

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0650

Appeal of New Hampshire Department of Environmental
Services

In re: Bryan and Linda Corr

APPEAL PURSUANT TO RULE 10 FROM AN ORDER OF
THE WETLANDS COUNCIL

**REPLY BRIEF OF THE APPELLEE / CROSS-
APPELLEE, BRYAN AND LINDA CORR**

Bryan and Linda Corr,
By and through their attorneys,
Cronin, Bisson & Zalinsky, P.C.

Dated: August 6, 2019

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The Appellee / Cross Appellee requests fifteen minutes of oral argument
before the full court, to be presented by Attorney John G. Cronin.

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QUESTIONS PRESENTED FOR REVIEW-CROSS APPEAL

1. Whether, in partially dismissing the appeal, the hearing officer lawfully or reasonably concluded that the New Hampshire Department of Environmental Services (“DES”) had the authority to regulate the height of a redeveloped non-conforming accessory structure. A. at 98-102.
2. Whether, in partially dismissing the appeal, the hearing officer lawfully or reasonably determined that the Department of Environmental Services had the authority to regulate the size, including the height, of the redeveloped boathouse where the statute limited the grant to “small accessory structures.” A. at 102-104.

ARGUMENT

I. On the Corr’s Cross Appeal, DES Argues That It Should Be Able to Regulate Height Simply Because It Has Done So and Ignores That It Lacked Subject Matter Jurisdiction To Issue The Underlying Order.

In its Cross Appeal, the Corrs raised two principal points. First, the New Hampshire Department of Environmental Services (“DES”) lacks authority to regulate height under RSA 483-B:17, IV. Second, DES only has the authority to regulate “small accessory structures” under that statute. DES raises a number of objections to each claim, but there are a couple of points that bear some emphasis or clarification in light of those objections, particularly, on the second point and how it ties into whether the Court should consider the same.

First, with respect DES’s authority to regulate height, DES references dictionary definitions of “size” and provisions in other statutory schemes relative to height. However, in construing a statute, the Court construes a statute in light of the overall statutory scheme and in light of the policy sought to be advanced by the entire statutory scheme. State v. Addison, 165 N.H. 381, 418 (2013). As such, that the Legislature may have authorized an agency to regulate height in the context of other schemes does not necessarily mean that it authorized DES to regulate the height of small accessory structures under RSA Chapter 483-B. RSA Chapter 483-B seeks to protect the shoreland in order to maintain the “integrity of public waters.” RSA 483-B:1, I. To this end, RSA Chapter 483-B itself governs the types, location and area

of improvements which may be located in the shoreland. RSA 483-B:9 [Minimum protection standards include prohibitions on certain uses and activities, setbacks, and limits on impervious surface.]. Similarly, in regulating the size of non-conforming structures, RSA Chapter 483-B repeatedly references the footprint of the structure. RSA 483-B:11. There is no height restriction relative to any structures within RSA Chapter 483-B and DES has no authority to adopt regulations relative to the size of primary structures. As such, primary structures are not subject to any height restriction under RSA Chapter 483-B and any limitation on height is purely a matter of local land use regulation. DES still does not offer any explanation as to how its construction of “size” furthers the purposes of this particular statutory scheme or is consistent with the language of the statute as a whole, particularly when “principal structures” are not subject to a height regulation under RSA Chapter 483-B. Accordingly, contrary to the rules of statutory construction, DES asks the Court focus upon RSA 483-B:17, IV in isolation and to rely upon unrelated statutory schemes to support its position so that it can continue to regulate the height of accessory structures because it has done so in the past and no other reason.

Second and perhaps dispositive of the entire appeal, RSA 483-B:17, IV grants DES the authority to adopt regulations relative to the size of “small accessory structures.” As such, to have jurisdiction to regulate the size of “small accessory structures,” DES first had to adopt regulations to that end. Lemm Development Corp. v. Town of Bartlett, 133 N.H. 618, 621-623 (1990) [Where the enabling legislation grants

the authority to adopt regulations over a matter, the body must first adopt regulations before controlling that matter.]. “Accessory structure” is a term of art under RSA Chapter 483-B, Lemm, 133 N.H. at 620 [Statutory definitions govern in interpretation.], and that definition included examples of structures meeting that definition. RSA 483-B:4, II. The Legislature chose to grant to DES the authority to regulate the size of “small accessory structures.” RSA 483-B:17, IV. RSA 483-B:17, IV, also includes examples of “small accessory structures” and that list is not coextensive with the list of examples in RSA 483-B:4, II, and focuses upon what are typically smaller accessory structures. As such, in order to have regulatory jurisdiction under RSA 483-B:17, IV, DES had to first adopt regulations relative to the size of “small accessory structures.” While the expired Fact Sheet with its specific description of a small accessory structure being less than one hundred and fifty square feet suggests that it might have done so at one point in time, C.R. Tab 26 [DES-29], DES did not have any regulations specifically regulating “small accessory structures.” It only had regulations purporting to regulate all “accessory structures” and those regulations do not purport to define what would be a “small accessory structure.” *See, e.g.*, N.H. Admin. Rule Env-Wq 1405.03(a) [Regulation governs accessory structures in protected shoreland.]; N.H. Admin. Rule Env-Wq 1402.02 [Adopting statutory definition of “accessory structure” for purposes of regulations]. As it has not adopted regulations strictly confined to the terms of the enabling legislation, DES lacks regulatory (i.e. subject matter) jurisdiction under RSA 483-B:17, IV. Lemm, 133N.H. at 621-623. Subject matter

jurisdiction cannot be conferred where it does not exist and, as such, it may be raised at any time, including on appeal. Gordon v. Town of Rye, 162 N.H. 144, 149 (2011). Moreover, orders issued without subject matter jurisdiction are void *ab initio*. Id. Since DES did not adopt regulations strictly confined to the terms of RSA 483-B:17, IV, its underlying order purporting to regulate the height of the Corrs' boathouse is void rendering all of its objections to the Council's decision moot in the process. Without the authority to regulate height of accessory structures under RSA 483-B:17, IV for want of authorized regulations, DES is in the same basic position that it is in under the Council's decision.

CONCLUSION

For the reasons set forth above, the Council's decision blocking enforcement of the purported height restriction should be affirmed whether on the original or the alternative grounds.

REQUEST FOR ORAL ARGUMENT

The Corrs hereby request oral argument and John G. Cronin, Esquire, shall present same on behalf of the Corrs.

WORD LIMIT CERTIFICATION

This brief complies with the word limitation set forth in Supreme Court Rule 16(11) by containing 1418 words.

Respectfully submitted,

Bryan and Linda Corr

By their attorneys,

CRONIN, BISSON & ZALINSKY, P.C.

Dated: August 6, 2019

By: /s/ John G. Cronin

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief were forwarded this 6th day of August 2019 to Joshua Harrison, Esquire and K. Allen Brooks, Esquire, counsel for DES, through the New Hampshire Supreme Court's electronic filing system.

/s/John G. Cronin

John G. Cronin, Esquire