The State of New Hampshire

Supreme Court

Case No. 2019-0460

State of New Hampshire

v.

Shane M. Beattie, et al.

Rule 7 Mandatory Appeal of a
Dismissal of the Appellants' Preliminary Objection
to a Taking under RSA chapter 498-A

Appellants' Reply Brief

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STATEMENT OF THE FACTS

The Appellants incorporate the Statement of the Facts set forth in their Brief here, as supplemented by the State's Counterstatement of the Facts.

ARGUMENT

(a) The Applicable Standard of Review does not Enlarge the Right to Appeal

In its response, the State argues that the 1995 amendments to RSA 498-A:1, after this Court's Armento decision, did not "'enlarge or diminish the rights given by law to any condemnee to challenge the necessity, public uses, and net-public benefit for any condemnation', but rather merely creates the procedure by which such challenges are reviewed and transferred amongst the different forums, according to their jurisdiction." (State's Brief (hereinafter "SB") at 22.)

The Beatties, in their brief, did not argue that the 1995 amendments enlarged the right to challenge necessity; the Beatties argued that these amendments merely clarified that the legislature intended RSA chapter 498-A to set forth a complete and exclusive procedure to challenge necessity in an appeal. (Appellant Brief (hereinafter "AB") 16–18.) Regardless, holding that the applicable standard of review is de novo, and not "fraud or gross mistake", would not enlarge the right to challenge necessity, as the standard of review itself does not add, subtract, or define any of the elements necessary to establish necessity. See AB at 20; see also Freund v. Nycomed Amersham, 347 F.3d 752, 762-65 (9th Cir. 2003); see generally, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

To further clarify how a standard of review itself does not enlarge or diminish rights, it is important to remember what the right is. The right at issue here is the right to challenge the "necessity" of taking one's land. In 1948, residents of Moultonborough challenged the necessity of taking their land for a public park, arguing that the State did not prove there was "public necessity" before the taking (they challenged necessity only, they did not challenge "public purpose"). State v. 4.7 Acres of Land, 95 N.H. 291 (1948). Therefore, the question presented was whether the taking was invalid because the State did not prove

"necessity"? The Court held that "[i]t is well settled under the Federal [and our State] Constitution that while determination of the question of public purpose is a judicial one, that of the necessity and expediency of the taking is wholly legislative." Id. In other words, citizens do not have an automatic right to challenge necessity, since it is not a constitutional requirement. However, the legislature is free to give citizens a right to challenge necessity.

Therefore, a citizen only has a right to challenge the necessity of a taking if the legislature has created this right. And, because RSA 498-A does not create any rights to condemn, or any rights to appeal (only the procedure for both), some other statute other than RSA 498-A must set forth this right to condemn and challenge necessity. In the present case, the legislature has chosen to create the right to condemn for state highways, and to challenge the necessity of such condemnations, in RSA chapter 230. RSA 230:14 clearly states that a State must establish the necessity of a taking, in addition to the constitutionally required element of "public [use]."

In other words, the Beatties agree that RSA 498-A does not create the right to challenge necessity, RSA 230:14 does. However, the Beatties further argue (and caselaw, statutory language, and legislative history supports) that a standard of review is procedural; that the procedure to appeal a finding of necessity is exclusively controlled by RSA 498-A; and that the applicable standard of review is de novo. See AB at 20–24; and Merrill v. Manchester, 124 N.H. 8, 15 (1983) (setting forth the de novo standard of review). Therefore, in applying de novo review, the Court would not be enlarging the right to challenge necessity, and therefore would comply with the legislature's intent in enacting RSA chapter 498-A as a complete and exclusive procedural act.

(b) The 1998 Amendments to RSA 230:14 do not Render RSA 230:19's Standard of Review as Controlling in this Case

Since at least 1945, RSA 230:19 (or its predecessor RSA 188) has stated that "there shall be no appeal from [the commission's] findings on the matter of occasion for the laying out of the highway or alteration thereof in the absence of fraud or gross mistake." (AB at 21; citing AA Vol. I, 136-138.) Since the passage of RSA 498-A in 1971, RSA chapter

230 has been amended, substantively, twice: once in 1983 and again in 1998. (AA Vol. II at 61, 86.) Yet, after these two amendments, the language cited above regarding the standard of review has not been removed.

As explained in detail below, the failure to remove this standard of review language from RSA 230:19 was not within the scope of the legislative efforts at the time to amend RSA 230:14 to broaden the reasons for which the state can acquire property. (AA Vol. II, Senate History notes, at 90–101.) Note RSA 230:19 was not amended at all, only RSA 230:14 was. The Senate History Notes indicate that the purpose was to focus on substance rather than procedure:

> It really broadens the reasons for which this state can acquire property. It's really what it does, it doesn't change the process it just adds things such as mitigation without which many facilities cannot be built as something that is possible after you go through the procedure to take by eminent domain.

(Id. (emphasis added).)

In 1983, RSA chapter 230 was amended for the purpose of "eliminating eminent domain sections of the highway laws that conflict with RSA 498-A." (AA Vol. II at 68–85.) The amendment removed language from RSA 230:14 discussing that the commission should assess damages, and added in language stating that any "land [] which cannot be acquired by agreement . . . may be acquired in accordance with RSA 498-A." (Id.)

In 1998, RSA chapter 230 was amended again, but this time for the purpose of "broaden[ing] the reasons for which [the] state can acquire property." (AA Vol. II, Senate History notes, at 90–101.) The concern was whether the power granted under RSA chapter 230 to acquire land for state highways was broad enough to cover the need for mitigation areas, drainage areas, and rest areas that are incidental to highway construction projects. (Id.) To accomplish this, the amendment made three changes to RSA 230:14:

1. Added in language stating that the commission may purchase land "that is reasonably necessary for the construction, reconstruction, or alteration" of State highways.
2. Added paragraph "II" to RSA 230:14, which did not exist before.

a. This stated "The commissioner may acquire such property as he or she determines necessary to:"

   i. Establish drainage for Class I or Class II highways
   ii. Maintain mitigation areas for highways as required under environmental laws
   iii. Provide rest areas, parking strips, etc., along highways
   iv. A broad grant of power to take land to "Provide for the health, safety, and welfare of the public using a class I or class II highway."
   v. Access for maintenance of highways; and
   vi. Erect administrative, storage, and operational buildings.

3. Added in language stating that "all issues that are appealed relating to necessity, public purpose, and net public benefit shall be determined in accordance with RSA 230:19."

(Id. at 86–100.)

Therefore, in sum, the legislature has amended RSA 230:14 twice, but has never amended RSA 230:19. The State now relies on this series of events to argue that the legislature intended for RSA 230:19's standard of review to control on appeals for necessity. The State fails to directly address whether a standard of review is procedural or not, and how that would be affected by the legislature's consistently expressed intent that RSA 498-A completely and exclusively control procedure for condemnation and appeals.

However, it is important to note that RSA 230:14's reference to RSA 230:19 was added at the same time the legislature added paragraph II under RSA 230:14. As explained above, paragraph II sets forth a long list of types of takings (rest areas, mitigation areas) that the legislature considered "necessary" for highways. In other words, the 1998 amendments focused on broadening the definition of what is "necessary" for a taking. In fact, **before these amendments, the word "necessary" did not even appear in RSA 230:14**. (AA Vol. II at 86–100.)

Therefore, the 1998 amendments to RSA chapter 230 stated expressly, for the first time, that citizens had a right to challenge the "necessity" of takings under this chapter.[1]

[1] The appellants are not stating this is the first time the right was created, but merely that this is the first time it was expressly stated in RSA chapter 230.

In other words, this made it clear that the enabling statute, RSA chapter 230, created a right to appeal a finding of necessity. This again underscores that while RSA 498-A may control the procedure to appeal necessity, it does not create the right to appeal necessity—the enabling statute of RSA chapter 230, does.

Why, then, would the legislature also state that "all issues that are appealed relating to necessity, public use, and net public benefit shall be determined in accordance with RSA 230:19", without removing the language regarding the standard of review? This is because RSA 230:19 does more than merely set forth a standard of review. The statute is titled "hearing", and it establishes how the commission is to conduct the hearing to determine if there is "occasion" to layout a highway. This section states that the commission shall (1) have a hearing; (2) make a personal examination of the location; (3) shall hear interested parties; (4) may adjourn as needed; (5) may admit or reject any evidence; and (6) that there are no appeals on the matter of occasion except for fraud or gross mistake. This section is primarily intended to set forth the requirements for the hearing to determine "occasion", it is not primarily intended to establish the procedures for an appeal by a landowner who wants to object.

In view of this, the legislature's primary goal of amending RSA 230:14 in 1998 was to broaden the reasons for which the state can acquire property for Class I and II highways. It was not to make a statement about appeal procedures. The legislature accomplished its goal by defining "necessity" in detail under RSA 230:14. **In the process, the legislature referenced RSA 230:19 to clarify that the hearing to determine "occasion" shall also determine the matters of necessity**. Again, RSA 230:19 is primarily intended to establish how the commission's hearing to determine "occasion" shall be conducted. There is no evidence to suggest that the legislature's reference to RSA 230:19 was intended to do anything other than clarify that the commission's hearing on occasion shall also determine the "necessity" that was now defined under RSA 230:14, II.

A close reading of the plain language of RSA 230:14 supports this interpretation. The relevant language of RSA 230:14 reads: "Any such land or property which cannot be acquired by agreement with the owner or owners thereof may be acquired in accordance

with RSA 498-A and all issues that are appealed relating to necessity, public use, and net public benefit shall be determined in accordance with RSA 230:19." Read more closely, this states that issues related to necessity must be appealed "in accordance with RSA 498-A", but that they must first be "**determined**" as necessary "in accordance with RSA 230:19." "Determined" refers to how the findings will be made; it does not refer to how they could be appealed (i.e., there must be a hearing that "determines" necessity first under RSA 230:19, by examining the proposed location and admitting evidence, before it can be appealed "in accordance with RSA 498-A.") Again, there is no evidence that the legislature understood or intended to make any statements regarding standards of review under RSA 498-A when it broadened the basis for taking land under RSA chapter 230 in 1998.[2]

This is especially true given the fact that RSA 498-A's legislative history and its statutory language make it clear that RSA chapter 498-A "provide[s] a complete and exclusive procedure to govern . . . the review of necessity . . . ." RSA 498-A:1. The word "**exclusive**" expressly appears in the statute, and the plain meaning of that word cannot be avoided. As has been explained in greater detail in the Beattie's initial brief, "exclusive" control of procedure means that courts cannot look to an enabling statute (such as RSA 230:19) to resolve any procedural questions that arise, such as what standard of review should apply on an appeal in accordance with RSA 498-A. (AB at 19.) If one must look to enabling statutes to answer procedural questions that arise for an appeal under RSA 498-A:9-a & b, citizens would again face a "patchwork" of statutes to determine the procedure for challenging a finding of necessity. (Id.)

[2] If the Beatties' interpretation of this statutory language is not adopted by this Court, and if this Court adopts the State's interpretation, then such conclusion takes the analysis on to the central procedural due process question: exactly how were the Beatties informed, in advance of the condemnation, that the standard of review to be applied to their Preliminary Objection was the "fraud or gross mistake" standard? However, if this Court **does** adopt the Beatties' interpretation of this statutory language, then the sequence of events that happened in this case makes sense, as a practical matter, and there is no procedural due process violation (i.e., the State filed its condemnation, the Beatties filed their Preliminary Objection, and a de novo hearing should be held as to the merits of the Beatties' Preliminary Objection under RSA 498-A).

As noted by the State, when faced with two different sets of statutes that cover similar topics, courts "construe them so that they will lead to reasonable results and effectuate the legislative purpose of the statutes." Wolfgram v. N.H. Dep't of Safety, 169 N.H. 32, 37 (2016). Further, this Court has stated that, when construing statutes, its "goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme. Accordingly, we interpret a statute in the context of the overall statutory scheme and not in isolation." State v. Etienne, 163 N.H. 57, 72 (2011) (internal citations omitted).

Reading these two statutory schemes as a whole, the most reasonable interpretation is that, in 1995, when amending RSA 498-A, the legislature clarified that RSA 498-A exclusively controlled the procedure for condemnation and subsequent appeals. In 1998, the legislature, when amending RSA 230:14, broadened the reasons for which the State can acquire property without changing the procedure for condemnation or appeals set forth under RSA 498-A. And it certainly did not alter or amend the fact that this Court has previously held that a de novo review of questions of necessity is a "procedural" safeguard required by our State Constitution. Merrill, 124 N.H. at 15.

(c) The Significance of Merrill and V.S.H Realty in this case

The State in its brief notes that no equal protection argument was raised before the trial court, and therefore is waived. (SB at 26.) However, the State fails to address the real significance of this Court's decisions in Merrill and V.S.H Realty to this case, beyond their equal protection arguments. Merrill, 124 N.H. 15; V.S.H. Realty, Inc. v. City of Manchester, 123 N.H. 505 (1983). The Beatties cited these cases primarily to establish that a de novo standard of review is required under RSA 498-A:9-a & b. The question of what standard of review is required under this statute was raised below. (AB 6.)

Merrill and V.S.H Realty are instructive here, not for their equal protection analysis, but for their ultimate conclusion that a de novo standard of review applies in an appeal under RSA 498-A. As explained in greater detail in the Beatties' brief, this Court held that a de novo review of the necessity for a taking is a "procedural" safeguard required by our

State Constitution. See AB at 22; Merrill, 124 N.H. 15; City of Keene v. Armento, 139 N.H. 228, 233 (1994) (describing the standard of review as a "procedure[] which we have previously read into other condemnation statutes in order to cure constitutional defects"). Its true that these two cases suggest that there is a strong equal protection argument for holding that a de novo standard of review applies here (because there is no "compelling governmental interest in providing fewer procedural safeguards to landowners merely because their property is sought for [a State highway] rather than for [a] municipal highway."). Merrill, 124 N.H. at 15.

However, independent of this equal protection argument, is the fact that, in order to provide "a simple uniform procedure for [all] condemnation[s]" instead of a "patchwork quilt" of procedures, this Court must apply the same standard of review for appeals brought under RSA 498-A, regardless of whether land is being condemned for a State highway rather than for a municipal highway. (AA Vol. 1, 123–124.) In other words, in order to provide an "exclusive" procedure for all condemnations, and to avoid a "patchwork" of different procedures for different takings, courts must read RSA 498-A:9-b to set forth the same standard of review for municipal condemnations as it does for state condemnations. And, in light of this Court's decisions in Merrill and V.S.H Realty, the applicable standard of review is de novo.

CONCLUSION

This Court should reverse Superior Court decision granting the State's Motion to Dismiss, and remand this matter to the Superior Court for further proceedings to consider the Beatties' Preliminary Objection under N.H. RSA 498-A:9-b.

Dated: February 13, 2020

Respectfully submitted,
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RULE 16 (10) / RULE 26 (7) / SUPP. RULE 18 (c) CERTIFICATION

I, Jonathan S. Frizzell, certify that the foregoing Reply Brief has this day been transmitted to opposing counsel via the Court's electronic filing system to counsel for Appellee, Allison B. Greenstein, Esquire.

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