The State of New Hampshire

Supreme Court

2022 Term

No. 2022-0142

Rule 7 Appeal from Decision of Belknap County Superior Court

JULIANA LONERGAN & DAVID LONERGAN

v.

TOWN OF SANBORNTON

MEMORANDUM OF LAW OF INTERVENOR, R.D. EDMUNDS LAND HOLDINGS, LLC, PURSUANT TO RULE 16(4)(b)

NOW COMES R.D. Edmunds Land Holdings, LLC, by and through counsel, Christopher C. Snook, Esquire, and Christopher J. Seufert, Esquire, and respectfully submits this Memorandum of Law:

I. PROCEDURAL ERRORS IN PETITIONERS' APPEAL

As a preliminary matter, Petitioners' appeal is deficient on several procedural grounds:

Petitioners' Statement of Questions Violates Rule 16(3)(b)

1. New Hampshire Supreme Court Rule 16(3)(b) provides that:

> "….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…. 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.

2. In their Brief, Petitioners present the following three (3) questions for review (Petitioners' Brief, Pg. 5) :

> 1. Did the Trial Court err by affirming the Town of Sanbornton Zoning Board of Adjustment ("ZBA") approval of the Intervener's special exception application ("Application") to operate a gravel pit in a residential area of the General Agricultural District ("GAD") when the abutters to the north and south objected due to the fugitive dust, noise and traffic it would create during both public hearings and the Intervener submitted no evidence to show how it would prevent or abate those concerns as required by N.H. Code Admin. R. Env-A 1000 and no basis to support a favorable finding by the ZBA on each Ordinance standard?
>
> 2. Did the Trial Court err when it affirmed the ZBA's implicit waiver of certain investigative studies it had requested from Bullfish Investments, LLC ("Bullfish") when the Intervener's agent and the ZBA both represented to the public those studies would be required before it considered approving the Application?
>
> 3. Did the Trial Court err when it held the ZBA and the Town of Sanbornton Planning Board ("Planning Board") have concurrent jurisdiction to resolve disputes as to whether the Intervener's land ("Property") is located in the Aquifer Conservation District ("ACD") when Article 12(B) of the Town of Sanbornton Zoning Ordinance ("Ordinance") expressly delegates that authority to the Planning Board and neither the General Agricultural Zoning District ("GAD") or the ACD list a gravel pit as a use permitted by special exception?

3. Petitioners have substantially reworded their four (4) Notice of Appeal Questions and combined some with new and different issues to form the questions presented in their Brief. In their Rule 7 Notice of Mandatory Appeal, Petitioners presented the following:

> 1. Did the Trial Court err when it held the Town of Sanbornton Zoning Board of Adjustment ("ZBA") has concurrent jurisdiction to evaluate and delineate the limits of the Aquifer Conservation District ("ACD") with the Town of Sanbornton Planning Board ("Planning Board") when Article 12(B) of the Town of Sanbornton Zoning Ordinance ("Ordinance") expressly delegates that authority to the Planning Board only and RSA 674:33 does not grant zoning boards that authority?
> 2. Did the Trial Court err when it held the ZBA had been granted "general authority" under Section 18(B)(3) of the Ordinance to grant the Intervener's special exception to operate a gravel pit on a parcel of land located in the General Agricultural Zoning District, also subject to the ACD overlay, when a gravel pit is not a permitted use, nor a use permitted by special exception, in either District?
> 3. Did the Trial Court err when it affirmed the ZBA decision granting the Intervener's special exception when the only evidence presented by the Intervener to address concerns about fugitive dust creating a health hazard or nuisance was its engineer alleging fugitive dust is only a problem for 100-acre pits; the Intervener's dump trailers would have covers and a water truck would be kept on the site?
> 4. Did the Trial Court err by affirming the ZBA decision granting the Intervener's special exception despite its engineer representing a noise study would be submitted; and the ZBA members expressly telling the public a noise study was required because the Intervener's business plan called for 30 ton dump trailers passing Johnson Road residences every 10 minutes during normal business, 5 days per week, but after the Intervener stated they would not submit one, the ZBA app (*sic*)?

4. Intervenor will identify below, the questions and issues not found in the Petitioners' Notice of Appeal. See Town of Bartlett v. Furlong, 168 N.H. 171, 181 (2015) (Ruling that to the extent that a party in a zoning appeal sought to add issues, it was long after his brief was due, and thus the motion to add new issues would be denied

5. Furthermore, Petitioners' Brief does not reference to the record where they raised the matters with the tribunal below, despite it being their burden to do so. Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004) ("It is the burden of the appealing party, here the plaintiff… to demonstrate that she raised her issues before the trial court").
6. Moreover, the purpose of referencing the record for each question presented is to evidence the preservation of issues being appealed and to apprise the other parties and the Court of those issues. Mahmoud v. Irving Oil Corp., 155 N.H. 405, 406 (2007).
7. In fact, the Rules of the Supreme Court "affirmatively require the moving party to demonstrate where each question presented on appeal was raised below, failure of the moving party to comply with these requirements may be considered by the court regardless of whether the opposing party objects on those grounds." Bean, 151 N.H. at 250 (citation omitted); and Thorndike v. Thorndike, 154 N.H. 443, 447 (2006) (citation omitted); see also N. Sec. Ins. Co. v. Connors, 161 N.H. 645, 654 (2011).
8. Failure to identify in the record provided to the Court where an issue on appeal was raised puts unnecessary burdens on the other parties

and the Court to sort through the 248 page appendix, the Trial Court Order, and transcript, to identify and analyze the issues on appeal.

9. Therefore, the Court should *sua sponte* strike the questions presented from Petitioners' Brief and dismiss their appeal. See Mahmoud, 155 N.H. at 406-07 ("the plaintiff failed to comply with Rule 16(3)(b), he failed to demonstrate that the issues were preserved for appeal, and he created unnecessary burdens for the defendant and the court. Accordingly, we strike his brief and dismiss the appeal").

Petitioner Brief Presents Issues not Found in their Motion for Rehearing Before the ZBA

10. In their Motion for Rehearing before the ZBA, Petitioners argued that only the Town's Planning Board had jurisdiction to determine whether the subject parcel is within the Aquifer Conservation District ("ACD"); that the ZBA should consider a report attached to Petitioners' motion to determine if Intervenor's parcel is in the ACD; that a noise study be ordered specific to "18-wheel dump trailers passing by residential homes as they travel Johnson Road daily at 15 minute intervals to remove aggregate materials from the Property"; and whether more specific conditions addressing fugitive dust and noise should be imposed. (App. 135-36).
11. Therefore, the issues on appeal concerning N.H. Code Admin. R. Env-A 1000, and Question 2 of Petitioners' Brief should not be heard. Nbac Corp. v. Town of Weare, 147 N.H. 328, 331 (2001).

Petitioners' Brief Present Issues Dismissed by the Trial Court

12. Previously, on 10/19/2021 the Trial Court issued an order dismissing Count I of Petitioners' appeal from the Sanbornton Zoning Board of Appeals ("the ZBA") on grounds that Petitioners did not exhaust administrative remedies by failing to raise such issue in their motion for rehearing before the ZBA.
13. Count I of Petitioners' Appeal from the ZBA alleged that the ZBA acted illegally and unreasonably when it granted a special exception for a use allegedly not permitted in the General Agricultural District. See Addendum to Memorandum of Law at 19-24.
14. Notably, Petitioners have omitted this Trial Court Order from their Appendix, therefore pursuant to New Hampshire Supreme Court Rule 17, Intervenor attaches a copy of the 10/19/2021 Order on Motion to Dismiss as an Addendum.
15. Therefore, any issue on appeal concerning the permitted uses in the Town's General Agricultural District should be stricken, namely Notice of Appeal Question 2., and parts of Petitioners' Brief Questions 1. and 3. See Halifax-American Energy Co. v. Provider Power, LLC, 170 N.H. 569, 574 (2018) ("the general rule in this jurisdiction is that a contemporaneous and specific objection is required to preserve an issue for appellate review.)

II. ESSENTIAL FACTS FOUND BY THE TRIAL COURT

16. Intervenor owns 19-acre tract in the Town of Sanbornton bordering Interstate Route 93 on its east and Johnson Road, abutting Petitioners 12-acre property. (F.O. at 2).

17. The Town of Sanbornton's Zoning Ordinance ("Zoning Ordinance"), Article 18, allows gravel pit excavation anywhere in the Town by Special Exception, and grants authority to the Town's ZBA to issue that special exception. (F.O. at 2).
18. In order to approve such special exception the ZBA must find subsections (a)-(f) of Zoning Ordinance Article 18.B(3) satisfied. (F.O. at 2-3).
19. On August 25, 2020, the ZBA conducted its first hearing related to the application where the Intervenor explained that no crushing or blasting would occur on-site, that the excavation would occur Monday through Friday from 7:00 AM to 4:30 PM with occasional Saturday operations until 12:00 PM for approximately 3—7 years, depending on how much material would be trucked at once. (F.O. at 3).
20. Such trucking would involve trucks driving down Johnson Road and then exiting onto I-93 (F.O. at 3).
21. The ZBA was provided with results of two studies on the impact of real estate values of homes located near gravel pits both finding negligible price difference and one finding an actual increase in one of the studied areas. (F.O. at 3).
22. At this hearing, Petitioners expressed concern about fugitive dust and the location of an aquifer within the area. (F.O. at 3).
23. Intervenor presented a water geologist, Harry Weatherbee from Geotechnical Services Inc., who provided a geological study of the area in question and whether an aquifer existed, and determined that

one did not exist. The ZBA then requested that a third-party be hired to review the aquifer issue. (F.O. at 4).

24. On October 27, 2020, the ZBA held another meeting to review potential third-party review vendors and chose Milone Macbroom. (F.O. at 4-5).
25. On December 22, 2020, the ZBA held a third meeting to review the report of Milone Macbroom where Gina Gulseth of Milone MacBroom explained that after re-measuring the water levels in the existing test wells on the property that she was in agreement that only low-yield aquifer was present on the property. (F.O. at 5).
26. On February 23, 2021, the ZBA held a meeting to vote on the application, where Intervenor represented that the gravel pit operation will meet the Town's Special Exception criteria, as well as the minimum standards of RSA 155-E:4-a, and specifically addressed several concerns raised during the hearings:
    - To reduce noise, access to the pit was relocated to enable trucks to enter closer to the active area of excavation, trucks would be equipped with white noise back-up alarms, and no blasting or hammering of ledge would occur on site.
    - To protect the groundwater table, no digging was to occur within five feet of the water table, with three test wells remaining on the property.
    - That operation of the gravel pit would now only be 7am-5pm Monday through Friday, except for holidays, for an estimated 3.1 years, pending market conditions, with no more than five acres mined at one time.

- Trucks entering and leaving the site would only travel south on Johnson Road, an asphalt skirt at the access point would protect the shoulder of Johnson Road, and the Intervenor would post surety bond of $35,000 for Johnson Road at the request of the Town's Road Agent.
- To mitigate fugitive dust, a water truck would be on-site to assist in mitigating dust, crushed stone was to be added to the pit exit way to clean truck tires when exiting, and no stockpiling of gravel would occur.

  (F.O. at 5-6).

27. Petitioners argued at the hearing that the ZBA was not using the Town's 1978 ACD map to determine the presence of an aquifer ordinance, stating that the Intervenor would need to prove to the Town's Planning Board that a significant aquifer was not present. (F.O. at 6).
28. The ZBA reiterated the submitted hydrogeological studies and that it would not be presented to the Planning Board since medium or high yield aquifer was not present at the property. (F.O. at 6).
29. The ZBA then passed the Motion 4-1 to grant the special exception, to which Petitioners filed their Motion for Rehearing, which was denied by a 4-1 vote on April 20, 2021, after the ZBA met to discuss the motion. (F.O. at 6).

III. STANDARD OF REVIEW

30. Appellate review from a Superior Court appeal of a ZBA decision is limited to determining whether there was legal error or a lack of

requisite evidence to support the trial court's fact finding. Nestor v. Town of Meredith Zoning Bd. of Adjustment, 138 N.H. 632, 634 (1994).

31. The Trial Court's decision will be upheld unless the appealing party can show that such decision is not supported by the evidence or is legally erroneous. Feins v. Town of Wilmot, 154 N.H. 715, 717 (2000).
32. Moreover, in land use appeals, such as ZBA cases, the review of the Trial Court's decision is not *de novo* even when the appellate record consists only of the certified record. Mountain Valley Mall Assocs. v. Municipality of Conway, 144 N.H. 642, 646 (2000).

IV. RESPONSE TO PETITIONERS' ARGUMENT I.

33. Petitioners argue that the record does not support approval of Intervenors' application under the special exception criteria under Zoning Ordinance Article 18(B)(3) by alleging the Intervenor failed to comply with RSA 155-E permit requirements, that the use of a water truck onsite to mitigate fugitive dust is insufficient, and that the ZBA cannot waive submittal of a noise study after requesting one.

RSA 155-E

34. As a preliminary matter, the argument of failing to receive an RSA 155-E permit was not among the questions in the notice of appeal nor in the statement of questions presented in Petitioners' Brief, and

therefore should not be considered. See Town of Bartlett, 168 N.H. at 181.

35. Nor was this argument addressed in Petitioners' Motion for Rehearing (App. 135-36), and therefore is not preserved for appeal. Nbac Corp., 147 N.H. at 331.
36. *Assuming arguendo* it is a basis for appeal, Petitioners argument has no merit.
37. Petitioners' only support for their argument that the ZBA must issue a permit, separately from the process of issuing a special exemption for the excavation is Nbac Corp., which involved the ZBA granting a special exemption, and the selectmen, the Town's RSA 155-E regulator, denying the permit.
38. In this case the regulator and the ZBA are one in the same, and the enforcement mechanism for failure to comply with RSA 155-E rests with the ZBA as regulator, or by Petitioners seeking a cease and desist order with the Superior Court, which Petitioners have not done. See RSA 155-E:10.
39. Therefore, Petitioners' appeal fails on this issue.

Env-A-1000 – Fugitive Dust

40. As with the previous argument, this issue was also not argued in their Motion for Rehearing, as Petitioners only motioned on grounds which concerned the dust of trucks passing homes on the road.
41. Secondly, this issue was not among the Questions in Petitioners' Notice of Appeal and doubly Petitioners have failed to identify

where in the record it has been raised previously, and therefore should be stricken. See Mahmoud, 155 N.H. at 406-07

42. *Assuming arguendo* it is a basis for appeal, Petitioners argument fails.
43. First, Petitioner argues that the ZBA had insufficient evidence that fugitive dust would not be a concern.
44. This is false, as the Trial Court found, to mitigate fugitive dust a water truck would be on-site to assist in mitigating dust, crushed stone was to be added to clean truck tires when exiting and no stockpiling of gravel would occur. (F.O. at 5-6).
45. Unlike the intervenors in cases cited by Petitioners (Barrington E. Cluster I Unit Owners' Ass'n v. Barrington, 121 N.H. 627 (1981); and Jensen's, Inc. v. Dover, 130 N.H. 761 (1988)) who provided no evidence to the respective ZBAs, the instant Intervenor provided testimony as to how fugitive dust would be a non-factor and operational standards on how to address such problems if they arise. (F.O. at 3-6).
46. Therefore, Petitioners' argument fails.

Noise

47. The argument that the ZBA cannot waive the submission of a noise study was not in Petitioners' Motion for Rehearing and should be stricken, as with Petitioners' other arguments above.
48. However, the only authority provided for this argument by Petitioners is Tidd v. Town of Alton, 148 N.H. 424 (2002), where

the ZBA waived requirements of its own zoning ordinance when granting a special exemption.

49. This is not the case here, as the Zoning Ordinance does not require the submission of noise studies.
50. As to Petitioners' other argument, regarding failure to comply with New Hampshire DOT regulations was likewise not in their Motion for Rehearing, nor in their Notice of Appeal, nor have Petitioners identified where they have previously raised this argument.
51. To the degree any merit remains in Petitioners' argument, the Trial Court found that to reduce noise, Intervernor relocated access to the gravel pit to enable trucks to enter closer to the origin of active excavation, equipped trucks with white noise back-up alarms, and would not blast or hammer ledge on site. (F.O. at 5-6).
52. Therefore, Petitioners argument fails.

V. RESPONSE TO PETITIONERS' ARGUMENT II.

53. Unlike all other arguments, Petitioners have preserved and noticed this one, however, Petitioners have again failed to identify where in the record they specifically raised this before the Trial Court, and therefore should be stricken.
54. As to this arguments' merits, the Petitioners argue that the Sanbornton ZBA did not have concurrent jurisdiction with the planning board concerning the ACD location.
55. The relevant portion of the Zoning Ordinance defines the ACD as those areas "which are **delineated** as having medium and high

potential to yield ground water… shown on the **Town Aquifer District Map**." (App. 210).

56. Petitioners attached the Town Aquifer District Map to their appeal, and it displays three (3) shades of blue to delineate three levels of predicted transmissivities of the aquifer below it. (Exhibit B to Lonergan Brief).
57. The Petitioners marked the site where Edmunds' proposed gravel pit would operate and it shows the site to be above an area with a predicted transmissivity of less than 2,000 feet squared per day. (Id.)
58. Milone & MacBroom, who were tasked by the Town of Sanbornton ZBA to conduct a hydrological study, stated that "a USGS designation of less than 2,000 square feet per day, as is assigned to the Site, could be correlated to a 'low' aquifer potential, in the sense of a municipal supply," concluding that the existing aquifer only had a low-yield potential. (App. 100-105), not the ACD defined "medium to high potential".
59. Thus, the aquifer delineated on the Town Aquifer District Map as being underneath Edmunds' proposed gravel pit does not meet the requirements of being within the ACD.
60. Regardless, Article 18(B)(3) of the Sanbornton Zoning Ordinance authorizes the ZBA to permit the use of land for earth excavation in any zone in the town whether inside or outside the ACD, the only requirement as to aquifers is that there will not be damage to a known aquifer. (App 230-31).

61. Also, New Hampshire Administrative Code Env-Wq 1500 *et. seq*. governs the criteria and procedure for issuance of Alteration of Terrain permit and has a stated purpose of:

> The purpose of these rules is to implement the intent of RSA 485-A:1 to protect drinking water supplies, surface waters, and groundwater by specifying the procedures and criteria for obtaining permits required by RSA 485-A:17.

62. Intervenor was found in compliance with its Alteration of Terrain permit by the New Hampshire Department of Environmental Services on 02/22/2021. (App 123).
63. The ZBA had ample evidence that there would be no damage to a known aquifer when considering the plan submitted by Intervenor, in conjunction with approval from the State of New Hampshire and the finding by Milone & MacBroom that the aquifer beneath the site has 'low' aquifer potential.
64. Therefore, Intervenor's pit is not subject to the Aquifer Conservation District and the ZBA had sufficient evidence to make a factual finding that no damage to a known aquifer would result from the gravel pit.

VI. CONCLUSION

65. The decision of the trial court should be affirmed and the Petitioners' appeal dismissed.

Respectfully Submitted,
R.D. Edmunds Land Holdings, LLC,
by and through counsel,

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CERTIFICATION OF SERVICE

I, Christopher C. Snook, Esquire, certify that on this the 21st day of September 2022 service through the efile system of the within was made on Stephen M. Bennett, Esquire and Patricia M. Panciocco, Esquire.

/s/ Christopher C. Snook
Christopher C. Snook, Esquire
Bar # 274093

RULE 26(7) STATEMENT OF COMPLIANCE

This filing has been properly served on all parties, and the within Memorandum of Law is in compliance with the Rule 16(4) 4,000 word limit for Memorandums of Law.

/s/ Christopher C. Snook
Christopher C. Snook, Esquire
Bar # 274093

CERTIFICATION OF WORD COUNT

I certify that the within Memorandums of Law contains 3724 words.

/s/ Christopher C. Snook
Christopher C. Snook, Esquire
Bar # 274093

ADDENDUM TABLE OF CONTENTS

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