

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 COURT ORDER DATED
MARCH 16, 2023**

NOW COMES Intervenor, R.D. Edmunds Land Holdings, LLC, by and through counsel, Christopher C. Snook, Esquire, and respectfully submits this Memorandum of Law pursuant to this Honorable Court's request that the Town of Sanbornton (hereinafter the "Town") and the intervenor address the interplay between RSA 155-E:9 as it applies to excavation permits and RSA 677:4 as it applies to a ZBA's authority to hear appeals pertaining to special exceptions, and how the two statutory regimes apply to the facts of this case and the question of subject matter jurisdiction.

I. INTERPLAY BETWEEN RSA 155-E:9 AND RSA 677:4

RSA 155-E:9 and RSA 677:4 in Isolation

1. Materially, RSA 155-E:9 provides the procedure for rehearings regarding an RSA 155-E regulators decision to approve or deny an excavation permit or “any matter determined thereby.” Id.
2. Specifically, an interested person affected by a regulator’s decision has 10-days following the decision to file a motion for rehearing that states every ground upon which such decision was unlawful or unreasonable, and the regulator then has 10 days to grant or deny the motion and if granted 30 days to schedule a hearing. Id.
3. After a decision on the motion for rehearing, any person affected by such decision may appeal pursuant to RSA 677:4–15. Id.
4. RSA 677:4 in material part states that “any person aggrieved by any order or decision of the zoning board of adjustment (“ZBA”) or any decision of the local legislative body may apply, by petition, to the superior court within 30 days after the date upon which the board voted to deny the motion for rehearing.” Id.
5. Viewed in isolation, RSA 155-E:9 and RSA 677:4 work in concert with one another, RSA 155-E:9 provides the procedure for obtaining a rehearing decisions by RSA 155-E:9 regulators and RSA 677:4 provides the procedure for appealing to the Superior Court when the regulator is the ZBA or a local legislative body.

6. However, RSA 155-E:9 and RSA 677:4 are not statutes which exist in isolation, but as part of large statutory schemes granting separate and distinct regulatory powers to municipalities. K&B Rock Crushing v. Town of Auburn, 153 N.H. 566, 569 (2006) (“the 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... placement of the excavation statute in Title XII... shows the legislature's intent to grant authority independent of the zoning enabling laws”).

Statutory Scheme - RSA 155-E

7. Municipalities, such as towns, are just subdivisions of the State of New Hampshire and only possess the powers “expressly or impliedly granted to them by the legislature.” Arthur Whitcomb, Inc. v. Town of Carroll, 141 N.H. 402, 405 (1996); accord Opinion of Justices, 134 N.H. 711, 715 (1991) (“municipalities in the State of New Hampshire are divisions of the State, and they derive their authority from the legislature”).
8. RSA 155-E is one such statute, which specifically grants authority to municipalities to regulate excavations, a particular land use. See K&B Rock Crushing, 153 N.H. at 569.
9. For example, RSA 155-E requires a statutory permit for all excavations except those specifically listed (RSA 155-E:2), issued by the local regulator proscribed by statute or the board of selectmen/ZBA by a specified procedure (RSA 155-E:1, III) after completion of a specified and extensive application process (RSA 155-E:3), and thereafter such

excavations are subject to specific and technical operational and reclamation standards (RSA 155-E:4-a – 5). Arthur Whitcomb, Inc., 141 N.H. at 406.

10. However, when an excavation is not permitted by ordinance in municipalities with commercial earth resources on unimproved land and who also prevent the excavation of some of these resources in at least some areas of the municipality, then such excavations “shall be deemed to be a use allowed by special exception as provided in RSA 674:33, IV. RSA 155-E:4, III.
11. The statute also mandates that the ZBA in all municipalities “shall grant” special exceptions to their zoning ordinances when qualifying excavations meet certain criteria, without any analysis of the criteria described in RSA 674:33, IV. RSA 155-E:4, III.
12. Therefore, the zoning powers of a municipality only apply to the excavation permit process when a special exception is necessary as required under RSA 155-E:4, III.
13. For all other matters involved in the granting of a gravel excavation permit under RSA 155-E the zoning statutes and their associated powers do not control. See Goffstown v. Thibeault, 129 N.H. 454, 459 (1987) (“where statutory provisions for particular land use regulations exist outside the sphere of the zoning laws, those specific land use enabling laws must be accorded full force and effect and not fall subject to any possible extrinsic limitations of the zoning enabling legislation”).

Rehearing Procedure for Special Exceptions

14. A special exception can only be granted by a ZBA pursuant to its statutory powers. Ouellette v. Town of Kingston, 157 N.H. 604, 610 (2008) (“the broad powers granted to [the ZBA] by statute”).
15. The purpose of special exceptions is to provide relief from the operation of zoning ordinances. Goffstown, 129 N.H. at 460.
16. Specifically, in order for a special exception to apply, the activity under consideration must be facially among the prohibitions of the zoning ordinance. Id. (“in order for one to view the five categories of permissible earth removal as exceptions, those categories must be facially includible within the prohibitions of the ordinance”).
17. In short, if the activity is not prohibited by the zoning ordinance, permitting such activity does not constitute a special exception. Id. at 461.
18. “Whenever a person or a municipality seeks a rehearing on or an appeal of a zoning-related order or decision, the procedures enacted under this chapter shall be followed.” RSA 677:1
19. Therefore, at best, the only time the rehearing procedure described in the zoning enabling statutes (Title LXIV) applies to actions of a ZBA is when a zoning-related matter has been decided, such as granting a special exception from the zoning ordinance for activities otherwise prohibited by the same zoning ordinance.

II. APPLIED TO THE FACTS OF THE CASE

Zoning Ordinance

20. The Intervenor's land which is subject to this ZBA appeal is in the Town of Sanbornton's General Agricultural District. (Final Order at pg. 2).
21. The Town of Sanbornton's Zoning Ordinance does not prohibit gravel excavations in the General Agricultural District, and instead explicitly permits it. (Appx. I at 155 ["Sand, gravel, rock, soil or construction aggregate may be removed only in the General Agricultural or Forest Conservation District"]).
22. The Zoning Ordinance then provides the criteria that must be met in order for a proposed gravel excavation to be permitted under Article 18-B(3). (Appx. I at 155 at 230-31).
23. The determination as to whether a proposed gravel excavation meets the Article 18-B(3) criteria, is made by the Town of Sanbornton's ZBA, who is also the town's RSA 155-E regulator. (Id. ["the Zoning Board of Adjustment, as regulator, shall be responsible for any enforcement action for violations of RSA 155-E"]).

ZBA's Authority

24. Although the above gravel excavation criteria is labelled a "special exception" in the Zoning Ordinance, it would only be a special exception if the Intervenor's proposed excavation was prohibited elsewhere in the zoning ordinance. See Goffstown, 129 N.H. at 460.

25. For example, if the Intervenor’s proposed excavation was in the General Residential District instead of the General Agricultural District, then a special exception would be necessary. (See Appx. I at 155).
26. In fact, the Town of Sanbornton would have no authority to issue a true special exception because RSA 155-E:4, III only grants the authority to issue special exceptions for gravel excavation permits when the proposed excavation is prohibited under the ordinance. See Ouellette, 157 N.H. at 610 (stating the ZBA’s powers as being statutory).
27. Instead, the Town of Sanbornton ZBA was merely determining if the Intervenor’s gravel excavation is permissible under its gravel excavation regulations.
28. This is allowed because “the legislature has clearly stated that RSA chapter 155-E contains only ‘minimum’ requirements for excavations that require a permit, it follows that municipalities are not preempted from imposing more stringent regulations upon those types of excavations.” Town of Carroll v. Rines, 164 N.H. 523, 531 (2012) (quoting Guildhall Sand & Gravel, LLC v. Town of Goshen, 155 N.H. 762, 767 (2007)); RSA 155-E:8 (“the regulator may include in a permit such reasonable conditions as are consistent with the purpose of this chapter”); and RSA 155-E:11, I (providing that local regulators are authorized to promulgate their own regulations, including those to protect water resources pursuant to RSA 674:2, III(d) and if stricter than those of the chapter, then the local regulations control).
29. In fact, RSA 155-E:9 contemplates a regulator determining issues beyond the approval or denial of a gravel permit. Id. (“appeal to the

- regulator for a rehearing on such decision or any matter determined thereby”).
30. Construing Article 18-B(3) as being enacted both as regulations under the police powers of RSA 155-E and separately as special exception criteria under the zoning powers of Title LXIV, furthers the purpose of RSA 155-E by allowing the Town of Sanbornton to have one comprehensive ordinance for governing all possible gravel excavations in the town. Arthur Whitcomb, Inc., 141 N.H. at 407 (quotation omitted) (“the legislature recognized that comprehensive and extensive local regulation of excavation of rock, sand, and gravel for the production of construction materials is in the best interest of the citizens and taxpayers of New Hampshire).
 31. To that point, there is no prohibition that the Article 18-B(3) criteria can exist as both gravel excavation regulations and special exception criteria when applicable because doing so otherwise would cause both statutory schemes to contradict each other. EnergyNorth Natural Gas v. City of Concord, 164 N.H. 14, 16 (2012) “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.”
 32. Pursuant to its RSA 155-E regulator powers, the Town of Sanbornton ZBA determined if the Intervenor’s proposed gravel excavation was permissible under the zoning ordinance, and found it met all the criteria established under Article 18-B(3). (Appx. I at 124-26).

33. Because there were no grounds for a special exception, no special exception was decided upon or granted, nor could a special exception have been considered or granted.
34. Therefore the Town of Sanbornton ZBA in the instant case sat solely in its capacity as an RSA 155-E regulator and the rehearing procedure described in RSA 155-E:9 controlled the proceedings.
35. The appellants filed their motion for rehearing more than 10-days after the decision of the ZBA (Appx. I at 134-35) and thus failed to abide by the 10-day filing period for a motion for rehearing under RSA 155-E:9.
36. Therefore, Trial Court had no jurisdiction to hear the case and therefore the appeal fails. K & B Rock Crushing, LLC, 153 N.H. at 570.

III. CONCLUSION

37. The appellants, having failed to follow the appeal procedure described in RSA 155-E-9 should have their appeal dismissed.

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

/s/ Christopher C. Snook 04/10/2023
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CERTIFICATION OF SERVICE

I, Christopher C. Snook, Esquire, certify that on this the 10th day of September 2022 service through the efile system of the within was made on Stephen M. Bennett, Esquire and Patricia M. Panciocco, Esquire.

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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.

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CERTIFICATION OF WORD COUNT

I certify that the within Memorandums of Law contains 2105 words.

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