THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2019 TERM

DOCKET NO. 2018-0495

DENIS GIRARD and FLORENCE LEDUC

v.

TOWN OF PLYMOUTH

APPEAL FROM AN ORDER OF THE

GRAFTON COUNTY SUPERIOR COURT

REPLY BRIEF OF THE APPELLANT

William B. Pribis, Esq.
(NH Bar #11348)(Orally)
CLEVELAND, WATERS AND BASS, P.A.
Two Capital Plaza,
P.O. Box 1137
Concord, NH 03302-1137
(603) 224-7761

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STATUTES AND ORDINANCES INVOLVED

674:55 Wetlands. – 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 purposes of such regulations and ordinances shall be as prescribed in rules adopted under RSA 482-A. Nothing in this subdivision shall be construed to limit the powers otherwise granted under this chapter for municipalities to plan land use and enact regulations based on consideration of environmental characteristics, vegetation, wildlife habitat, open space, drainage, potential for flooding, and protection of natural resources, including critical or sensitive areas or resources and groundwater. In the context of such authority, municipalities may define and delineate resources or environmental characteristics, such as wet soils or areas, and shoreline or buffer areas, in a manner different from the common meaning and delineation of wetlands required herein.

ARGUMENT

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

The petitioners argued that the Trial Court erred in upholding the Planning Board decision that use of Article VIII, B to deny the petitioner's Application due to its effect on wetlands where that regulation does not even use the word "wetlands". The Town submits that this argument fails "…because the Petitioners' argument requires Article VIII, B to be interpreted in isolation, which contravenes this Court's oft-repeated rules of construction." The Town claims that its "overall regulatory scheme" demonstrates that Article VIII, B is intended to enable the Town to require subdivision based upon wetlands- despite the fact that Article VIII B does not use that word. Town's Memo at 5. The Town's primary support for this argument is the fact that the Town's regulations require an applicant to identify all "wetlands" on a subdivision application. Regulations Article VI, M (12).

First, the Town disregards another well-established rule of construction. When interpreting a statute (or in this case, a regulation), courts should not "…consider what the legislature might have said or add language that the legislature did not see fit to include." Evans v. J Four Realty, LLC, 164 NH 570, 572 (2013). In Batchelder v. Town of Plymouth this Court repeated its oft-quoted maxim that, when interpreting local ordinances a court should not guess what the drafters of the ordinance may have intended, or add words that they did not see fit to include." Batchelder, 160 N.H. 253, 257-58 (2010) (internal quotation and citation omitted). This should be particularly true with respect to a well-defined

term of art (both legally and scientifically) under New Hampshire law – "wetlands". The legislative body in this case (the Town) was obviously familiar with the term "wetlands" having used it in a non-regulatory manner in the subdivision regulations. The Court should not read into Article VIII, B a very specific term that the Town chose not to include.

However, the Town's argument fails even when considering Article VIII, B "…in the context of the overall regulatory scheme." Memorandum at 5. The Town's substantive subdivision regulations (as opposed to the administrative requirements for what must be included on an application) address wetlands at Article IV, E and Article VI, M (27). Article IV, E allows the Board to grant approval of an application conditioned upon the applicant's obtaining permits and approvals granted by other boards or agencies, including "the Wetlands Board". Similarly, Article VI, M (27) requires a final plat for all subdivisions to show final state approvals (when appropriate) from various agencies, including "the Wetlands Board".

Contrary to the Town's assertions, the overall context of its subdivision regulations demonstrate an intent to defer to the appropriate state regulators regarding wetlands issues. The requirement that wetlands be depicted on a subdivision application is clearly in place so that the Board can determine compliance with Article IV, E and Article VI, M(27). It is not, as the Town suggests, to open the door for Board engaging in the ad hoc regulation of wetlands.

Finally, it is significant that counsel's research indicates that in literally every modern case in which this Court has dealt with the issue of a municipality regulating wetlands, the subject municipality had an ordinance that very specifically addressed the issue of wetlands, using that word. The

Town's argument that an applicant should glean from an overall "interpretation" of the entirety of Plymouth subdivision's regulations an intent to regulate wetlands under Article VIII, B where the term is not substantively used, flies in the face of how every town that properly regulates wetlands' development has done so.

B. RSA 674:55

The Town argues that RSA 674:55 "…simply provides a definition; it does not provide or limit municipal authority to enact regulations." Memorandum at 7. This argument actually highlights why the Board's and Trial Court's decisions were incorrect.

In this case, the Town took an ordinance (Article VIII, B) that does not use the word "wetlands". The Town used that ordinance as a basis for denying an application based upon alleged development in wetlands. Under the Town's logic, "wetlands" can be whatever the Town wants it to be because Article VIII, B does not use the word "wetlands". This defies RSA 674:55's obvious purpose of ensuring a level of uniformity and clarity in the municipal regulation of development that affects wetlands. The Town should not be allowed to "end-around" RSA 674:55 by implying language into a regulation where it does not exist.

C. PREEMPTION

The Town argues that a municipality is not estopped from creating more restrictive rules for wetlands than those required by the state and, therefore, the plaintiff's preemption argument fails. The Town relies upon

the cases of Rowe v. North Hampton, 131 NH 424 (1989); Cherry v. Town of Hampton Falls, 159 NH 720 (2004) and Lakeside Lodge v. Town of New London, 158 NH 164 (2008). However, those cases best serve to highlight the fundamental flaw in the Town's position. In each of those cases, the municipality in question had enacted regulations that specifically addressed wetlands.

The petitioners do not dispute that a Town can enact regulations that are more restrictive than the state's regulations governing development effecting wetlands. What a municipality cannot do is purport to regulate development effecting wetlands via a regulation that provides no specificity whatsoever and indeed does not even use the term "wetlands". Replacing a well-established and comprehensive regulatory scheme with a regulation that can be whatever a given Board wants it to be is exactly what the doctrine of preemption is designed to prevent.

CONCLUSION

With respect to the Town's remaining arguments, the petitioners believe they have been sufficiently briefed by the parties and, in the interest of judicial economy, do not repeat arguments previously raised. For all of the foregoing reasons, as well as the reasons submitted in the petitioners' initial brief, the Trial Court's decision should be reversed.

CERTIFICATION PURSUANT TO RULE 26(7)

Pursuant to Supreme Court Rule 26(7), I hereby certify that every issue specifically raised herein (a) has been presented in the proceedings below and (b) has been properly preserved for appellate review by a

contemporaneous objection or, where appropriate, by a properly filed pleading. I further hereby certify the within brief complies with the word limitation in Supreme Court Rule 16(11) of 3,000 words. This reply brief contains 1165 words.

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

Date: February 22, 2019

By: /s/ William B. Pribis

William B. Pribis, Esq.
NH Bar No. 11348
Two Capital Plaza, 5th Floor
P.O. Box 1137
Concord, NH 03302-1137
(603) 224-7761
pribisw@cwbpa.com

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2019, the foregoing Appellant Reply 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.