

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket #2022-0142

Juliana Lonergan & David Lonergan

v.

Town of Sanbornton

BRIEF OF APPELLEE,
TOWN OF SANBORNTON,
RULE 7 APPEAL FROM THE
BELKNAP COUNTY SUPERIOR COURT

Counsel for Town of Sanbornton:

Stephen M. Bennett, NH Bar #529
Wadleigh, Starr & Peters, P.L.L.C.
95 Market Street
Manchester, NH 03101
603-669-4140
mtierney@wadleighlaw.com

Oral Argument Requested to be Argued
by Stephen M. Bennett, Esq.

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES..... 4

QUESTIONS PRESENTED 6

TEXT OF RELEVANT AUTHORITIES 7

STATEMENT OF THE CASE 20

SUMMARY OF ARGUMENT 25

ARGUMENT 27

Standard of Review 27

 I. The Trial Court Did Not Err When It Upheld the ZBA’s Finding
 That the Intervenor’s Plan Satisfied the Requirements of Article 18
 B(3) of the Zoning Ordinance..... 28

 A. Appellants Failed to Preserve Their Argument That the ZBA
 Did Not Issue Intervenor A RSA Chapter 155-E Permit..... 28

 B. Intervenor’s Plan for the Excavation Operation Contains
 Sufficient Precautions Against Fugitive Dust..... 32

 C. The Trial Court Did Not Err When it Found That the
 Intervenor’s Measures to Reduce Noise From the Excavation
 Operation Satisfied the Requirements of Article 18 B(3)..... 34

 II. The Trial Court Did Not Err When It Determined That the ZBA Had
 the Authority to Grant Intervenor A Special Exception 35

CONCLUSION 39

REQUEST FOR ORAL ARGUMENT 39

CERTIFICATE PURSUANT TO RULE 26 (7)..... 39

CERTIFICATE OF SERVICE..... 40

ADDENDUM

10/19/21 Order on Motion to Dismiss..... 41

TABLE OF AUTHORITIES

Cases

<i>Arthur Whitcomb, Inc. v. Town of Carroll</i> , 141 N.H. 402 (1996).....	26,31,32
<i>Atwater v. Town of Plainfield</i> , 116 N.H. 503 (2010)	29
<i>Dietz v. Town of Tuftonboro</i> , 171 N.H. 614 (2019)	28
<i>Duffy v. City of Dover</i> , 149 N.H. 178 (2003)	28
<i>Foster v. Town of Henniker</i> , 167 N.H. 745 (2015)	31
<i>Fox v. Town of Greenland</i> , 151 N.H. 600 (2004)	38
<i>Harrington v. Town of Warren</i> , 152 N.H. 74 (2005)	28
<i>McKibbin v. City of Lebanon</i> , 149 N.H. 59 (2003).....	37
<i>Olson v. Town of Grafton</i> , 168 N.H. 563 (2016).....	28
<i>Progressive N. Ins. Co. v. Argonaut Ins. Co.</i> ,	
161 N.H. 778 (2011).....	25,27,29,36
<i>Sperl v. Sperl</i> , 119 N.H. 818 (1979).....	25,29
<i>Town of Carroll v. Rines</i> , 164 N.H. 523 (2013).....	31

Statutes

N.H. RSA 155-E.....	25,27,28,31,32
N.H. RSA 155-E:1.....	25,30
N.H. RSA 155-E:2.....	30
N.H. RSA 155-E:3.....	25,30

RSA 155-E:4	24,31
RSA 155-E:7	25
RSA 155-E:9	25,27,29
RSA 155-E:11	31
RSA 266:72	22,26,33
RSA 485-A:17	38
RSA 674:33	37
RSA 677:4	27,29
RSA 677:6	27,28
<u>Admin Rules</u>	
N.H. Code Admin. R. Env-A 1002.03 (a).....	32
N.H. Code Admin R. Env-A 1002.03 (b)(1),(2)	32
<u>Supreme Court Rules</u>	
Rule 7.....	27,36
Rule 16.....	25,30
<u>Ordinances</u>	
Article 18 B	6,24,25,27,33,37,38

QUESTIONS PRESENTED

1. Did the trial court err when it upheld the ZBA's finding that the plan submitted by the Intervenor satisfied the requirements of Article 18 B(3) of the Zoning Ordinance?
2. Did the trial court err when it determined that the ZBA had the authority to grant Intervenor a special exception?

TEXT OF RELEVANT AUTHORITIES

Section 155-E:3

155-E:3 Application for Permit. –

Any owner or owner's designee subject to this chapter shall, prior to excavation of his land, apply to the regulator in each city or town involved for a permit for excavation. If the area subject to this chapter is situated in an unincorporated place application shall be made to the county commissioners. The applicant shall also send a copy of the application to the conservation commission, if any, of the city or town. Such application shall be signed and dated by the applicant and shall contain at least the following information:

- I. The name and address of the owner of the land to be excavated, the person who will actually do the excavating and all abutters to the premises on which the excavation is proposed;
- II. A sketch and description of the location and boundaries of the proposed excavation, the number of acres to be involved in the project and the municipalities and counties in which the project lies;
- III. A sketch and description of the access and visual barriers to public highways to be utilized in the proposed excavation;
- IV. The breadth, depth and slope of the proposed excavation and the estimated duration of the project;
- V. The elevation of the highest annual average groundwater table within or next to the proposed excavation;
- VI. A plan for the reclamation of the area affected by the excavation at least in compliance with RSA 155-E:5 and RSA 155-E:5-a. Such plan shall address the effects of the proposed excavation on soil, surface water and groundwater, vegetation, overburden, topography, and fill material, and may address future land use consistent with the approved master plan, and shall include a timetable for reclamation of fully depleted areas within the excavation site during said project;
- VI-a. Specific actions to be taken by the applicant on the excavation site relative to fuel and chemical handling and storage, dust control, traffic, noise control and abatement, and comprehensive site safety of unauthorized persons; and
- VII. Such other information or other special investigative studies as the regulator may reasonably deem necessary.

Source. 1979, 481:2. 1989, 363:5. 1991, 310:10, 11. 1996, 141:2, eff. Jan. 1, 1997.

Section 155-E:4

155-E:4 Prohibited Projects. –

The regulator shall not grant a permit:

- I. Where the excavation would violate the operational standards of RSA 155-E:4-a;
- II. For excavation within 50 feet of the boundary of a disapproving abutter or within 10 feet of the boundary of an approving abutter unless approval is requested by said abutter;
- III. When the excavation is not permitted by zoning or other applicable ordinance, provided, however, that in municipalities which have commercial earth resources on unimproved land within their boundaries, and which do not provide for opportunities for excavation of some of these resources in at least some, but not necessarily all areas within the municipality, or in municipalities which have zoning ordinances which do not address the subject of excavations, excavation shall be deemed to be a use allowed by special exception as provided in RSA 674:33, IV, in any non-residential areas of the municipality, and the zoning board of adjustment shall grant such a special exception upon a finding that:
 - (a) The excavation will not cause a diminution in area property value or unreasonably change the character of the neighborhood;
 - (b) The excavation will not unreasonably accelerate the deterioration of highways or create safety hazards in the use thereof;
 - (c) The excavation will not create any nuisance or create health or safety hazards; and
 - (d) The excavation complies with such other special exception criteria as may be set out in applicable local ordinances.
- IV. When the issuance of the permit would be unduly hazardous or injurious to the public welfare;
- V. Where existing visual barriers in the areas specified in RSA 155-E:3, III would be removed, except to provide access to the excavation;
- VI. Where the excavation would substantially damage a known aquifer, so designated by the United States Geological Survey;
- VII. When the excavation requires land use permits from state or federal agencies; but the regulator may approve the application when all necessary land use permits have been obtained; or
- VIII. Where the project cannot comply with the reclamation provisions of RSA 155-E:5 and 155-E:5-a.

Source. 1979, 481:2. 1989, 138:5; 363:6-8. 1991, 310:12, 13, eff. Aug. 23, 1991.

Section 155-E:4-a

155-E:4-a Minimum and Express Operational Standards. –

It shall be a violation of this chapter for any person to excavate, or for any owner to permit excavation on his excavation site, when such excavation is subject to a permit under this chapter, without complying with the following minimum standards or when such excavation is not subject to a permit under this chapter pursuant to RSA 155-E:2 without complying with the following express standards:

I. No excavation shall be permitted below road level within 50 feet of the right of way of any public highway as defined in RSA 229:1 unless such excavation is for the purpose of said highway.

II. No excavation shall be permitted within 50 feet of the boundary of a disapproving abutter, within 150 feet of any dwelling which either existed or for which a building permit has been issued at the time the excavation is commenced.

II-a. No excavation shall be permitted within 75 feet of any great pond, navigable river, or any other standing body of water 10 acres or more in area or within 25 feet of any other stream, river or brook which normally flows throughout the year, or any naturally occurring standing body of water less than 10 acres, prime wetland as designated in accordance with RSA 482-A:15, I or any other wetland greater than 5 acres in area as defined by the department of environmental services.

III. Vegetation shall be maintained or provided within the peripheral areas required by paragraphs I and II.

IV. Drainage shall be maintained so as to prevent the accumulation of free-standing water for prolonged periods. Excavation practices which result in continued siltation of surface waters or any degradation of water quality of any public or private water supplies are prohibited.

V. No fuels, lubricants, or other toxic or polluting materials shall be stored on-site unless in compliance with state laws or rules pertaining to such materials.

VI. Where temporary slopes will exceed a grade of 1:1, a fence or other suitable barricade shall be erected to warn of danger or limit access to the site.

VII. Prior to the removal of topsoil or other overburden material from any land area that has not yet been excavated, the excavator shall file a reclamation bond or other security as prescribed by the regulator, sufficient to secure the reclamation of the land area to be excavated.

VIII. Nothing in this chapter shall be deemed to supersede or preempt applicable environmental standards or permit requirements contained in other state laws, and no exemption under this chapter shall be construed as an exemption from any other state statute.

Source. 1989, 363:9. 1991, 310:14-17. 1996, 296:36, eff. Aug. 9, 1996.

Section 155-E:5

155-E:5 Minimum and Express Reclamation Standards. –

Within 12 months after the expiration date in a permit issued under this chapter, or of the completion of any excavation, whichever occurs first, the owner of the excavated land shall have completed the reclamation of the areas affected by the excavation to meet each of the following minimum standards or when such excavation is not subject to a permit under this chapter pursuant to RSA 155-E:2, to meet each of the following express standards:

I. Except for exposed rock ledge, all areas which have been affected by the excavation or otherwise stripped of vegetation shall be spread with topsoil or strippings, if any, but in any case covered by soil capable of sustaining vegetation, and shall be planted with seedlings or grass suitable to prevent erosion. Areas visible from a public way, from which trees have been removed, shall be replanted with tree seedlings, set out in accordance with acceptable horticultural practices.

II. Earth and vegetative debris resulting from the excavation shall be removed or otherwise lawfully disposed of.

III. All slopes, except for exposed ledge, shall be graded to natural repose for the type of soil of which they are composed so as to control erosion or at a ratio of horizontal to vertical proposed by the owner and approved by the regulator.

Changes of slope shall not be abrupt, but shall blend with the surrounding terrain.

IV. The elimination of any standing bodies of water created in the excavation project as may constitute a hazard to health and safety.

V. The topography of the land shall be left so that water draining from the site leaves the property at the original, natural drainage points and in the natural proportions of flow. For excavation projects which require a permit from the department of environmental services pursuant to RSA 485-A:17, the provisions of that statute, and rules adopted under it, shall supersede this paragraph as to areas of excavation sites covered thereby. The excavator shall file a copy of permits issued under RSA 485-A:17 with the regulator.

Source. 1979, 481:2. 1989, 363:10. 1991, 310:18-20. 1996, 228:108, eff. July 1, 1996.

Section 155-E:7

155-E:7 Hearing. – Prior to the regulator approving an application for an excavation permit or an application for an amended excavation permit, a public

hearing shall be held within 30 days on such application. A notice of said hearing shall be sent to all abutters and shall specify the grounds for the hearing as well as the date, time and place and at least 10 days' notice of the time and place of such hearing shall be published in a paper of general circulation in the city, town or unincorporated place wherein the proposed excavation is to be located and a legal notice thereof shall also be posted in at least 3 public places in such city, town or unincorporated place; the 10 days shall not include the day of publications nor the day of the meeting, but shall include any Saturdays, Sundays and legal holidays within said period. Within 20 days of said hearing or any continuation thereof, the regulator shall render a decision approving or disapproving the application, giving reasons for disapproval.

Source. 1979, 481:2. 2002, 89:1, eff. July 2, 2002.

Section 155-E:9

155-E:9 Appeal. – If the regulator disapproves or approves an application for an excavation permit or an application for an amended permit, any interested person affected by such decision may appeal to the regulator for a rehearing on such decision or any matter determined thereby. The motion for rehearing shall fully specify every ground upon which it is alleged that the decision or order complained of is unlawful or unreasonable and said appeal shall be filed within 10 days of the date of the decision appealed from. The regulator shall either grant or deny the request for rehearing within 10 days, and if the request is granted a rehearing shall be scheduled within 30 days. Any person affected by the regulator's decision on a motion for rehearing to the regulator may appeal in conformity with the procedures specified in RSA 677:4-15.

Source. 1979, 481:2. 1985, 103:2, eff. Jan. 1, 1986.

Section 155-E:11

155-E:11 Regulations. –

- I. The regulator may adopt such regulations as may be reasonably necessary to carry out the provisions of this chapter, including adopting a permit fee schedule. Whenever such local regulations differ from the provisions of this chapter, the provision which imposes the greater restriction or higher standard shall be controlling, except that no local regulation shall supersede the sole applicability of express standards under RSA 155-E:2, I, III, and IV.
- II. Such regulations may include reasonable provisions for the protection of water resources, consistent with the municipality's local water resources management

and protection plan developed under RSA 674:2, III(d). If such regulations prohibit excavations below a stated height above the water table, the regulations shall also contain a procedure whereby an exception to such prohibition shall be granted if the applicant demonstrates that such excavation will not adversely affect water quality, provided, however, that written notice of such exception shall be recorded in the registry of deeds, and one copy filed with the department of environmental services.

III. The regulator may impose reasonable fees to cover the costs of notice under RSA 155-E:7, and to cover its administrative expenses, review of documents, and other matters which may be required by particular applications or proceedings before the regulator under this chapter.

Source. 1979, 481:2. 1989, 363:14. 1991, 310:23. 1996, 141:3; 228:108. 2002, 178:7, eff. July 14, 2002.

266:72 Spillage of Material. –

I. No vehicle shall be driven or moved on any way unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled on a way in cleaning or maintaining such way.

II. No person shall operate on any way any vehicle with any load unless said load and any covering thereon is securely fastened so as to prevent said covering or load from becoming loose, detached, or in any manner a hazard to other users of the way. Without limiting the foregoing provision, no person shall drive on any way any open vehicle loaded with earth, sand, asphalt, stone, gravel, or other particulate substance unless said vehicle is equipped with and said load is entirely covered and secured by a tarpaulin or similar covering which prevents the escape of any substance from said load onto the way.

II-a. No person shall operate on any way any open vehicle loaded with light scrap metal, unless the load is covered with and secured by a close-fitting tarpaulin which prevents the escape of any light scrap metal from the load onto the way. For the purposes of this paragraph "light scrap metal" means any fragments less than 8 inches wide and no more than 1/8 inch thick of manufactured metal articles or shredded metal parts rejected or discarded and useful only as material for reprocessing. The provisions of this paragraph shall not apply to truck operators transporting crushed vehicles to shredding facilities or to transporters of heavy scrap metals to or from metal scrap dealers or remelting facilities.

III. Any person who violates the provisions of this section shall be guilty of a

violation if a natural person, or guilty of a misdemeanor if any other person. Any person shall be liable to the state or town for any damage done to the way by spillage.

IV. The provisions of paragraphs I, II, II-a, and III of this section shall not apply to a local farmer transporting his or her own farm products or materials incidental to a local farming operation where such transporting requires incidental use of a way, provided that such farmer shall not thereby be relieved of his or her duty to exercise reasonable care to prevent hazardous spillage.

V. The provisions of paragraphs II and II-a shall not apply to:

(a) The operation of construction equipment as defined in RSA 259:42 and motor vehicles used in the construction of highways provided that such equipment or motor vehicle is used within a highway construction zone as prescribed by the commissioner of transportation, provided that the driver of any such vehicle shall not thereby be relieved of the duty to exercise reasonable care;

(b) The operation of municipal and state highway maintenance equipment;

(c) The driving of any vehicle on a way at speeds of less than 30 miles per hour.

Source. RSA 249:51. 1965, 178:1. 1973, 530:32; 573:1, 2. 1981, 146:1. 1994, 373:1-3. 1995, 232:1. 2004, 257:33. 2006, 317:7. 2010, 251:5, eff. Sept. 4, 2010.

Env-A 1002.03 Precautions to Prevent, Abate, and Control Fugitive Dust.

(a) Any person engaged in any activity within the state that emits fugitive dust, other than those listed in Env-A 1002.02(b), shall take precautions throughout the duration of the activity in order to prevent, abate, and control the emission of fugitive dust.

(b) Precautions required by (a), above, shall include but not be limited to the following:

(1) The use of water or hydrophilic material on operations or surfaces, or both;

(2) The construction of wind barriers, application of asphalt, water or hydrophilic material, or tarps or other such covers to material stockpiles;

(3) The use of hoods, fans, fabric filters, or other devices to enclose and vent areas where materials prone to producing fugitive dust are handled;

(4) The use of containment methods for sandblasting or similar operations, such as construction of wind barriers and phasing of work to reduce disturbed surface area; and

(5) The use of vacuums or other suction devices to collect airborne particulate matter.

Source. #1038, eff 10-15-78; and by #1717, eff 2-19-81; ss by #2332, eff 4-29-83; ss by #2938, eff 12-27-84; ss by #5033, eff 12-27-90; ss by #6283-B, eff 7-10-96; ss by #7850, eff 3-12-03; ss by #9863, INTERIM, eff 3-4-11, EXPIRES:8-31-11; ss by #9909, eff 5-1-11 (from Env-A ss by #12831, eff 8-1-19

Rule 7. Appeal from Trial Court Decision on the Merits.

(6)(A) The appealing party in a mandatory appeal shall attach or append to the notice of appeal the decision below, the clerk's written notice of the decision below, any order disposing of a timely-filed post-trial motion, and the clerk's written notice of any order disposing of a timely-filed post-trial motion.

Rule 16. Briefs.

(3) So far as possible, the brief of the moving party on the merits shall contain in the order here indicated:

(a) A table of contents, with page references, and a table of cases listed alphabetically, a table of statutes and other authorities, with references to the pages of the briefs where they are cited.

(b) The questions presented for review, expressed in terms and circumstances of the case but without unnecessary detail. While the statement of a question need not be worded exactly as it was in the appeal document, the question presented shall be the same as the

question previously set forth in the appeal document. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. The moving party may argue in the brief any question of law not listed in the moving party's appeal document, but only if the supreme court has granted a motion to add such question, and the moving party has presented a record that is sufficient for the supreme court to decide the questions presented. Motions to add a question may be filed only by a party who filed an appeal document (including a party who filed a cross-appeal), and shall be filed at least 20 days prior to the due date of the moving party's brief.

After each statement of a question presented, counsel shall make specific reference to the volume and page of the transcript where the issue was raised and where an objection was made, or to the pleading which raised the issue. Failure to comply with this requirement shall be cause for the court to disregard or strike the brief in whole or in part, and opposing counsel may so move within ten days of the filing of a brief not in compliance with this rule.

ARTICLE 18 BOARD OF ADJUSTMENT

The Board of Adjustment shall function in accordance with powers granted in New Hampshire Revised Statutes Annotated (NH RSA). The Board of Adjustment shall conform in membership and terms of office as provided under NH RSA 673:3 and 673:5. The Board of Selectmen is designated the Appointing Authority for the Board of Adjustment. As terms expire or vacancies occur, the Appointing Authority shall be responsible for filling vacancies so as to maintain full membership on the Board of Adjustment. Subject to NH RSA 674 and 676, the Board of Adjustment may:

- A. At a public hearing, hear, and subsequently decide upon appeals where it is alleged there is an error in any order, requirement, decision, or determination made by an administrative official (any town officer, department, board or commission) in the enforcement of NH RSA, or the Town of Sanbornton Zoning Ordinance.
- B. At a public hearing, hear, and subsequently decide upon appeals for special exceptions to the terms of the Zoning Ordinance upon which the Board is required to pass under the ordinance as follows:
 - (1) Permit an outdoor recreational facility in all districts subject to site plan approval by the Planning Board. [March 2000]
 - (2) Permit the establishment and operation of a motel in the Highway Commercial District subject to the following conditions:
 - (a) Minimum Land Area: No lot shall be less than 80,000 square feet.
 - (b) Set-Back: There shall be from the edge of the nearest right-of-way and the extreme front of any building a minimum distance of 150 feet.
 - (c) Side and Rear Set-Backs: No building shall be located within 25 feet of any side or rear property lines.
 - (d) Shielding: A solid fence at least 6 feet in height or a solid barrier of evergreens shall be provided at the side and rear property lines.
 - (e) Off-Street Parking: At least one parking space for each motel unit shall be provided.
 - (3) Permit the use of land for the excavation or removal of earth material for commercial use or sale within the Town or outside the Town, or the use of land for depositing garbage, rubbish, waste material or by-products but only after due public hearing, at which time a plan shall be submitted by the owner or operator of the property concerned. The plan shall contain a detailed description including a time schedule of the proposed activity, a description and map of the area affected in relation to the entire parcel, a statement of the environmental impact of the proposed project, and a plan for the reclamation of the affected area. No permit shall be granted until the plan is approved and it is found that:
 - (a) The activity will not impair the health or property of others or create a hazard to life or property generally.

ARTICLE 18 BOARD OF ADJUSTMENT (Continued)

- (b) That the operation will not have an adverse impact on the environment, including but not limited to pollution of streams and other surface waters, pollution of air, landslides or cave-ins, stagnant water, flooding, and damage to a known aquifer; and that the operation will not have an adverse effect on Town maintained roads. The Board of Adjustment must require adequate surety to repair Town roads where adverse effect on Town roads is in question. The Board must also require that operators improve Town roads when in the opinion of the Board of Adjustment the road is incapable of handling anticipated hauling. Additionally, the operation shall not adversely impact the normal flow of traffic or use of Town roads by residents. The Board may impose restrictions on Commercial vehicles hauling to and from the operation to insure this requirement is met.
- (c) The accepted plan shall be binding upon the owner/operator and his heirs or assigns. Upon completion of the reclamation by the owner/operator, he shall notify the Board of Selectmen. The selectmen shall be responsible for an on-site inspection of the reclaimed site and upon finding that the reclamation plan has been fulfilled, may release any portion or all of the surety.
- (d) The Town may draw upon sources of gravel and other road building materials for the purpose of public use within the town without the above hearing and permit; however, the provision for restoration shall apply.
- (e) The requirements of NH RSA 485-A:17 and NH RSA 155-E and as from time to time amended have been met.
- (f) The Selectmen, or their appointed agents, shall be responsible for the enforcement of the conditions of any special exception and shall have all the enforcement powers described in RSA 676:15, and RSA 676:17-a. In addition, any exception shall be subject to the fines and penalties set forth in RSA 676:17.

In instances where RSA 155-E:10 requires the "regulator" to enforce the terms of RSA 155-E, the Zoning Board of Adjustment, as regulator, shall be responsible for any enforcement action for violations of RSA 155-E. [March 1994]

- (4) Permit a non-conforming temporary use for an initial period of not more than two years. Permits may be renewed by the Board of Adjustment for successive periods of not more than one year.
- (5) [Rescinded March 2020 – Refer to Article 13, Floodplain Conservation District]
- (6) Permit special exceptions in the Wetlands Conservation District where the application has been referred to the Planning Board, the Conservation Commission, and to the Health Officer by the Board of Adjustment for review and comment at least forty-five days prior to the hearing:
 - (a) Streets, roads and other access ways and utility right-of-way easements, including power lines and pipe lines if essential to the productive use of land not so zoned and if so located and constructed as to minimize any detrimental impact of such uses upon the wetland.
 - (b) Water impoundments.

ARTICLE 18 BOARD OF ADJUSTMENT (Continued)

- (c) The undertaking of a use not otherwise permitted in the Wetlands Conservation District, if it can be shown that such proposed use is consistent with the Purpose and Intent of the Wetlands Conservation District and if such proposed use is otherwise permitted by the Zoning Ordinance.
- (7) Permit the expansion of a non-conforming use subject to the following conditions:
- (a) Preliminary site plan approval has been granted by the Sanbornton Planning Board if required under the Site Plan Ordinance.
 - (b) Both the current use and the proposed expanded use does not/will not offend by reason of emission of smoke, dust, gas, noise, odor, or fumes. The proposed expansion will not be unsightly and will not diminish or detract from the value of real estate in the area, nor be offensive to or incompatible with use of properties in the area, the general purpose of this ordinance and the official map, and will not increase traffic hazards.
 - (c) Following a public hearing, to authorize upon appeal in specific cases such variance from the terms of the Town of Sanbornton Zoning Ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and justice done.
 - (d) Act in other matters concerning the Town of Sanbornton Zoning Ordinance according to powers specifically granted in NH RSA, and as amended.
- (8) Permit by special exceptions in the Aquifer Conservation District:
- (a) Spraying or spreading of chemical fertilizers.
 - (b) Spraying or spreading of herbicides or pesticides.
 - (c) Storage of manure.
 - (d) Animal feedlots, however, the Board must find that the use will not pose a significant source of contamination to or reduction of the aquifer recharge capability. The findings shall be supported by qualified professional testimony and documentation. The Board of Adjustment may charge the owner(s) for all or part of the cost of the professional testimony and documentation.
- (9) Permit the conversion of a single-family dwelling to a two-family dwelling where it can be shown that such conversion will not have an adverse effect on property values, nor jeopardize the health, safety, or welfare of the occupants or the neighborhood. Written approval of the Fire Chief, Police Chief, and Health Officer must be presented by the applicant. (Owners of existing two-family dwellings shall have one year from passage of this ordinance to apply for a permit to continue such use.) [March 1995]

ARTICLE 18 BOARD OF ADJUSTMENT (Continued)

- (10) Permit an addition to an existing dwelling as a special exception to the Shorefront District within fifty (50) feet from the normal high water level or water's edge subject to the following conditions: [March 1988] [May 2010]
 - (a) The dwelling or seasonal dwelling existed during or prior to 1985.
 - (b) No point on the proposed addition is closer to the high water level than the closest point on the existing dwelling or seasonal dwelling.
 - (c) The portion of the proposed addition within the fifty (50) foot setback is not larger in area of ground coverage nor higher than the portion of the existing dwelling or seasonal dwelling that is within the fifty (50) foot setback. [March 1995] [May 2010]
 - (d) The provisions of this paragraph may be applied only once for each dwelling or seasonal dwelling.
 - (e) The proposed addition complies with all other provisions of the ordinance. [March 1988]
- (11) Permit the subdivision of contiguous lots consisting of one or more non-conforming residential lots subject to the following conditions:
 - (a) The pre-existing lots were in separate ownership and in conformity to the law at the time of the adoption of the requirements which made one or more of them non-conforming.
 - (b) Each of the pre-existing lots contained a habitable single family residence at the time of merger, and the residence on each lot has continued to be occupied at least a part of each year during the period when there was unity of ownership.
 - (c) There is adequate water supply for each pre-existing lot.
 - (d) Unless served by public sewer, there is adequate area for sub-surface disposal for each pre-existing lot.
 - (e) There is adequate means of access and egress to each pre-existing lot.
 - (f) The Zoning Board of Adjustment shall, where appropriate, require the applicant to adjust the common boundary line to bring both lots into greater conformity with the intent of the zoning ordinance and the town plan. In such case, the special exception will be subject to the approval of the adjustment in boundary line by the Planning Board. [March 1991]
- C. Following a public hearing, to authorize upon appeal in specific cases such variance from the terms of the Town of Sanbornton Zoning Ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and justice done.
- D. Act in other matters concerning the Town of Sanbornton Zoning Ordinance Regulations according to powers specifically granted in NH RSA, and as amended.

STATEMENT OF CASE

Appellants appeal the decision of the Belknap County Superior Court denying their appeal and affirming the Sanbornton Zoning Board of Adjustment's decision to grant the Intervenor, R.D. Edmunds Land Holdings, LLC, a special exception to permit the operation of a gravel pit on Intervenor's property.

STATEMENT OF FACTS

Intervenor owns approximately 19 acres (the "Property") located in the Town of Sanbornton's ("Town") General Agricultural Zoning District. Appellants' Appendix ("Apx") I at 14 (Plan Note #3). The Property is bounded on the east by Interstate 93 and on the west by Johnson Road, a Class V town road. Apx I at 14. The Appellants own a 12 acre parcel abutting Intervenor's property to the north. Apx I at 3.

The public hearing on the Intervenor's application extended over several days from August, 2020 through February, 2021. The application for the special exception was submitted initially on July 21, 2020. Apx I at 5. The application, in part, contained a set of plans for the excavation site, a hydrological report, and a Business Plan, Mitigation Standards & Local Requirements. Apx I at 6-44. The Business Plan, Mitigation Standards & Local Requirements and the excavation site plans were amended and resubmitted to the ZBA a month prior to the last day of the public hearing held on February 23, 2021. Apx I at 108-115, 117-121. The requirements and operational standards contained in the Business Plan, Mitigation Standards & Local Requirements, as well as the excavation site plans must

be adhered to by the operator of the gravel pit and are, therefore, terms of the permit granted by the Town. Apx I at 117.

The Property was vacant and unimproved, although it “has been mined numerous times over the years and so an existing hole is being used as the origin of excavation.” Apx I at 125. The access to the site has been slightly relocated to significantly improve site distance for vehicles using Johnson Road. Apx I at 118. Johnson Road going north from the excavation site will not be impacted by truck traffic. Apx I at 118. All truck traffic to and from the excavation site will approach from and exit to the south on Johnson Road. Id. The trucks will then go south on Interstate 93 to the company purchasing the gravel. Apx I at 46. No vehicles associated with the excavation site will be allowed to park on Johnson Road. Apx I at 119. On a normal day, the excavation operation will generate 64 additional vehicle round trips, including those vehicles driven by onsite employees. Apx I at 118.

The gravel operation will operate on a Monday through Friday schedule from 7:00 a.m. to 5:00 p.m., excluding holidays. Apx I at 117. Operational days and hours may be reduced during spring thaws. Apx I at 119. It is anticipated that the operation will be completed in four years barring any unforeseen delays. Apx I at 117. Only five acres of the site will be mined at a time. Apx I at 118. Mined areas will be reclaimed and final graded when new areas of excavation are opened. Id.

The Intervenor provided two studies on the impact of nearby excavation operations on housing values. The local New Hampshire study concluded that there was a minor drop in the value of homes located near two gravel pits and a substantial increase in house values near another

gravel operation. Apx I at 61-2 (Data for house sales was not included in the Appendix). In a national study of the impact of excavation operations on house values, it was found that there was no appreciable impact on home values. Apx I at 63-82.

The Intervenor will take precautions to minimize dust generated by the excavation operation. All site dust is generally not an issue except in operations covering 100 acres or more and where large piles of excavated materials are stored. Apx I at 125. There will be no stock piling of materials on the site. Id. There will be a “fully functional dust control water truck” on site at all times for mitigating dust. Apx I at 120. Crushed stone will be placed at the entrance to the excavation to clean dirt off truck tires as the vehicles exit. Apx I at 124. Trucks hauling gravel and other earth products are required to be covered to prevent “the escape of any substance from said load onto the way.” Appellant’s Brief at 65; RSA 266:72,II.

There will be no blasting, hammering or mining of ledge on the site. Apx I at 120. All vehicles with back-up alarm systems “shall be equipped with a ‘white noise’ alarm system. Apx I at 119. Trucks will be loaded from the floor of the excavation. Id. A berm will be constructed around the entire mining area. Id. There will be a 50-foot vegetated buffer around the entire property. Apx I at 120.

The excavation will not come closer than five feet to the groundwater table. Id. Three existing wells on the site will be maintained to monitor the groundwater table. Id. No trucks will be refueled at the site and there is a “Source Control Plan” for refueling onsite construction equipment. Id. All on-site equipment shall be checked daily for leaks and

immediately repaired or taken off site if a leak is discovered. Id. On the north side of the Property, there is a 100-foot setback for the watershed area around a pond located on the abutting property. Apx I at 124. The Intervenor has received an Alteration of Terrain Permit from the New Hampshire Department of Environmental Services which also provides oversight of excavation and groundwater. Apx I at 123.

The ZBA also commissioned an independent review on the hydrogeological report submitted by the Intervenor. The independent expert submitted a report and testified at the public hearing on December 20, 2020, that she agreed with the Intervenor's expert that there is only a low yield aquifer in the area of the Property. Apx I at 107.

At the conclusion of the public hearing on February 23, 2020, the ZBA voted (4-1) to approve the special exception based upon the plans provided by the Intervenor with the added conditions that (1) the road surety bond be increased to \$35,000.00; (2) all stumps will be ground on site; and (3) a water truck to mitigate dust will be on the site at all times. Apx I at 126.

Appellants filed a timely motion for rehearing. Apx I at 134-39. Appellants, in their motion for rehearing, requested: (1) that the ZBA reopen the hearing and refer the determination of whether the Property is within the Aquifer Conservation District to the Planning Board; (2) that the Planning Board consider the recommendations contained in a report not previously provided to the ZBA recommending a year of monitoring the onsite wells; (3) that the Intervenor provide a noise study on the impact of truck traffic; and (4) that the ZBA consider imposing requirements to

minimize fugitive dust from truck traffic on Johnson Road. Id. The ZBA denied the motion for rehearing by a vote to 4 to 1. Apx I at 141.

Appellants appealed the ZBA's decision to the Belknap County Superior Court. Appellants' appeal alleged (1) that the ZBA granted a special exception for a use not permitted in the District (Count I); (2) that the ZBA had "no authority to alter the aquifer delineation on the aquifer map (Count II); and, (3) the record "does not support the special exception criteria of RSA 155:4,III or Article 18(b)(3) of the Ordinance (Count III)." Appellants' Brief at 53. The Trial Court noted that Count I, alleging that the ZBA authorized and unpermitted use in the zoning district, had been dismissed in response to the Town's Partial Motion To Dismiss. Id. Of the remaining counts, the Trial Court determined that the ZBA had authority to grant a special exception within the Aquifer Conservation District regardless of whether there was an underlying high, medium or low yield aquifer. Appellants' Brief at 61. The Court also determined that the ZBA acted lawfully when evaluating the evidence submitted to satisfy the requirements of Zoning Ordinance Article 18(b)(3). Appellants' Brief at 63. The Appellants did not file motions to reconsider the Trial Court's decisions dismissing Count I of the appeal and denying of Appellants' appeal of the ZBA decision granting the special exception.

SUMMARY OF ARGUMENT

Appellants allege that the ZBA did not issue a RSA Chapter 155-E permit and is now illegally operating a gravel excavation. Appellant's Brief at 41-2. However, this issue is waived due to Appellant's failure to raise this issue: (1) in the motion for rehearing before the ZBA; (2) in their appeal to the Trial Court; (3) in their Notice of Mandatory Appeal; or, (4) in the "Questions Presented" in their brief. Failure to preserve an issue at any point in the appeal process waives the issue. *See* RSA 155-E:9 (Rehearing); *see Sperl v. Sperl*, 119 N.H. 818, 821 (1979) (Trial Court); *see Progressive N. Ins. Co. v. Argonaut Ins. Co.*, 161 N.H. 778, 784 (1979) (Notice of Mandatory Appeal). A moving party may only argue an issue not raised in the appeal document if the court grants a motion to do so. Supreme Court Rule 16, 3(b). No such motion was filed by Appellants. The Court should strike Appellant's argument that the ZBA did not issue Intervenor a permit compliant with RSA Chapter 155-E.

Even had Appellants preserved this issue, their argument fails on the merits. The Town's procedure and requirements for obtaining a permit for an excavation are consistent with the requirements of RSA Chapter 155-E. The municipal regulator is the ZBA as provided for in RSA 155-E:1. Appellants do not allege that they failed to receive notice or that the Intervenor's application was incomplete. *See* RSA 155-E:3, 7. Nor did Appellants allege that the Intervenor's application was granted without a public hearing. *See* RSA 155-E:7. Contrary to Appellant's allegations, the Town's excavation permit process does require the regulator ensure that the proposed excavation is compliant with RSA Chapter 155-E. *See* Zoning Ordinance Article 18 B(3)(e). RSA Chapter 155-E does not require nor

contemplate two parallel processes by the same local body designed to address the same concerns regarding the public's health, safety and welfare, as well as their property. *See Arthur Whitcomb v. Town of Carroll*, 141 N.H. 402, 408 (1996).

Appellant's argument that there are no precautions in Intervenor's plan to address fugitive dust is unfounded. The plan approved by the ZBA provides a number of precautions against fugitive dust sufficient to protect the health and safety of the community. There is no blasting, hammering or crushing of ledge on site. Apx I at 120. There will be no stockpiling of any excavated material on site. Apx I at 125. There will be berm around the mining site and trucks will only be loaded on the excavation floor. Apx I at 119. In addition, crushed gravel at the excavation exit will remove dirt from truck tires and trucks hauling excavated materials will be covered to prevent material from escaping. Apx I at 124; *see* RSA 266:72.

Likewise, Appellant's allegation that no measures were required to ensure reasonable noise levels from the operation is unsupported by the record. Operations are limited from Monday to Friday from 7:00 A.M. to 7:00 P.M. Apx I at 117. The excavation will not operate the weekends, holidays or after normal business hours. There will be no blasting, hammering or crushing of ledge at the site. Apx I at 120. There is a berm around the site to dampen the noise. Apx I at 119. Trucks will be loaded only on the excavation floor. Apx I at 120. Vehicles will be equipped with "white noise" backing alarm systems. Apx I at 119. The operation will generate a minimum amount of traffic on Johnson Road with 64 trips (including coming and going) on a normal day. Apx I at 118. The ZBA's

determination that noise from the operation would not harm the public was reasonable and lawful.

Applicants allege that an excavation is not a permitted use in the Aquifer Conservation District or General Agricultural Zoning District. However, this argument was not preserved in Appellant's motion for rehearing before the ZBA and was, upon motion of the Town, dismissed by the Trial Court. Add. at 32. Nor did Appellants raise this argument in their Notice of Mandatory Appeal or attach a copy of the Court's Order to its Notice of Mandatory Appeal. Appellants have waived this issue. See *Progressive N. Ins. Co.*, 161 N.H. at 784; Supreme Court Rule 7 (C)(6)(A).

The trial court correctly found that the Town's Zoning Ordinance authorizes the ZBA to approve an excavation in any zoning district if all criteria for the special exception are met. Appellant's Brief at 61. The ordinance contains no language excluding excavations in the Aquifer Conservation District. *Id.* The ZBA's responsibility is to ensure that the operation will not damage any "known aquifer" and the ordinance does not reference the Aquifer Conservation District or the Town's aquifer map. See Article 18 B(3), Apx I at 230-31. The Intervenor satisfied the requirements of the Town's RSA Chapter 155-E permitting process and the ZBA was required to issue a permit for an excavation to the Intervenor.

ARGUMENT

STANDARD OF REVIEW

RSA Chapter 155-E provides that a party may appeal a regulator's decision "in conformity with the procedure specified in RSA 677:4-15." RSA 155-E:9. "The party seeking to set aside the ZBA's decision bears the

burden of proof on appeal to the trial court. *See Harrington v. Town of Warner*, 152 N.H. 74, 77 (2005). “The factual findings of the ZBA are deemed *prima facie* lawful and reasonable, and will not be set aside by the trial court absent errors of law, unless the court is persuaded based upon a balance of probabilities, on the evidence before it, that the ZBA’s decision is unreasonable.” *Id.*; see RSA 677:6. The purpose of the trial court’s review of a ZBA decision is to determine whether the ZBA’s decision was reasonably based on the evidence contained in the record. *See Dietz v. Town of Tuftonboro*, 171 N.H. 614, 617 (2019). This Court will uphold the Trial Court’s decision on appeal “unless it is not supported by the evidence or is legally erroneous.” *Duffy v. City of Dover*, 149 N.H. 178,180 (2003). The Supreme Court does not act as a “super zoning board.” *Harrington v. Town of Warner*, 152 N.H. at 82. The review of the Trial Court’s statutory interpretation is *de novo*. *See Olson v. Town of Grafton*, 168 N.H. 563, 566 (2016).

I. **THE TRIAL COURT DID NOT ERR WHEN IT UPHELD THE ZBA’S FINDING THAT THE INTERVENOR’S PLAN SATISFIED THE REQUIREMENTS OF ARTICLE 18B(3) OF THE ZONING ORDINANCE.**

A. **APPELLANTS FAILED TO PRESERVE THEIR ARGUMENT THAT THE ZBA DID NOT ISSUE INTERVENOR A RSA CHAPTER 155-E PERMIT.**

For the first time in their brief to this Court, the Appellants raise the issue that the ZBA granted the Intervenor a special exception, not a permit for operating an excavation operation pursuant to RSA Chapter 155-E. Appellant Brief at 41. According to the Appellants, this means that the

Intervenor “is currently operating its gravel pit illegally and the Trial Court Order must be reversed.” Appellant Brief at 42. The Appellants, however, never raised this issue in their motion for rehearing before the ZBA. They did not raise this issue in their appeal to the trial court. Appellants failed to include this issue in their Notice of Mandatory Appeal. Apx. 1 at 134-35. In fact, this issue is not even included in “Questions Presented” in Appellant’s Brief. The issue is first raised on page 41 of Appellant’s Brief.

A party appealing a decision of the regulator must file a motion for rehearing and “specify every ground upon which it is alleged that the decision or order complained of is unlawful or unreasonable. RSA 155-E:9; see also RSA 677:4. This Court has articulated that “if a party fails to set forth in its motion for rehearing alleged errors with respect to the ZBA’s decision, the party is barred from raising those grounds in appeal to the Superior Court unless the court, for good cause shown, orders otherwise.” *Atwater v. Town of Plainfield*, 116 N.H. 503, 511-12 (2010). This Court has declared that if an appellant fails to raise an argument before the trial court, that argument is waived. *See Sperl v. Sperl*, 119 N.H. 818, 821 (1979) (“it is elementary that issues not raised at trial cannot be raised on appeal to the [New Hampshire Supreme Court]”). The Appellants failed to raise this issue in their motion for rehearing and before the trial court, therefore, the issue has been waived.

Appellants also failed to include this issue in their Notice of Mandatory Appeal and it is thus waived. *See Progressive N.Ins. Co. v. Argonaut Ins. Co.*, 161 N.H. 778, 784 (2011) (“appellant questions not presented in a Notice of Appeal are generally considered waived by this

court.”) While Supreme Court Rule 16 provides that the “statement of a question presented will be deemed to include every subsidiary question fairly comprised therein,” this provision does not save Appellant’s argument for appeal. This issue is unrelated to any of the questions raised in Appellant’s Notice of Appeal or even in the questions presented for review in their brief.

Supreme Court Rule 16(3)(b) provides that “[t]he moving party may argue in the brief any question of law not listed in the moving party’s appeal document, but only if the Supreme Court has granted a motion to add such question...” The Appellant did not move this Court to add this question. Further, with respect to the questions presented in the brief, “[a]fter each statement of a question presented, counsel shall make specific reference to the volume and page of the transcript where the issue was raised and where an objection was made, or to the pleading which raised the issue. Failure to comply with this requirement shall be cause for the court to disregard or strike the brief in whole or in part ...” *Id.* The Appellants have not complied with this rule and the Court should strike their arguments accordingly.

Had Appellants preserved this issue, they would have failed on the merits of their argument. RSA 155-E:2 requires landowners to obtain permits for non-exempt excavations. The permitting process is overseen by the “regulator” of a municipality. RSA 155-E:3. The ZBA is the designated regulator pursuant to the Town’s Zoning Ordinance. RSA 155-E:1, III; Article 18 B(3). RSA 155-E provides an application process for municipalities which do not permit excavations or do not address

excavations in their zoning ordinances. RSA 155-E:4, III. Regulators are authorized to “adopt such regulations as may be reasonably necessary to carry out the provision of this Chapter ...” RSA 155-E:11, I. Regulators may also “impose reasonable fees to cover ... other matters which may be required by particular applications or proceedings before the regulator.” RSA 155-E:11, III.

This Court has determined that RSA Chapter 155-E “constitutes a comprehensive, detailed scheme regulating excavations ...” *Arthur Whitcomb, Inc. v. Town of Carroll*, 141 N.H. 402, 406 (1996). RSA Chapter 155-E preempts local land use ordinances and regulations regarding excavations. *Id.* at 408. However, RSA Chapter 155-E preempts only those local ordinances and regulations which conflict or frustrate the purposes of this statutory scheme. *Town of Carroll v. Rymes*, 164 N.H. 523, 530 (2013). “A conflict exists when a municipal ordinance or regulation permits that which a State statute prohibits or vice versa.” *Forster v. Town of Henniker*, 167 N.H. 745, 756 (2015).

The Town’s special exception application process is exactly the type of local regulations necessary to carry out the provisions of RSA Chapter 155-E. This is the same permitting process required for those municipalities without provisions in their zoning ordinances for allowing excavations. *See* RSA 155-E:4, III. The Town permits excavations which are compliant with the requirements of RSA Chapter 155-E. Appellant’s argument that there are two parallel processes for permitting excavations, one under RSA 155-E and one pursuant to local zoning ordinances, is inconsistent with the plain language of the statutes and ordinance and

would result in unnecessary and duplicative procedures which would burden both appellants and municipalities. *See Arthur Whitcomb, Inc. v. Town of Carroll*, 141 N.H. at 408.¹

B. INTERVENOR’S PLAN FOR THE EXCAVATION OPERATION CONTAINS SUFFICIENT PRECAUTIONS AGAINST FUGITIVE DUST.

Appellants misrepresent the record before the trial court in regard to their allegations that the Intervenor failed to propose, and the ZBA failed to require, sufficient measures to address and minimize fugitive dust from the excavation operation. NH Admin. R. Env-A 1002.03 requires persons engaged in activities that emit fugitive dust to take “precautions ... to prevent, abate, and control the emission of fugitive dust.” Env-A 1002.03 (A). This administrative rule provides a non-exhaustive list of possible precautions. Precautions listed in that administrative rule and applicable to Intervenor’s operation include the use of water on operations and surfaces and construction of wind barriers. Env-A 1002.03(b)(1),(2).

The ZBA did required and the Intervenor’s plan does provide a number of precautions to prevent the generation of fugitive dust at the site. There will be no stockpiling of materials at the site. Apx I at 125. A fully functional dust control water truck will be on site at all times. Apx I at 120. There will be no blasting, hammering or mining of ledge on site which could result in fugitive dust. *Id.* There will be a berm around the entire site

¹ The appellants fail to identify any material procedural or substantive differences between the public hearing held by the Town pursuant to Article 18B(3) and the public hearing they envision for a permit compliant with RSA Chapter 155-E.

thus reducing the risk of dust escaping the site. Apx I at 119. The loading of trucks will occur on the floor of the excavation further reducing the chance that dust will escape from the site. *Id.*

The ZBA special exception permit also requires the Intervenor to reduce and contain off-site fugitive dust which may result from the transporting of material from the excavation site. The Intervenor has placed crushed stone at the excavation site entrance to clean dirt off truck tires as the vehicles exit the site. Apx I at 124. All trucks leaving the site with excavated materials will be covered as required by RSA 266:72, II. Appellant's Brief at 65. In addition, Johnson Road is a paved, not dirt, road and truck traffic will not generate dust while driving on Johnson Road. Apx I at 48.

The precautions provided in Intervenor's plan, which are a condition of the ZBA's approval, are consistent with the precautions required by Env-A 1002.03 to limit and contain fugitive dust. These precautions also satisfy the requirements of Article 18 B(3)(a) to ensure that the excavation operation "will not impair the health or property of others or create a hazard to life or property generally." The New Hampshire Department of Environmental Services which issues Alteration of Terrain Permits, and who Appellants state also requires precautions against fugitive dust, issued a letter prior to the approval of the special exception stating, in part, that its "[r]eview of the plan indicates that the project is in general compliance with the permit ...". Apx 1 at 123.

Contrary to Appellant's representations that Intervenor provided and the ZBA approved, insufficient precautions against fugitive dust, it is clear from a review of the record that the ZBA took its responsibilities seriously and required a number of measures against fugitive dust both on and off the excavation site to protect the public. The trial court's determination that the plan approved by the ZBA adequately addressed the issue of fugitive dust was lawful, reasonable and based on ample evidence in the record.

C. **THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT THE INTERVENOR'S MEASURES TO REDUCE NOISE FROM THE EXCAVATION OPERATION SATISFIED THE REQUIREMENTS OF ARTICLE 18 B(3).**

The ZBA, during its review of the Intervenor's plans for the excavation operation, considered the impact of noise generated by the overall operation of the gravel excavation. Intervenor's plan, and the conditions of the ZBA's approval, require a number of measures to reduce and limit noise to protect the public. The limitations on the days and hours of operation ensure that no noise will be generated by the excavation operation during weekends, holidays or after normal business hours. Apx I at 117.

As noted earlier, there will be no blasting, hammering, or crushing of ledge at the site. Apx I at 120. Trucks will be loaded on the floor of the excavation limiting noise escaping from the site. *Id.* The berm surrounding the site will reduce the level of noise to which the public is exposed. Apx I at 119. There is a 50-foot buffer around the entire Property. Apx I at 120.

Vehicles will be equipped with white noise alarm systems to reduce noise from the site. Apx I at 119.

The operation will not add a significant amount of traffic or noise to Johnson Road. The additional traffic generated by the operation will total only 64 trips per day (including all vehicles accessing and leaving the site) and, due to the restrictions on days and hours of operation, trucks will operate only on business days during business hours. Apx I at 117-18. Historically, Johnson Road has had truck traffic from this site during prior excavation activities. Apx I at 125.

The ZBA carefully considered the possible impact of noise from the excavation operation on the surrounding area. The ZBA's approval requires the Intervenor to take a number of precautions to reduce the impact of noise. The record reflects that the precautions are appropriate and will be effective in reducing noise generated by the operation. The trial court's determination that the plan approved by the ZBA protects the health, safety and welfare of nearby residents, and their properties, was lawful, reasonable, and supported by the record.

II. THE TRIAL COURT DID NOT ERR WHEN IT DETERMINED THAT THE ZBA HAD THE AUTHORITY TO GRANT INTERVENOR A SPECIAL EXCEPTION.

The Appellants spent considerable time in their brief arguing that the gravel pit is not a use permitted by special exception in the General Agricultural Zoning District or the Aquifer Zoning District. *See* Appellant's Brief at 5 (Questions Presented #3), at 48. This Court should

ignore this argument because it was dismissed by the Trial Court and the Appellants failed to properly preserve the issue for review.

The Appellants did not raise this issue in their motion for rehearing to the ZBA, but included it as Count I in their appeal to the Belknap County Superior Court. Apx. I at 134-35; Appellant's Brief at 53. The Town filed a Partial Motion to Dismiss Count I which the trial court granted prior to the hearing on the merits. Add. at 42-47. The trial court properly found that the Appellants failed to raise this issue in their motion for rehearing before the ZBA and, therefore, the issue could not be heard on appeal. Add. at 46-47.

The Appellants did not file a motion for reconsideration with the trial court. The Appellants did not raise as an issue in their Notice of Appeal whether the trial court erred in dismissing this count. Now in their brief, Appellants argue the underlying merits of the issue, without advising this Court that the trial court previously dismissed the count.

“Appellants questions not presented in a notice of appeal are generally considered waived by this court.” *See Progressive N. Ins. Co.*, 161 N.H. at 784. Appellants also failed to comply with Supreme Court Rule 7 (C (6)(A) which requires that an “appealing party in a mandatory appeal shall attach or append to the notice of appeal the decision below ...”. Accordingly, this argument has been waived and the Court should strike Appellant's argument that excavations are not a permitted use.

The Town agrees with the trial court's conclusion that, while the planning board can modify the Aquifer Conservation District (“ACD”), the ZBA may also determine if a property falls within the ACD when reviewing an application such as Intervenor. Appellant Apx I at 61-2.

However, as the trial court's decision makes clear, the issue of what local body may modify the ACD is an ancillary issue, not a dispositive issue, in this matter. *Id.*

The trial court found that Article 18 B(3) confers upon the ZBA the authority to grant a special exception for an excavation even if the location is within the ACD. Apx I at 61. The Town's Zoning Ordinance does not identify what uses may be permitted in a specific zoning district by special exception in the articles identifying each specific zoning district. Apx I at 201-28. Instead, Article 18 B lists the special exceptions the ZBA may approve. Some of the special exceptions are applicable to all zoning districts: Article 18 B(1) – Outdoor Recreational Facilities, (3) – Excavations, (4) – Non-conforming Temporary Uses, (7) – Expansion of Non-conforming Uses, (9) – Expansion of Single Family Dwelling to Two Family, (11) Subdivision of Contiguous Non-conforming Lots. Apx I at 23-33. The remaining special exemptions are limited to specific zoning districts: Article 18 B(2) – Hotel and Highway Commercial District, (6) - Special Exceptions in Wetland Conservation District, (8) – Special Exceptions in Aquifer Conservation District, (10) – House Addition Within Shore Front District Setback. *Id.*

The special exception for excavation contains no language limiting the zoning districts in which excavations may be located. The ZBA must issue a permit for a special exception, in any zoning district, if the applicant meets all the requirements for that specific use. RSA 674:33, IV(a); *see McKibbin v. City of Lebanon*, 149 N.H. 59, 61 (2003). To satisfy the requirements of a special exception for an excavation, the ZBA must approve the required plan and find that the excavation “will not impair the

health or property of others or create a hazard to life or property generally.” Article 18 B(3)(a), Apx I at 230. The ZBA must also be satisfied that the operation “will not have an adverse impact on the environment,” negatively impact town roads, or disrupt traffic flow or use of town roads by residents. Article 18 B(3)(b), Apx I at 231. The ZBA must also ensure that the requirements of N.H. RSA 485-A:17 and N.H. RSA 155-E have been met. Article 18 B(3)(e), *Id.* The Intervenor satisfied all requirements of Article 18 B(3) and the ZBA was required to issue a permit to the Intervenor.

Appellant’s position that the excavations are not permitted in the ACD is further undercut by the ordinance’s specific requirement that the excavation cannot damage a “known aquifer.” Article 18 B(3)(b), Apx I at 231. As was discussed and documented during the public hearing, there are three levels of aquifers – low, medium and high-yield aquifers. Apx I at 100-03, 106. Article 18 B(3) does not differentiate between the three levels of aquifers, nor reference the Town’s aquifer map. The ordinance requires the ZBA to ensure that the plan contains precautions to protect any known aquifer. Applicant’s argument that an excavation may not be located in the ACD is defeated by the plain language of the ordinance. *See Fox v. Town of Greenland*, 151 N.H. 600, 605 (2004) (“When the language of an ordinance is plain and unambiguous, we need not look beyond the ordinance itself for further indications of legislative intent.”) The trial court’s determination that the Town’s Zoning Ordinance authorizes the ZBA to permit excavations in any zoning district, subject to satisfying all requirements, was lawful, reasonable and supported by the record.

CONCLUSION

The trial court's determination that the record provides a basis for the ZBA's decision to grant the Intervenor a special exception for an excavation was lawful and reasonable. The Town of Sanbornton requests that this Honorable Court affirm the trial court's decision.

REQUEST FOR ORAL ARGUMENT

The Town of Sanbornton requests oral argument, of at least fifteen minutes, to be argued by Attorney Stephen M. Bennett.

CERTIFICATION PURSUANT TO RULE 26(7)

I hereby certify that this brief complies with Rule 26(7) and contains 5,507 words, excluding the cover page, table of contents, table of authorities, statutes, rules and addendum.

Respectfully submitted,

TOWN OF SANBORNTON

By its attorneys,

WADLEIGH, STARR & PETERS

By /s/ Stephen M. Bennett
Stephen M. Bennett, Esq.
95 Market Street
Manchester, NH 03101
Tel. (603) 206-7239
sbennett@wadleighlaw.com

September 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2022, copies of the foregoing will be forwarded to all parties of record via the Supreme Court's electronic filing system.

/S/ Stephen M. Bennett
Stephen M. Bennett, Esq.

Juliana Lonergan
and
David Lonergan

v.

Town of Sanbornton

ADDENDUM TABLE OF CONTENTS

10/19/21	Order on Motion to Dismiss	Add 41-47
----------	----------------------------	-----------

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS.

SUPERIOR COURT

Juliana Lonergan and David Lonergan

v.

Town of Sanbornton

Docket No. 211-2021-CV-00102

ORDER ON MOTION TO DISMISS

The plaintiffs, Juliana and David Lonergan, filed this action on May 19, 2021 against the Town of Sanbornton (the "Town") alleging that the Sanbornton Zoning Board of Adjustment ("ZBA") violated the Sanbornton Zoning Ordinance by approving a special exception for Tax Map 15, Lot 58, owned by R.D. Edmunds Land Holdings, LLC ("Edmunds"). The defendant moves to dismiss Count I of the complaint because the plaintiffs never filed a motion for rehearing on this issue as required by RSA 677:3. The plaintiffs object. The court held a hearing on September 13, 2021. For the following reasons, the court GRANTS the motion to dismiss.

Facts

The following facts are drawn from the Complaint and are assumed true for the purposes of this Order. See Lamb v. Shaker Reg. Sch. Dist., 168 N.H. 47, 49 (2015).

The plaintiffs own two parcels of land which abut the Edmunds land. (Compl. ¶¶ 6–7.) The land is located in the General Agricultural District in the Town. (Id. ¶ 8.) Edmunds applied to the ZBA for special exception to operate an excavation on its land. (Id. ¶ 20.) After public hearing closed on Edmunds' 2020 application, the ZBA moved to grant it. (Id. ¶ 33.) The

plaintiffs timely filed a motion for rehearing to the ZBA (id. ¶ 35), which the ZBA denied. (Id. ¶ 37.) This appeal followed, Count I of which alleges that the ZBA acted illegally and unreasonably when it granted special exception for a use not permitted in the district. (Id. ¶¶ 39–46.)

Analysis

The defendant moves to dismiss Count I as in violation of the appeal procedure in RSA 677:3. (See generally Mot. Dismiss.) Specifically, the defendant contends that plaintiffs' motion for rehearing did not request that the ZBA reconsider whether it was permitted to approve, by special exception, a use that is not listed as a permitted use in the General Agricultural District. (Id. ¶ 4.) The defendant contends that the court cannot subsequently hear the appeal, absent a showing of good cause. (Id. ¶ 6.) The plaintiffs respond in two ways. First, they argue that good cause exists for the court to hear the appeal. (Id. ¶ 18.) Second, the plaintiffs request leave to amend their complaint to add a declaratory judgment petition. (Obj. ¶ 10.) The court will address both in turn.

I. Good Cause

The plaintiffs argue that good cause exists for the court to hear the appeal because:

(a) zoning protects the health, safety and welfare of all residents by organizing and segregating land uses; (b) the public at large is entitled to rely upon the notice provided by local zoning of the specific uses permitted at or near their property; and (c) without this Court's review of the language in the Ordinance, a prohibited use may be allowed to operate in the General Agricultural District without legislative body approval.

(Id. ¶ 18.) The defendants argue no good cause exists and allege that the plaintiffs were aware of the facts giving rise to this issue and elected not to include it in their motion for rehearing. (Mot. Dismiss ¶ 8.)

Any person affected by ZBA decisions may apply for rehearing within 30 days of the proceeding. RSA 677:2. In moving for rehearing, a party must lay out “every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” RSA 677:3. Further, no appeal shall be taken unless the appellant followed the procedures for rehearing. Id. Upon appeal, the court shall not give any consideration to a ground not raised in the rehearing application without good cause. Id.

Upon review, the court finds that the plaintiffs have not sufficiently demonstrated good cause for the court to consider the content of Count I. While the plaintiffs make reference to several points of public policy in their response, none of these points abate the requirement that this issue be addressed during ZBA rehearing. The plaintiffs have also cited no law, nor does this court know of any, identifying public policy as good cause to hear arguments not raised in rehearing applications. Therefore, the plaintiffs have not met their burden of demonstrating good cause exists for the court to hear this appeal.

II. Declaratory Judgment Amendment

Next, the plaintiffs request leave to add a declaratory judgment petition because Count I presents an issue of law best resolved by judicial review as opposed to administrative treatment. (Obj. ¶ 8.) The defendant argues no vagueness or ambiguity exists in the Zoning Ordinance, and further reiterates that the plaintiffs cannot now raise an issue on appeal that they did not raise for rehearing. (Resp. ¶¶ 5–6.)

A petitioner may bring a declaratory judgement action to challenge a municipal board decision rather than to exhaust administrative remedies when the action raises a question that is “peculiarly suited to judicial rather than administrative treatment and no other adequate remedy is available.” Olson v. Town of Litchfield, 112 N.H. 261, 262 (1972). These are issues as to

which “specialized administrative understanding plays little role.” McNamara v. Hersh, 157 N.H. 72, 74 (2008) (citation omitted.)

More specifically, judicial treatment is suitable when the constitutionality or validity of an ordinance is in question or when the agency at issue lacks the authority to act. McNamara, 157 N.H. at 74; Blue Jay Realty Tr. v. City of Franklin, 132 N.H. 502, 509 (1989) (holding administrative exhaustion was not required when the plaintiff directly attacked the validity of zoning amendments). An agency lacks the authority to act when it lacks the power to grant the requested relief. Dembiec v. Town of Holderness, 167 N.H. 130, 134 (2014) (holding further administrative remedies would have been futile, as zoning boards lack general equitable jurisdiction necessary to resolve municipal estoppel claim). The court in Dembiec outlined the extent of the zoning board's authority in this respect:

Pursuant to RSA 674:33, a zoning board has the power to: (1) [h]ear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance, and reverse or affirm, wholly or in part, or ... modify the order, requirement, decision, or determination appealed from and ... make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken; (2) grant variances under certain statutorily-described conditions; and (3) if authorized by the zoning ordinance, make special exceptions to the terms of the ordinance under certain statutorily-prescribed conditions.

Id. (quotations omitted).

In contrast, when the issue involves substantial questions of fact, the petitioner must exhaust administrative remedies. Bosonetto v. Town of Richmond, 163 N.H. 736, 744 (2012) (holding that resolution of the issue mainly involved questions with respect to the characteristics of the property, it is not suited for judicial treatment.). For example, “the question of whether a building permit complies with the ordinance is not a question that is particularly suited to judicial

treatment or resolution, but is one that is routinely addressed by the local zoning board.” Sutton v. Town of Gilford, 160 N.H. 43, 52 (2010).

Upon review, the court finds that a declaratory judgement action on this matter would not be fruitful, because Count I does not present a question of law peculiarly suited to judicial rather than administrative treatment. Count I alleges that the ZBA permitted, by special exception, a use that is not listed as a permitted use in the General Agricultural District. (Compl. ¶¶ 44–45.) Specifically, the plaintiffs state the “ZBA has no authority to grant a special exception to allow a use not listed as permitted in the General Agricultural District for which a variance would be required.” (Id.) The plaintiffs aver that while “Article 18(B)(3) of the Ordinance authorizes the ZBA to grant a special exception for an Excavation, this specific use must be listed as permitted subject to meeting the special exception test.” (Id.) This count does not question the validity or constitutionality of any ordinance or statute. Rather, the plaintiffs request the court review how the ZBA applied the law. The ability to reverse or affirm this decision is firmly within the authority of the ZBA; the ZBA has the authority to act to remedy the situation, if appropriate. RSA 674:33. This question is not one that is particularly suited for judicial treatment, but rather one the ZBA would routinely address. Sutton, 160 N.H. at 52. Therefore, even if the plaintiffs were to amend to add a count for declaratory judgement, it would fail to cure the deficiencies in the complaint because administrative exhaustion is required for this court to hear an appeal of the content of Count I.

Conclusion

For the foregoing reasons, the defendant's partial motion to dismiss is GRANTED. The second basis for appeal, that the ZBA had no authority to alter the aquifer delineation shown on

the aquifer map, and the third basis for appeal, that the record evidence did not meet the criteria for granting a special exception, remain.

So Ordered.

October 19, 2021



Amy L. Ignatius
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/19/2021