

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2022-0142

Juliana Lonergan & David Lonergan

v.

Town of Sanbornton

TOWN OF SANBORNTON'S MEMORANDUM OF LAW

This Honorable Court has requested that the Town of Sanbornton (hereinafter the “Town”) address (1) the interplay between RSA 155-E:9 as it applies to excavation permits and RSA 674:4 as it applies to a ZBA’s authority to hear appeals pertaining to special exceptions, and (2) how the statutory regimes apply to the facts of this case and the questions of subject matter jurisdiction.

I. STATUTORY OVERVIEW OF RSA CHAPTER 155-E

RSA Chapter 155-E “constitutes a comprehensive, detailed scheme regulating excavations.” *Town of Carroll v Rines*, 164 N.H. 523, 529 (2013); *see also Arthur Whitcomb, Inc. v. Town of Carroll*, 141 N.H. 402, 406 (1996). “The legislature’s purpose in enacting [this chapter] was, in part, to increase the supply of construction materials and decrease the cost of roads and other governmental infrastructure to the public by curtailing simultaneous state and local regulations of the same activity.” *Arthur Whitcomb*, 141 N.H. at 407. However, the statute’s pre-emption of the field of excavation does not entirely exclude local regulation of excavation. This Court concluded that “because the legislation has clearly stated that RSA chapter 155-E contains only ‘minimum’ requirements for excavations that

require a permit, it follows that municipalities are not pre-empted from imposing more stringent regulations upon those types of excavations.” *Guildhall Sand & Gravel, LLC v. Town of Goshen*, 155 N.H. 762, 765 (2007).

Because the statute pre-empts local ordinances, if the local ordinance is repugnant to, or inconsistent with, state law, the local ordinance may not be enforced. *Town of Carroll*, 164 N.H. at 528. Nor may municipalities enact or enforce ordinances or regulations which “would have the effect or intent of frustrating State authority.” *Arthur Whitcomb*, 141 N.H. at 408 (citations omitted). Therefore, “municipal requirements (for excavations requiring permits) that are less stringent than those imposed by the State, are given no effect. See RSA 155-E:4; :4-a; :5; :5-a.” *Guildhall Sand & Gravel*, 155 N.H. at 765. RSA Chapter 155-E goes on to state that “[w]henver local regulations [for non-exempt excavations] differ from the provisions of this chapter, the provision which imposes the greater restriction or higher standard shall be controlling.” RSA 155-E:11.

## II. INTERPLAY BETWEEN RSA 155-E:9 and RSA 677:4

RSA 155-E:9 sets forth the process for appealing decisions of the regulator. An appealing party must begin the appeal process with a motion for rehearing. *Id.* The motion for rehearing must “fully specify the ground upon which it is alleged that the decision or order complained of is unlawful or unreasonable.” *Id.* The motion must be filed within ten days of the date of the decision. *Id.* The parties affected by the decision of the regulator “may appeal in conformity with the procedure specified in RSA 677:4-15.” *Id.* This Court has previously determined that RSA 155-E:9

sets forth the procedure for appealing regulators' decisions. *K&B Rock Crushing v. Town of Auburn*, 153 N.H. 566, 570 (2006).

The appeal process of RSA 155-E:9 "is a specific grant of authority to municipalities to regulate a particular land use." *Id.* at 569. "[T]he regulation of earth excavation [is] an exercise of the police and general welfare powers of the towns, exclusive of the authority granted by the zoning enabling legislation." *Id.* at 700. In the case of *K&B Rock Crushing v. Town of Auburn*, the court concluded that the process set forth in RSA 155-E:9 must be followed when appealing a decision of the regulator. *Id.* RSA 155-E:9's appeal procedure is applicable regardless of whether the appointed regulator is the planning board, board of selectmen or the ZBA.

ZBAs are authorized "in appropriate cases and subject to appropriate conditions and safeguards, to make special exceptions to the terms of the [zoning] ordinance." RSA 674:33, IV(a). The ZBA's general authority to make special exceptions is contained in a grant of authority pursuant to RSA 674:16. When a party is dissatisfied with the ZBA's decision on a special exception application, the appeal process is governed by the requirements set forth in RSA 677:2 through 677:14. Appeals of a special exception decision require the appealing party to first apply for a rehearing specifying the grounds for its request. RSA 677:2. The motion for rehearing must be submitted within thirty days of the decision being appealed. No appeal may be taken unless there is a timely motion for rehearing. RSA 677:3. The appeal process following the denial of a motion for rehearing is contained in RSA 677:4 through 677:14.

When a municipality adopts an excavation ordinance pursuant to RSA 155-E and does not adopt any additional or more stringent requirements, the minimum requirements of that chapter, including the appeal process of RSA 155-E:9, must be followed. If a municipality then adopts additional criteria pursuant to RSA 674:33, IV in a stand-alone ordinance, the appeal process for decisions is solely governed by RSA 677:2 through 677:14. The Town's excavation ordinance falls within the third option available to municipalities wishing to implement excavation regulations - adopt an ordinance containing both the minimum requirements of RSA 155-E and additional local criteria. The appeal process under such an ordinance should, as directed by RSA 155-E:11, be governed by the more restrictive standard appeal requirements if local regulations "differ from the provisions of this chapter."

Plaintiffs argue that even when a municipality has appointed its ZBA as the "regulator," it cannot enact an excavation ordinance which requires the "regulator" to apply the minimum requirements of RSA 155-E along with local criteria during one public hearing. Under Plaintiffs' theory, an applicant would be required to file separate special exception and RSA 155-E applications, pay separate fees, attend separate public hearings and follow different appeal procedures. Such a requirement for separate processes conflicts with the legislature's purposes when enacting RSA 155-E which included enhancing availability of construction material and reducing the cost of materials for the benefit of the citizens and taxpayers of the State of New Hampshire by reducing redundant procedures. Municipalities may elect to have separate procedures for RSA 155-E permitting requirements

and town permitting requirements, but RSA 155-E does not require municipalities to do so.

RSA 155-E allows municipalities to “adopt such regulations as may be reasonably necessary to carry out provisions of this chapter.” RSA 155-E:11. The legislature’s decision to allow municipalities to adopt more restrictive local regulations to carry out the purposes of RSA 155-E recognizes the obvious - that requiring multiple local applications and hearings inevitably slows down the approval process resulting in less, but more costly construction materials. In those communities enacting a single ordinance requiring compliance with RSA 155-E and additional local criteria, the interests of the public are protected and the process streamlined as intended by the legislature. A single application process is permissible when a town appoints the ZBA as the “regulator,” whereby the ZBA has the authority to determine if an excavation applicant’s proposal meets the requirements of all state and local excavation criteria.

Allowing a single excavation permit process not only furthers the legislative purposes of RSA Chapter 155-E, but is also consistent with the rules of statutory interpretation. “Where reasonably possible, statutes should be construed as consistent with each other.” *EnergyNorth Natural Gas v. City of Concord*, 164 N.H. 14, 16 (2012) (quotation omitted). “When interpreting two statutes which deal with similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute.” *Id.*

### III. FACTS OF CASE AND SUBJECT MATTER JURISDICTION

The Town permits excavations which meet the criteria contained in Article 18 B(3) of the Town's Zoning Ordinance. The criteria, in part, specifies that an applicant must comply with the "requirements of ... NH RSA 155-E. Article 18 B(3)(e). Plaintiff's Apx. 1 at 231. The same article identifies the ZBA as the "regulator" for purposes of the requirements of RSA Chapter 155-E.

Plaintiffs allege that the Town ZBA is not the regulator because the warrant articles proposing amendments to Article 18 B(3) did not provide the voters with sufficient information to understand that they were appointing the ZBA to be the regulator pursuant to RSA Chapter 155-E. Plaintiffs' Memorandum of Law, p. 6. Specifically, Plaintiffs argue that the warrant article summary of the proposed amendment to Article 18 B(3) in 1994 was insufficient because it only referenced the ZBA's enforcement powers in relation to excavations, such as gravel pits. *Id.* at p. 5. Despite Plaintiffs' allegations, the content of that warrant article is consistent with the requirements of the statutory amendment process which requires only a "topical description of substance of amendment." RSA 675:3, VII; *see Hadley v. Town of Hooksett, 147 N.H. 184, 191 (2001).*

In addition, RSA 675:3, governing the adoption and amendment of zoning ordinances, provides a number of safeguards to insure that voters understand the significance of their votes. Voters are given the opportunity to hear about a proposed zoning ordinance amendments from the planning board and to express their views on proposed amendments during a public hearing. RSA 675:3, II, IV. Final copies of the proposed amendment are "placed on file and made available to the public" at the town clerk's office

five weeks prior to the vote. RSA 675:3, V. The voters have the opportunity for a final look at the proposed ordinance at the meeting on the day of the vote. *Id.* Plaintiffs make no claim that the Town failed to follow the requirements of RSA 675:3 prior to the Town’s vote on any of the amendments to Article 18 B(3).

The most recent claim by Plaintiffs of irregularities in the noticing of amendments to Article 18 B(3) allegedly occurred in 1994. Claims such as Plaintiffs’ that a zoning ordinance amendment is invalid because the amendment was adopted without following the required statutory enactment procedure fail unless brought within five years of the approval and enactment of the zoning amendment. RSA 31:126. The amendment to Article 18 B (3) in 1994 is “entitled to a conclusive presumption of compliance with statutory enactment procedure.” *Id.* Plaintiffs’ claim that the voters did not choose the ZBA as the RSA 155-E “regulator” fails because (1) the voters did, in fact, receive all necessary notice prior to the vote; and (2) the amendment was approved twenty-nine years ago and, therefore, has a conclusive presumption of compliance with statutory enactment procedures.

The Town’s excavation ordinance provides as follows: **No Permit** shall be granted until the plan is approved and it is found that: ... (e) the requirements of NH RSA 485-A:17 [terrain alteration] and NH RSA 155-E and as from time to time amended have been met.” Article 18 B(3) (Emphasis added). The Town’s excavation ordinance therefore incorporates the minimum requirements of RSA 155-E in the permitting process. Because the ZBA is the “regulator” for the Town, the ZBA may,

after a public hearing, approve an application for permit, if it determines that the excavation “is not prohibited by RSA 155-E:4.” RSA 155-E:8.

Intervenor’s application to the ZBA clearly explains that its operation will comply with the criteria contained in RSA 155-E, as well as additional regulations set forth in Article 18 B(3). Plaintiffs’ Apx. 1 at 121, ¶(e). The Intervenor addressed, to the satisfaction of the regulator, that the proposed project was not a project prohibited by RSA 155-E:4. For example, Intervenor’s plans show that the proposed excavation “will not be within 50 feet of the boundary of a disapproving abutter or within 10 feet of the boundary with an approving abutter.” RSA 155-E:4, II. Plaintiffs’ Apx. 1 at 124. The Intervenor provided convincing evidence that the “issuance of the permit would not be unduly hazardous or injurious to the public welfare.” RSA 155-E:4, IV. Intervenor’s application and testimony at the public hearing described how it would address issues of noise, traffic and dust, to avoid endangering the health, safety and welfare of the community. Plaintiffs’ Apx. 1 at 117-121, 124-126. The ZBA had ample evidence that the excavation would not substantially damage a known aquifer as required by RSA 155-E:4, VI. Plaintiffs’ Apx. 1 at 120. The Intervenor obtained the required alteration of terrain permit from NHDES as required by RSA 155-E:4, VII prior to obtaining its permit. *Id.* at 123. The ZBA, acting as the “regulator” was satisfied that the proposed excavation was not a prohibited project pursuant to RSA 155-E:4.

Plaintiffs, on the other hand, argue that the proposed project was prohibited and that the excavation was injurious to the public’s welfare. Plaintiffs’ untimely motion for rehearing alleged that a long period of



monitoring was required to determine if the excavation would threaten a known aquifer. Plaintiffs' Apx. 1 at 135 ¶2. Plaintiffs also complained that there was inadequate information to determine if noise would be injurious to residents in the area. Plaintiffs' Apx. 1 at 135 ¶3. Plaintiffs claim in their motion for rehearing that there were inadequate protections for residents against fugitive dust a "serious public health concern." Plaintiffs' Apx. 1 at 135, ¶4. The issues raised in Plaintiffs' motion for rehearing are, in fact, allegations that the Town's regulator should not have issued the permit because the proposed excavation is a prohibited project pursuant to RSA 155-E:4, IV and VI.

The Town's excavation ordinance, which incorporates the requirements of RSA 155-E's permitting process with additional Town regulations allows a one-time permit process benefiting all parties. This framework does not undercut the protections afforded the public by RSA 155-E nor the rights of applicants under that chapter. The public and applicants are provided with one comprehensive list of requirements for applying for and operating an excavations project. The Town's ZBA and the Town's "regulator" are one in the same and it has the statutory authority to conduct the application and public hearing process as required by RSA 155-E and RSA 674:33, IV.

#### CONCLUSION

When a municipality's regulator issues a permit for an excavation pursuant to an ordinance requiring compliance with RSA Chapter 155-E, an appeal of that decision must comply with RSA 155-E:9. Plaintiffs' Notice of Rehearing raises issues under RSA 155-E:4 which, if true, would prohibit the issuance of a permit pursuant to RSA 155-E:8. Therefore, the

Plaintiffs' motion for rehearing had to be filed within ten days after the ZBA, the Town's regulator, granted a permit to the Intervenor. Because Plaintiffs failed to file a motion for rehearing within the ten day period, their appeal should be dismissed for lack of subject matter jurisdiction. *See K&B Rock Crushing*, 153 N.H. at 701.

### **CERTIFICATION**

I hereby certify that this brief contains less than 4,000 words and complies with this Court's Order dated March 16, 2023 for the filing of a supplemental brief.

Respectfully submitted,

TOWN OF SANBORNTON

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April 7, 2023

### **CERTIFICATE OF SERVICE**

I hereby certify that on April 7, 2023, 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.