H. at 446 (where planning board decision was reversed because the board effectively imposed a new rule which had never been proposed or adopted by the appropriate rule making process) "A vague law impermissibly delegates basic ruling matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application." Montenegro v. N.H. Division of Motor Vehicles, 166 N.H. 215, 221 (2014) (internal citations and quotations omitted).

Here the Board took a regulation that made no mention of wetlands whatsoever and used it as a basis to deny the Application because of a remote possibility that the proposed subdivision might affect a tiny fraction of wetlands on the Property. The Board did so where the Application:

(a) Indisputably met each of the Town's specific applicable regulations for subdivision approval (see C.R. at 96-97);

(b) Indisputably would have been approved by DES had it been approved by the Board;

(c) Was restricted by Probate Court order such that it would have no impact on wetlands;

(d) Would impact less than 750 out of over 1 million square feet of wetlands even if that Court order was violated.

The Trial Court acknowledged that the term "natural resources" is "…possibly susceptible to absurdly broad interpretations." Decision at 6. Your petitioners respectfully suggest that this is exactly the "absurd interpretation" the Trial Court envisioned could happen. With no specific statutory or regulatory guidance whatsoever, the Board denied the Application based upon a standard that only the Board's individual members could know. The Board effectively wrote a rule that does not exist in the Plymouth Subdivision Regulations. This is exactly the type of ad hoc rule and decision making that New Hampshire law forbids.

B. New Hampshire law requires a heightened level of regulatory specificity when regulation of development in wetlands is involved.

i. When purporting to regulate "wetlands", a municipal regulation must use that term.

Towns cannot enact vague subdivision regulations and subsequently use those regulations to engage in ad hoc rule making and ad hoc decision making. Furthermore, New Hampshire law requires particular specificity

when it comes to municipal regulations that purport to regulate development that affects wetlands.

RSA 674:55 states that:

> Wherever the term "wetlands", whether singular or plural, is used in regulations and ordinances adopted pursuant to this chapter, such term shall be given the meaning in RSA 482-A:2, X and the delineation of wetlands for the purposes of such regulations and ordinances shall be as prescribed in rules adopted under RSA 482-A.

This statute means that if a municipality is going to adopt ordinances or regulations which claim to restrict land use on account of wetlands, the municipality must specifically use the term "wetlands". The purpose of this is obvious. Including the term "wetlands" in an ordinance will trigger a specific and established state-wide set of rules and regulations and will avoid inconsistent interpretations and decisions from municipality to municipality.

In this case, the Board denied the petitioners' application because of the remote possibility the Woods Road might someday effect approximately .00075 of one percent of the total wetlands on the property. Yet the regulation that the Board cited as giving it the authority to do so makes no mention of "wetlands". See Article VIII, B of the Plymouth Subdivision regulations. See also Batchelder v. Town of Plymouth Zoning Board, 160 N.H. 253, 257 (2010) (interpreters of ordinance should not add words to ordinance that are not there). Both as a general matter, and because the Board was purporting to regulate "wetlands", it was improper

for the Board to read that word ("wetlands") into Article VIII, B and the Trial Court erred when it upheld the Board's decision.

ii. The fact that the Board mentioned wetlands early in the process does not change this requirement.

Plymouth in fact has no regulation specifically identifying "wetlands" as a criteria for denying a subdivision application.[7] The Trial Court nonetheless held the Board's decision was reasonable despite Article VIII, B's failure to specifically use the word "wetlands" because "… the Board first emphasized its wetland interests in relation to the proposal approximately four years before the parties actually submitted their application[8] [and therefore] the petitioners had actual notice that wetland impacts would be relevant to obtaining subdivision approval notwithstanding that Article VIII, B does not explicitly use the term "wetlands"." Decision at 7-8.

It is true that the topic of the delineation of wetlands was raised at an October 18, 2012 Board discussion of what was then a conceptual subdivision plan. However, no specific (or any) actual concerns with respect to wetlands were raised and, indeed, a Board member stated that he "…would like to make this as simple as possible. No house plans at this time and the zoning is agricultural." The "driveway" (i.e. the Woods Road) was discussed and no concerns about wetlands were raised. C.R. at 20. When the application was actually submitted in 2017, the Town Planner

[7] Plymouth's regulations' only use of the word "wetlands" demonstrates that, under the regulations, state wetlands permits create a presumption of wetlands issues having been properly and appropriately addressed. Regulations at IV, E; Article VI, M (27).
[8] The Board's mention of wetlands that the Trial Court referred to is at C.R. 20.

recommended approval. C.R. at 34-35. A Board statement regarding the delineation of wetlands is not "notice" that wetlands would be a "concern" – all plots must delineate wetlands per Article VI, M, 12 of the Plymouth Subdivision Regulations. The Board's statement was simply not any type of pre-application notice to the petitioners that wetlands were going to be a concern - let alone that they might be the sole basis upon which the Application could be denied.

In any event, a planning board is not permitted to engage in ad hoc rule making or decision making in any point in the process simply because it indicates early on that that is what it is in fact going to do. Put another way, a Board cannot effectively impose a new rule upon an applicant, which rule becomes effective simply because the applicant is told about it early on in the process. Moreover, even if a comment were made indicating that wetlands would be a concern, such comment provides no objective standards whatsoever upon which an applicant could make rational decisions regarding preparation of an application. Accordingly, it was error for the Trial Court to uphold the Board's decision.

B. Preemption

A. The Board's ad hoc interpretation of Article VIII, B frustrates the State of New Hampshire's regulations governing the permitting of development affecting wetlands.

The Trial Court ruled that the Board's interpretation of Article VIII, B did not expressly contradict any specific statute or state regulation. The Trial Court further ruled the state statutory and regulatory scheme governing wetlands did not demonstrate a legislative intent to preempt all

municipal regulations of wetlands. Accordingly, the Trial Court ruled that the doctrine of preemption did not apply. Decision at 6-8.

It should first be noted that the Trial Court's finding that the Board's interpretation of Article VIII, B did not expressly contradict any specific statute or state regulation highlights the ad hoc and arbitrary nature of the Board's decision. The Planning Board interpreted and used a regulation which did not contain the word "wetlands" to deny a subdivision application because of a remote possibility that a Woods Road might someday effect .00075% of overall wetlands on the subject site. The Planning Board's decision gave no indication as to any objective standard that was used to determine that the Woods Road's effect upon wetlands warranted rejection. There is in fact no way the Trial Court could have known what "interpretation" of Article VIII, B the Board was using[9] - let alone whether or not that interpretation was consistent or inconsistent with state law.

"It is well settled that towns cannot regulate a field that has been preempted by the State." Thayer v. Town of Tilton, 151 N.H. 483, 487 (2004). One way in which municipal legislation will be preempted is if it expressly contradicts state law. Id. State law expressly preempts local law where there is an actual conflict between state and local regulation North Country Environmental Services v. Town of Bethlehem, 150 N.H. 606, 611 (2004).

[9] Of course the Planning Board's decision was inconsistent with the uncontradicted evidence before the Board that DES would have approved the Woods Road in its location on the Petitioners' application.

However, a conflict can also exist even when a local ordinance does not expressly conflict with a state statute. The ordinance will be preempted when it frustrates the state regulation's purpose. Id. The question this Court should ask is "… does the subject matter reflect a need for uniformity… and does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature?" Id. (citing and quoting SE McQuillin, Municipal Corporations §15.20.) Here, it can only be surmised that the Board believed it had the authority under Article VIII, B to deny the Application if it had any effect whatsoever upon wetlands. See C.R. at 127 (Application denied simply because "[t]he applicant rejected moving the driveway away from the wetlands"); Decision at 12 (stating Board could have denied Application if it had "any" effect on wetlands). That interpretation clearly frustrates the purposes of New Hampshire's wetlands regulations.

The purpose of RSA Chapter 482-A is "to protect and preserve the state's submerged lands under tidal and fresh waters and its wetlands…from despoliation and unregulated alteration. RSA 482-A:1. The legislature charged the Commissioner of Environmental Services with adopting "reasonable rules, pursuant to the rulemaking provisions of RSA 541-A, to implement this purpose. RSA 482-a:11, I (2013)" In Re Appeal of Cook, 170 N.H. 746, 751 (2018) (internal quotation omitted). See also RSA 482-A:2 (2013). This protection is to be achieved through a detailed, orderly and uniform permitting process according to rules adopted by the commissioner pursuant to RSA 482-A:11. Detailed rules governing the permitting of development affecting wetlands have in fact been enacted. See Env-Wt 100-900. However, RSA 482-A's purpose was not to ban all

roads and development in the wetlands. It is to regulate such use for the protection and preservation of the wetlands. In fact, the State's rules and regulations allow development in wetlands – that is why it is called a "permitting" process.

RSA 482-A does contemplate municipal regulation of wetlands – but in accordance with the statute's provisions. In section 482-A:11 (administrative provisions for fill and dredge in wetlands), the municipal conservation commission may weigh in with its written report on any dredge and fill permit. However, it is DES that makes the final decision and makes written findings on each issue of disagreement with the conservation commission report. In RSA 482-A:15 (prime wetlands) a municipality can initiate the mapping, documentation and vote on a designation of "prime wetlands". The State then accepts this designation (which must conform to its rules) and maintains a record of the designation.[10] By statute a setback of 100 feet is automatically applied to these prime wetlands. But even in the paragraph which deals with prime wetlands wherein the state plays a passive role, the legislature reaffirms the State's authority over wetlands when it emphatically states "this paragraph [governing permits in prime wetlands] shall not be construed as to relieve the department of its statutory obligations under this chapter to protect wetlands not so mapped and designated." RSA 482-A:11, IV(a).

Clearly the State of New Hampshire has a "comprehensive regulatory scheme" governing the permitting of development projects affecting wetlands. That scheme goes as far as to specify when and how

[10] The Town of Plymouth has not designated any of its land as "prime wetland".

municipalities may participate in the process. The question is therefore "does the Planning Board's interpretation of Article VIII, B frustrate that comprehensive regulatory scheme?" The answer is a resounding "yes".

Here, the Board's interpretation and application of Article VIII, B turned that Article into a regulation that is a flat-out ban of any development that affects wetlands. This is contrary to, and frustrates the purpose of, the State's regulatory scheme. Such an interpretation totally usurped the State's role to regulate development in wetlands under RSA 482-A. Allowing a board to interpret a regulation that does not contain the word "wetlands" as providing a basis for denying a subdivision application because a Woods Road might encroach a tiny portion of wetlands on the site does not simply frustrate the state's comprehensive regulatory scheme. It bypasses it altogether. It takes a comprehensive, orderly, specific and objective set of statutes and regulations and replaces them with an ad hoc "I'll know it if I see it" approach to determining what is and is not allowable in wetlands. The doctrine of preemption clearly prohibits a Board from acting in this fashion.

B. The decisions relied upon by the Trial Court demonstrate that, while municipal regulations governing activity in set-back areas from wetlands are not pre-empted, municipal regulations governing activity in wetlands themselves are.

Citing several of this Court's decisions, the Trial Court stated that this Court has never issued a wholesale prohibition of municipal regulation of wetlands based upon the doctrine of preemption. See Decision at 7. First, it should be noted that those cases serve to highlight the correct manner in which a municipality may introduce wetlands as a criteria to be considered

when judging a subdivision application. In each of those cases the municipality involved had adopted specific rules governing wetlands. Those rules defined wetlands, established setbacks, and established permissible uses near wetlands. They provided specific criteria that both applicants and the municipality could look to in submitting and judging an application. Those specific rules provided a means to avoid a situation whereby a board could interject their own subjective opinions and beliefs about development in wetlands into the process of determining if and how a proposed subdivision's effect upon wetlands could be used as a basis for denial. They prevent a situation where a board can engage in ad hoc decision and rule making.

In Blagborough Family Trust v. Town of Wilton, 153 N.H. 234 (2006) the Court drew an important distinction between regulation in wetlands and regulation of areas within a specific setback from wetlands. Id. A close reading of the cases that the Trial Court relied upon demonstrates that they all involve town regulation of setback – not regulation of matters in wetlands. This is an important distinction. This Court should seize this opportunity to issue a clear edict: municipalities may adopt regulations that govern matters in designated setback areas from wetlands. Towns may also adopt regulations that address development in wetlands, but only as provided for in RSA 482-A:11 and RSA 482-A:15. Municipalities may otherwise not adopt regulations addressing matters in wetlands. That is a field that the State of New Hampshire comprehensively regulates and it should be designated as the sole province of the state.

Irrespective of whether this Court choses to issue such a broad edict, this Court should not countenance what happened in this case. A

municipality should not be allowed to interpret a broad and vague regulation that makes no mention of "wetlands" as giving a planning board authority to bypass the State's comprehensive regulatory scheme and apply whatever subjective opinions and interpretations a board's members may have regarding wetlands.

The record makes clear that this is exactly what happened. In a June 1, 2017 work session during which board members discussed the petitioners' application without public notice, the Board members were clear that they intended to preempt DES:

> UNIDENTIFIED MALE: You know, but it's simple enough just to do, you know, one of the two. I mean, that- it ends it right there, you know, either an easement or move the boundary. But I think we were pretty clear in saying **we do not like traversing these wetlands**. And this is …"
>
> UNIDENTIFIED MALE: It isn't a matter of they can't; right? The State won't let them.
>
> REBECCA HANSON: They will if there's no other option and basically we're making it so that there's no other option.
>
> UNIDENTIFIED MALE: Right. If we give them the subdivision, then the state will let them across that wetland.
>
> UNIDENTIFIED MALE: Right.

Transcript of June 1, 2017 Work Session at 7-8.

By denying the petitioners' application in the manner in which it did, the Board was clearly intending to prospectively apply veto power over DES's decision making process. Moments before the denial vote on June 15, 2017 the vice-chair indicated that this was her intent when she said "I just want to emphasize this DES wetlands permit, just the idea of when there's no better alternative, they will approve of wetlands disturbance or damaging stuff- development to wetlands. **At this point, we're trying to stop there from being a single alternative. So that's what we're trying to work with right now.**" Transcript of June 15, 2017 meeting at 25-26. In other words, "we need to stop this or else DES will approve it." The Board's intent to frustrate the State's comprehensive and orderly regulation of wetlands was clear and the Trial Court's decision allowing this to happen should be reversed.

C. Sufficiency of the Evidence

In a planning board appeal, it is impermissible for a Trial Court to misinterpret the record to find that a board based its decision upon evidence where the record does not support such a conclusion. Trustees of Dartmouth College v. Town of Hanover, 2018 WL 5796932 (N.H. Supreme Court). Here, the Trial Court placed particular significance upon a letter from Deborah Hinds (the "Hinds Letter") stating that the Woods Road's location was "not an area… suitable for the construction of a driveway [and] [t]he NHDES Wetland Bureau [would] not approve a wetlands crossing when there is an alternate location for an access or driveway with

less wetlands impact." Decision at 8. Based upon this letter the Trial Court went on to speculate that

> …the Board could reasonably infer that if DES had jurisdiction over the location of the application's proposed lot lines that DES might insist that the parties agree to adjust the lot lines to accommodate an alternative driveway location in order to protect the Property's wetlands. Accordingly, even if – as the petitioners maintain – the Board was bound to defer to DES's hypothetical opinion on whether Driveway #3 adequately preserved and protected the wetlands at issue, the petitioners have failed to demonstrate the Board's decision did not comply with such a standard.

Decision at 9.

First, there is nothing in the record demonstrating that, in its deliberations or otherwise, the Board relied in <u>any</u> manner on the Hinds Letter. <u>See</u> <u>Trustees of Dartmouth College</u> at 5 (record did not support trial court's finding that Hanover planning board denied application due to shade issues). The record is also void of anything that remotely suggests that the Board used the letter to form any conclusions as to what a hypothetical DES would have done under a hypothetical – <u>and legally impossible</u> – scenario where DES had jurisdiction to establish where the lot lines for the Application must be located. DES simply has no such jurisdiction under New Hampshire law.

The Hinds Letter came to pass when the Planning Board specifically asked for "…a wetlands narrative or synopsis from the wetlands scientist that delineated the wetlands originally …." (Transcript of April 20, 2017 meeting at 62). The Town Planner's statement giving rise to that request was "Could I also suggest that perhaps maybe that it will come out of the wetlands scientist, I'm calling it a narrative. We don't want to subject them to a 125 page report… but we want a synopsis, you know a fairly thorough, but nonetheless, a synopsis." Transcript of April 20, 2017 meeting at 54.

What the Board actually received was a single page letter, citing only a site walk as support, that stated in very conclusory fashion that the area of the proposed Woods Road "…is not an area that is suitable for the construction of a driveway. The owner would need to obtain wetlands permits from the NHDES Wetlands Bureau. The NHDES Wetland Bureau will not approve of wetlands crossing when there is an alternate location for an access or driveway with less wetlands impact." C.R. at 91.

The Hinds Letter in no manner contradicts the uncontested evidence, acknowledged by the Board, that had the Board approved the subdivision as submitted, DES would have approved the driveway location. The Hinds Letter in no manner contradicts the evidence before the Board that because any development would be limited to a "Woods Road" then the subdivision application would <u>never</u> impact wetlands. The Hinds Letter ignores the fact that DES approval is <u>not</u> a pre-requisite to approval of the Application. The Hinds Letter ignores the fact that there is no Plymouth Regulation that specifically tells the Board it can consider wetlands impact as a criteria for subdivision approvals. In short, the Hinds Letter envisions a hypothetical, non-existent situation that, under New Hampshire's regulatory framework,

could literally never exist, and speculates as to the outcome of that hypothetical situation.

In Dartmouth, this Court found that the Trial Court erred when it found that there was an evidentiary basis (the abutters' light and shade study) supporting the Hanover Planning Board's decision. However, the certified record in that case demonstrated that the study was in fact not the reason for the denial. There was furthermore evidence in the record that was contrary to the abutters' light and shade study. The abutters had successfully argued at the Trial Court level that the Hanover Board was entitled to disregard that evidence. This Court said that the Hanover Board should not have ignored that contrary evidence where the record gave no indication that any credence had been given to the light and shade study. Trustees of Dartmouth at 5-6.

Dartmouth stands for the proposition that a Trial Court cannot uphold a planning board decision based upon a finding that the board relied upon "evidence A" (in this case, the Hinds Letter) over "evidence B" (in this case, the other uncontested evidence described above) where the record shows no actual reliance on "evidence A". Here, there is no indication in the record that the Board relied upon the Hinds Letter. Indeed, the Hinds Letter seems to fall far short from what the Board was looking for, thus leaving the Board with only its own subjective opinions and conclusions upon which to base its decision. The Trial Court then took that conclusory and speculative letter and ruled how the Board could have used it to further speculate and conclude what might have happened in a legally impossible, hypothetical scenario where DES has jurisdiction to require lot line or other adjustments in hearings on municipal subdivision applications. Per

Dartmouth, it was unreasonable for the Trial Court to rely upon the Hinds Letter as support for the Board's decision and the Trial Court's decision must be reversed.

D. Lack of Notice

At a public meeting held on June 1, 2017, the Board substantively discussed the Application. See June 1, 2017 Transcript. No notification had been provided that the application was going to be a topic discussed at the June 1, 2017 meeting. C.R. at 101. At the time, the Board had not closed public comments as indicated in the fact that public comments were taken at the June 15 hearing on the Application. C.R. at 119 ("public hearing opened at 6:35 pm"). At the time of the June 1, 2017 hearing, the Board had not begun its deliberations on the Application.

The following discussion occurred at the June 1, 2017 work session concerning the Application:

> UNIDENTIFIED MALE: Right. So, I think that you know, I don't know if it's everybody against us or if, you know, how it's working out but, you know, it would seem to me that the best and highest use of the land is (inaudible) high ground there, even if it means moving pins. It's a subdivision. That's what it's all about anyway, and it seemed like their main objection to that was that the mandated split would be altered. But as you and I discussed, you can move your lines around so, you know, our committee's laws still observed.

UNIDENTIFIED MALE: It's a minimal loss even if you didn't move anything around

UNIDENTIFIED MALE: Right.

UNIDENTIFIED MALE: -- move the two pins.

UNIDENTIFIED MALE: Yeah, but I mean, think they were -- that was signed and sealed from the court. So they have to stick with those acreages after ten years of wrangling going over it.

UNIDENTIFIED MALE: Why don't they file an amendment with the court or

UNIDENTIFIED MALE: Yeah.

UNIDENTIFIED MALE: What the hell.

UNIDENTIFIED MALE: You know, but it's simple enough just to do, you know, one of the two. I mean, that -- it ends it right there, you know, either an easement or move the boundary. But I think we were pretty clear in saying we do not like traversing these wetlands. And this is –

UNIDENTIFIED MALE: It isn't a matter of they can't; right? The State won't let them.

REBECCA HANSON: They will if there's no other option, and basically we're making it so that there's no other option.

UNIDENTIFIED MALE: Right. If we give them the subdivision, then the State will let them across that wetland.

UNIDENTIFIED MALE: Right.

UNIDENTIFIED MALE: But, you know, having this behind you and the previous master plan, you know, the preservation and natural resources, and you have a clear alternative or the least damaging one, I think it's your duty to stick to your guns in something like that but

CHAIR STEVE RHODES: And there's really no harm to the parties except their ego, frankly.

UNIDENTIFIED MALE: Exactly.

Transcript of June 1, 2017 Hearing at 6-8.

The petitioners argued that the June 1 consideration of the application was a violation of RSA 676:4, I (d) (1) which requires a

Planning Board to notify its applicants of the date of any public hearing on the application. The Trial Court held that

> To the extent the Board's June 1 discussion constituted a "hearing" on the Parties' application and, therefore, the failure to notify the parties violated RSA 676:4, I (d) (1), the petitioners have not demonstrated that they were not afforded sufficient "fair and reasonable treatment." The Board reached no material conclusions at the June 1st meeting and the conversation was generally informal. Importantly, the gravamen of the Board's discussion was its belief that the parties should seriously consider an alternative to Driveway #3 that would not impact the Property's wetlands. This issue had been raised at the various prior meetings on the Application for which the parties received notice and the parties were again given an opportunity to address the issue at the June 15th meeting. Accordingly, the Court finds the Board did not treat the petitioners unfairly, unreasonably, or seriously impair their participation in the Board's consideration of the application.

Decision at 10-11.

The very plain language of RSA 676:4,I(d)(1) requires notification and mandates that procedural defects "shall" result in the reversal of a planning board's decision when such defects create serious impairment of "opportunity for notice and participation". No notice whatsoever cannot do anything but create serious impairment of "opportunity for notice and participation." This is true irrespective of the substance of a board's discussion of an application or whether any "material conclusions" were reached at the unnoticed hearing.

Moreover, a significant and substantive discussion did occur at the June 1 meeting. Of particular note is that the Board acknowledged that DES would have provided a wetlands permit for the woods road in its location on the application. Also of note was the fact that Board members, for the first time, were indicating that their intent was to actively prevent a situation where DES would approve the Woods Road. These were important issues in this case and these statements by the Board could have factored into further hearings and arguments. It was error for the Trial Court to ignore RSA 676:4 I(d)(1) based upon the substance of what was discussed at the June 1 hearing. Rather, the statute focuses upon whether the lack of notice creates a serious impairment of opportunity for notice and participation. In this case, it clearly did.

E. Reasonableness of the Board's Decision

Although the Board is entitled to rely upon its own judgment and experience in acting upon applications, the Board may not deny approval on an ad hoc basis because of vague concerns. Smith v. Town of Wolfeboro, 136 NH 337, 344 (1992). Further, the Board's decision must be based upon more than the mere personal opinion of its members. Condos

East Corp. v. Town of Conway, 132 NH 431, 438 (1989). The Board's decision cannot be "unreasonable". Upton v. Town of Hopkinton, 157 NH 115, (2008).

Here, the uncontroverted evidence before the Board was that:

A. The Applicant's subdivision Application, which did not call for any manner of property development except for the development of a "Woods Road", did not violate in any manner any of the Regulations' specific subdivision requirements.

B. The Woods Road would likely never affect wetlands. The historical use of the existing road was for sustainable timber harvesting, performed once every 10 years, during the winter months – when the wetlands were frozen. There was no evidence that the recipients of the parcel containing the new Woods Road had plans for a different use.

C. The use of the Woods Road was limited by order of the probate court to what its name suggests – a woods road. It could not be paved, turned into a driveway, used for development, or upgraded into a paved road for automobile traffic. Even if it were used in the summertime for logging, the Woods Road would temporarily affect approximately 750 square feet out of well over a million square feet of wetlands on the Property. In short, the uncontroverted evidence before the Board was that the Woods Road's potential impact upon the overall wetlands on the property was so small as to be virtually non-existent.

D. The Department of Environmental Services would have approved the use of the Woods Road for logging purposes. Even though the probate court order prohibits development of the Woods Road, DES would have approved use of the Woods Road for other purposes.

Based upon the foregoing, the Petitioners argue that the Planning Board decision was unreasonable. In response, the Trial Court found:

> Here the Board received a report from a certified wetlands scientist that Driveway #3's proposed location was "not an area that is suitable for the construction of a driveway." (C.R at 91.) On the basis of this report alone, the Board could reasonably conclude Driveway #3 would harm the wetlands at issue, regardless of the driveway's proposed use. Finally, although Driveway #3's wetland impacts would seemingly be minor in relation to the total amount of wetlands on the Property, it was not unreasonable for the Board to conclude that any wetland impacts were undesirable where alternative accessway locations or solutions existed.

Decision at 12.

As discussed above, there is no evidence in the record that the Board based its decision upon the report from the certified wetlands scientist (the

Hinds Letter). Moreover, the Hinds Letter simply ignores the uncontroverted evidence in this case that the so-called "driveway" was, by judicial mandate, to be a woods road- and therefore would never effect wetlands. The Trial Court's language further emphasizes the fact that the Trial Court was approving the Planning Board effectively becoming the department of environmental services (recall the Trial Court language stating that the Board could "infer" that a hypothetical DES would not approve of the location of the driveway). This was not reasonable.

CONCLUSION

For all of the foregoing reasons, Denis Girard and Florence Leduc request that this Honorable Court reverse the Trial Court's decision and remand this matter to the Trial Court with instructions for the Trial Court to order the Town of Plymouth Planning Board to approve the Application as submitted.

ORAL ARGUMENT

William B. Pribis will argue the case for the appellant and fifteen minutes are requested for that purpose.

CERTIFICATION PURSUANT TO RULE 16(3)(i)

Pursuant to Supreme Court Rule 16(3)(i), I hereby certify that the decision being appealed was in writing, and that a true and accurate coy of the same is appended to this brief.

Respectfully submitted,
Denis Girard and Florence Leduc
By and through their Attorneys,
CLEVELAND, WATERS AND BASS, P.A.

Date: December 21, 2018

By: /s/ William B. Pribis

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2018, the foregoing Appellant Brief was sent via the Court's electronic filing system to John J. Ratigan, Esq. and John J. McCormack, Esq.

/s/ William B. Pribis
William B. Pribis, Esq.