THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2022-0142

JULIANA LONERGAN & DAVID LONERGAN

v.

TOWN OF SANBORNTON

BRIEF FOR APPELLANTS, JULIANA LONERGAN & DAVID LONERGAN RULE 7 APPEAL FROM THE BELKNAP COUNTY SUPERIOR COURT

Docket No.: 211-2021-CV-00102

Counsel for Julian Lonergan &
David Lonergan

Patricia M. Panciocco (NH Bar #15872)
Panciocco Law, LLC
One Club Acre Lane
Bedford, NH 03110
Phone: (603) 518-5370
E-mail: Patatpancioccolaw.com

Oral Argument Requested to be Argued
by Patricia M. Panciocco, Esquire

TABLE OF CONTENTS

TABLE OF CASES

CASES

TABLE OF STATUTES AND OTHER AUTHORITIES

STATUTES

RULES

QUESTIONS PRESENTED

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?

TEXT OF RELEVANT AUTHORITIES

RSA: 125-C:2 Definitions.
Terms used in this chapter shall be construed as follows unless a different meaning is clearly apparent from the language or context:

I. [Omitted.]
I-a. "Affected source," any stationary source, the construction, installation, operation, and modification of which is subject to Title V, Clean Air Act, 42 U.S.C. 7401 et seq., as amended.
II. "Air contaminant," soot, cinders, ashes, any dust, fume, gas, mist (other than water), odor, toxic or radioactive material, particulate matter, or any combination thereof.
III. "Air pollution," the presence in the outdoor atmosphere of one or more contaminants or any combination thereof in sufficient quantities and of such characteristics and duration as are or are likely to be injurious to public welfare, to the health of human, plant, or animal life, or cause damage to property or create a disagreeable or unnatural odor or obscure visibility or which unreasonably interfere with the enjoyment of life and property.
III-a. "Biomass" means organic matter used as a fuel, not including wood derived from construction and demolition debris, as defined in RSA 149-M:4, IV-a; wood which has been chemically treated; or agricultural crops or aquatic plants or byproducts from such crops or plants, which have been used to rehabilitate a contaminated or brownfields site through a process known as "phytoremediation."
IV. "Clean Air Act," the Clean Air Act, 42 U.S.C. 7401, and amendments thereto amending 42 U.S.C. 1857 et seq.
V. [Omitted.]
V-a. "Commissioner," the commissioner of the department of environmental services.
V-b. "Department," the department of environmental services.
V-c. "Consumer products," any substance, product (including paints, coatings, and solvents), or article (including any container or packaging) held by any person, the use, consumption, storage, disposal, destruction, or decomposition of which may result in the release of air contaminants.
VI. "Device which contributes to air pollution," any burner, furnace, machine, equipment or article which, in the opinion of the commissioner, contributes or may contribute to the pollution of the air.
VI-a. "Dioxin" means a group of chemical compounds that share certain similar chemical structures and mode-of-action biological characteristics, including a total of 17 dioxin-like compounds that are members of 2 closely related families: chlorinated dibenzo-p-dioxins (CDDs) and chlorinated dibenzofurans (CDFs).
VII. [Repealed.]

VII-a. "Eligible biomass fuel" means fuel sources including biomass or neat biodiesel, as defined in RSA 362-A:1-a, I-b, and other neat liquid fuels that are derived from biomass.
VIII. "Emission," a release into the outdoor atmosphere of air contaminants.
VIII-a. "Hearing," the opportunity for the submission of either written or oral comments, or the submission of both written and oral comments.
VIII-b. "Major deviation from requirement" means the violator deviated from a requirement of a statute or rule to such an extent that there is substantial non-compliance.
VIII-c. "Major potential for harm" means a substantial likelihood of causing unhealthful air quality.
IX. [Repealed.]
IX-a. "Non-Title V Source," any stationary source other than an affected source which, in the opinion of the commissioner, contributes or may contribute to the pollution of the air.
IX-b. "Minor deviation from requirement" means the violator deviated partially from a requirement of a statute or rule such that most of the requirement was met.
IX-c. "Minor potential for harm" means a small likelihood of causing unhealthful air quality.
IX-d. "Moderate deviation from requirement" means the violator significantly deviated from a requirement of a statute or rule but some requirements were implemented as intended, such that approximately half the requirements were met.
IX-e. "Moderate potential for harm" means a moderate likelihood of causing unhealthful air quality.
IX-f. "Particulate matter" means any material, including lead, but not uncombined water, which is or has been suspended in air or other gases and which exists in a finely divided form as a liquid or solid at standard conditions.
X. "Person," any individual, partnership, firm or co-partnership, association, company, trust, corporation, department, bureau, agency, private or municipal corporation, or any political subdivision of the state, the United States or political subdivisions or agencies thereof, or any other entity recognized by law as subject to rights and duties.
X-a. "Repeat violation" means a subsequent violation of a statute or rule at a facility or by a person for which a letter of deficiency, administrative order, or administrative fine has previously been issued by the department.
XI. "Stationary source," any building, structure, facility, or installation which emits or which may emit any regulated air pollutant.

RSA 155-E:1 Definitions.
In this chapter:
I. "Earth" means sand, gravel, rock, soil or construction aggregate produced by quarrying, crushing or any other mining activity or such other naturally-occurring unconsolidated materials that normally mask the bedrock.
II. "Excavation" means a land area which is used, or has been used, for the commercial taking of earth, including all slopes.
III. "Regulator" means:
(a) The planning board of a city or town, or if a town at an annual or special meeting duly warned for the purpose so provides, the selectmen of the town or the board of adjustment; or
(b) If there is no planning board, the selectmen of the town or the legislative body of the city; or
(c) The county commissioners if the land area is in an unincorporated place.
IV. "Dimension stone" means rock that is cut, shaped, or selected for use in blocks, slabs, sheets, or other construction units of specified shapes or sizes and used for external or interior parts of buildings, foundations, curbing, paving, flagging, bridges, revetments, or for other architectural or engineering purposes. Dimension stone includes quarry blocks from which sections of dimension stone are to be produced. Dimension stone does not include earth as defined in RSA 155-E:1, I.
V. "Excavation site" means any area of contiguous land in common ownership upon which excavation takes place.
VI. "Excavation area" means the surface area within an excavation site where excavation has occurred or is eligible to occur under the provisions of this chapter.

RSA 155-E:2 Permit Required.
No owner shall permit any excavation of earth on his premises without first obtaining a permit therefor, except as follows:
I. Existing Excavations. The owner of an excavation which lawfully existed as of August 24, 1979, from which earth material of sufficient weight or volume to be commercially useful has been removed during the 2-year period before August 24, 1979, may continue such existing excavation on the excavation site without a permit, subject to the following:
(a) Such an excavation site shall be exempt from the provisions of local zoning or similar ordinances regulating the location of the excavation site, provided that at the time the excavation was first begun, it was in compliance with such local ordinances and regulations, if any, as were then in effect.
(b) Such an excavation area may not be expanded, without a permit under this chapter, beyond the limits of the town in which it is situated and the area which, on August 24, 1979, and at all times subsequent thereto has been contiguous to and in common ownership with the excavation site of that date, and has been appraised and inventoried for property tax purposes as part of the same tract as the excavation site of that date, as modified by the limitations of RSA 155-E:4-

a, I, II, and II-a. In this paragraph the term "contiguous" means land whose perimeter can be circumscribed without interruption in common ownership except for roads or other easements, in a single town. It is further provided that when such excavation is not allowed in that location by local zoning or similar ordinances in effect on August 4, 1989, or when such ordinances allow such excavation only by special exception, expansion may be restricted or modified with conditions by order of the regulator if after notice to the owner and a hearing, the regulator finds that such expansion will have a substantially different and adverse impact on the neighborhood.

(c) Such an excavation shall be performed in compliance with the express operational standards of RSA 155-E:4-a and the express reclamation standards of RSA 155-E:5 and 155-E:5-a. Any violations of those standards shall be enforceable pursuant to RSA 155-E:10.

(d) The owners or operators of any existing excavation area for which no permit has been obtained under this chapter shall file a report with the local regulator within one year after receiving written notice of this requirement from the regulator and in no case later than 2 years following August 4, 1989. The report shall include:

(1) The location of the excavation and the date the excavation first began;

(2) A description of the limits of permissible expansion, as described in subparagraph (b), which are claimed to apply to the excavation;

(3) An estimate of the area which has been excavated at the time of the report; and

(4) An estimate of the amount of commercially viable earth materials still available on the parcel.

(e) The exemption from local zoning or site location regulations as stated in subparagraph (a) shall include the quarrying or crushing of bedrock for the production of construction aggregate; provided, however, that no owner shall, after August 4, 1989, permit any such quarrying or crushing of bedrock to occur for the first time on any excavation site without first obtaining a permit therefor under this chapter.

II. Abandoned Excavations. The permit and zoning exemptions under RSA 155-E:2, I shall not apply to any abandoned excavation, as defined in subparagraph (a).

(a) For purposes of this section, any excavation, except for excavations or excavation sites described in RSA 155-E:2, III, whether subject to a permit under this chapter or not, for which the affected area has not yet been brought into complete compliance with the reclamation standards of RSA 155-E:5 shall be deemed "abandoned" if:

(1) No earth material of sufficient weight or volume to be commercially useful has been removed from that excavation site during any 2-year period, either before, on, or after August 4, 1989; provided, however, that before the end of such 2-year period, the owner or operator may extend the period by submitting to the regulator a reclamation timetable to be approved by the regulator, and posting a bond or other security with the municipal treasurer in a form and

amount prescribed by the regulator, sufficient to secure the reclamation of the entire excavation site in accordance with the standards of RSA 155-E:5; or
(2) The excavation site is in use and is not an excavation or excavation site as described in RSA 155-E:2, III, but does not conform with the incremental reclamation requirement of RSA 155-E:5-a, or the owner or operator has not posted a bond or other security and submitted a reclamation timetable to be approved by the regulator as described in subparagraph (a)(1); or
(3) The owner or operator of the excavation has neither secured a permit pursuant to this chapter nor filed a report of an existing excavation pursuant to subparagraph I(d) within the prescribed period.
(b) In addition to the enforcement remedies of RSA 155-E:10, the regulator may order the owner of any land upon which an abandoned excavation is located to either file a reclamation timetable, to be approved by the regulator, and bond or other security as described in subparagraph II(a)(1), or to complete reclamation in accordance with this chapter within a stated reasonable time. Such an order shall only be made following a hearing for which notice has been given in accordance with RSA 155-E:7, if the regulator finds that the public health, safety, or welfare requires such reclamation. If the owner fails to complete reclamation within the time prescribed in the order, the regulator may request the governing body to cause reclamation to be completed at the expense of the municipality. The municipality's costs shall constitute an assessment against the owner, and shall create a lien against the real estate on which the excavation is located. Such assessment and lien may be enforced and collected in the same manner as provided for real estate taxes.
(c) The site of an excavation which ceased commercially useful operation prior to August 24, 1977, but for which the affected area has not been brought into compliance with the reclamation standards of RSA 155-E:5, may be made subject to the remedy prescribed in RSA 155-E:2, II(b) only if the regulator finds in writing that specified reclamation measures are necessary to eliminate or mitigate an identified hazard to public health or safety.
III. Stationary Manufacturing Plants.
(a) No permit shall be required under this chapter for excavation from an excavation site which on August 4, 1989, was contiguous to or was contiguous land in common ownership with stationary manufacturing and processing plants which were in operation as of August 24, 1979, and which use earth obtained from such excavation site. Such excavation shall be performed in compliance with the operational standards as expressly set forth in RSA 155-E:4-a and the reclamation standards as expressly set forth in RSA 155-E:5 and 155-E:5-a, which express standards shall be the sole standards with which such excavations must comply in order to retain their non-permit status as provided under this paragraph. Loss of such non-permit status shall be preceded by written notice from the regulator that the excavation is not in compliance and the owner shall have failed to bring such excavation into compliance within 30 days of receipt of such notice. Such excavation may be expanded without a permit under this chapter to any contiguous lands which were in common ownership with the site

of the plant on August 4, 1989, except as limited by RSA 155-E:4-a, I, II, and III.
(b) No further permit shall be required under this chapter for excavation from a site which on August 4, 1989, was contiguous to or was contiguous land in common ownership with stationary manufacturing and processing plants for which local or state permits have been granted since August 24, 1979, and before August 4, 1989, which use earth obtained from such site. It is further provided that their operation and reclamation shall continue to be regulated by such local or state permits and any renewals or extensions thereof by the permitting authority or authorities.
IV. Highway Excavations. No permit shall be required under this chapter for excavation which is performed exclusively for the lawful construction, reconstruction, or maintenance of a class I, II, III, IV or V highway by a unit of government having jurisdiction for the highway or an agent of the unit of government which has a contract for the construction, reconstruction, or maintenance of the highway, subject, however, to the following:
(a) A copy of the pit agreement executed by the owner, the agent, and the governmental unit shall be filed with the regulator prior to the start of excavation. The failure to file such agreement, or the failure of the excavator to comply with the terms of such agreement, shall be deemed a violation of this chapter, and may be enforced pursuant to RSA 155-E:10.
(b) Such excavation shall not be exempt from local zoning or other applicable ordinances, unless such exemption is granted pursuant to subparagraph (c), or from the operational and reclamation standards as expressly set forth in RSA 155-E:4-a, 155-E:5 and 155-E:5-a, which express standards shall be the sole standards with which such excavations must comply in order to retain their non-permit status as provided under this paragraph. Before beginning such excavation, the governmental unit or its agents shall certify to the regulator that:
(1) The excavation shall comply with the operational and reclamation standards of RSA 155-E:4-a, RSA 155-E:5, and 155-E:5-a.
(2) The excavation shall not be within 50 feet of the boundary of a disapproving abutter or within 10 feet of the boundary of an approving abutter, unless requested by said approving abutter.
(3) The excavation shall not be unduly hazardous or injurious to the public welfare.
(4) Existing visual barriers in the areas specified in RSA 155-E:3, III shall not be removed, except to provide access to the excavation.
(5) The excavation shall not substantially damage a known aquifer, so designated by the United States Geological Survey.
(6) All required permits for the excavation from state or federal agencies have been obtained.
(c) The department of transportation or its agent may apply directly to the appeals board created under RSA 21-L to be exempted from the provisions of local zoning or other ordinances or regulations, with respect to the excavation or transportation of materials being used exclusively for the lawful construction,

reconstruction, or maintenance of a class I, II, or III highway.
(1) The application shall state whether the applicant has requested any exceptions or variances which may be available at the local level, and shall describe the outcome of such requests.
(2) Prior to acting on the application, the board shall hold a hearing in the municipality whose ordinance or regulation is at issue. At least 7 days prior to such hearing, notice shall be published in a newspaper of general circulation in the municipality, and shall be sent by certified mail to the applicant, the municipality's chief executive officer as defined in RSA 672:9, the chairman of its governing board as defined in RSA 672:6, the chairman of the local regulator as defined in RSA 155-E:1, the chairman of its conservation commission, if any, and, if the proposed exemption concerns an excavation site, to the abutters of that site as defined in RSA 672:3.
(3) Following the hearing, the board shall issue a written decision, copies of which shall be mailed to the applicant and the parties to whom notice was sent. If an exemption is granted, the written decisions shall include:
(A) A statement of the precise section of the ordinance or regulation from which the applicant is exempted. The applicant shall not be exempt from any section or provisions not so listed.
(B) An identification of the public interest being protected by the ordinance or regulation.
(C) A statement of the state interest involved, and of why, in the opinion of the board, that state interest overrides the interest protected by the ordinance or regulation.
(D) Any conditions to be imposed on the applicant, to protect the public health, safety, or welfare.
(4) The decision of the board may be appealed in the manner provided for zoning decisions in RSA 677:4-14; provided, however, that a decision under this section shall be considered a rehearing under RSA 677, and no further motion for rehearing shall be required.

RSA 155-E:2-a Other Exceptions.
I. No permit shall be required for the following types of excavations:
(a) Excavation that is exclusively incidental to the construction or alteration of a building or structure or the construction or alteration of a parking lot or way including a driveway on a portion of the premises where the removal occurs; provided, however, that no such excavation shall be commenced without a permit under this chapter unless all state and local permits required for the construction or alteration of the building, structure, parking lot, or way have been issued.
(b) Excavation that is incidental to agricultural or silvicultural activities, normal landscaping, or minor topographical adjustment.
(c) Excavation from a granite quarry for the purpose of producing dimension stone, if such excavation requires a permit under RSA 12-E.

II. A person owning land abutting a site which was taken by eminent domain or by any other governmental taking upon which construction is taking place may stockpile earth taken from the construction site and may remove the earth at a later date after written notification to the appropriate local official.

RSA 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.

RSA 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.

RSA 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.

RSA 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.

RSA 155-E:5-a Incremental Reclamation. Except for excavation sites of operating stationary manufacturing plants, any excavated area of 5 contiguous acres or more, which is depleted of commercial earth materials, excluding bedrock, or any excavation from which earth materials of sufficient weight or volume to be commercially useful have not been removed for a 2-year period, shall be reclaimed in accordance with RSA 155-E:5, within 12 months following such depletion or 2-year non-use, regardless of whether other excavation is occurring on adjacent land in contiguous ownership. Each operator, other than the operator of stationary manufacturing plants which are exempt from permit requirements pursuant to RSA 155-E:2, III, shall prepare and submit for the regulator's record a reclamation plan for the affected land, including a timetable for reclamation of the depleted areas within the reclamation site.

RSA 155-E:5-b Exceptions. The regulator, upon application and following a hearing held in accordance with RSA 155-E:7, may grant an exception in writing to the standards contained in RSA 155-E:4-a, 155-E:5 and 155-E:5-a for good cause shown. The written decision shall state specifically what standards, if any, are being relaxed, and include reasonable alternative conditions or standards. The regulator's decision on any request for such exception may be appealed in accordance with RSA 155-E:9.

RSA 155-E:6 Application for Amendment. When the scope of a project for which an excavation permit has been issued is proposed to be altered so as to affect either the size or location of the excavation, the rate of removal or the plan for reclamation, the owner shall submit an application for amendment of his excavation permit which application shall be subject to approval in the same manner as provided for an excavation permit.

RSA 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.

RSA 155-E:8 Issuance of Permit. If the regulator after the public hearing approves the application for a permit and determines it is not prohibited by RSA 155-E:4 it shall, upon receipt of an excavation fee determined by the regulator not to exceed $50 and the posting of a bond or other such surety with the municipal treasurer in an amount, as it requires, reasonably sufficient to guarantee compliance with the permit, grant a permit to the applicant for an excavation. A copy of the permit shall be prominently posted at the excavation site or the principal access thereto. A permit shall not be assignable or transferable without the prior written consent of the regulator. A permit shall specify the date upon which it expires. The regulator may include in a permit such reasonable conditions as are consistent with the purpose of this chapter and may include requirements for a permit for excavation which are more stringent than the standards set forth in this chapter including the provision of visual barriers to the excavation.

RSA 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.

RSA 155-E:10 Enforcement.
I. The regulator or its duly authorized agent may suspend or revoke the permit of any person who has violated any provision of his permit or this chapter or made a material misstatement in the application upon which his permit was granted. Such suspension or revocation shall be subject to a motion for rehearing thereon and appeal in accordance with RSA 155-E:9.
II. Fines, penalties, and remedies for violations of this chapter shall be the same

as for violations of RSA title LXIV, as stated in RSA 676:15, 676:17, 676:17-a, and 676:17-b. In addition, the regulator or a person directly affected by such violation may seek an order from the superior court requiring the violator to cease and desist from violating any provision of a permit or this chapter and to take such action as may be necessary to comply with the permit and this chapter. If the superior court issues such an order, the superior court in its discretion may award all costs and attorneys' fees incurred in seeking such an order to the regulator or person directly affected by such violation.
III. To ascertain if there is compliance with this chapter, a permit issued hereunder or an order issued hereunder, the regulator or its duly authorized agent may enter upon any land on which there is reason to believe an excavation is being conducted or has been conducted since August 24, 1979.
IV. [Repealed.]

RSA 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.

RSA 485-A:17 Terrain Alteration.
I. Any person proposing to dredge, excavate, place fill, mine, transport forest products or undertake construction in or on the border of the surface waters of the state, and any person proposing to significantly alter the characteristics of the terrain, in such a manner as to impede the natural runoff or create an unnatural runoff, shall be directly responsible to submit to the department detailed plans concerning such proposal and any additional relevant information requested by the department, at least 30 days prior to undertaking any such activity. The operations shall not be undertaken unless and until the applicant receives a permit from the department. The department shall have full authority

to establish the terms and conditions under which any permit issued may be exercised, giving due consideration to the circumstances involved and the purposes of this chapter, and to adopt such rules as are reasonably related to the efficient administration of this section, and the purposes of this chapter. Nothing contained in this paragraph shall be construed to modify or limit the duties and authority conferred upon the department under RSA 482 and RSA 482-A.
II. (a) The department shall charge a fee for each review of plans, including project inspections, required under this section. The plan review fee shall be based on the total area to be disturbed. Except for property subject to RSA 483-B:9, the fee for review of plans encompassing an area of at least 100,000 square feet but less than 200,000 square feet shall be $3,125. For the property subject to RSA 483-B:9, the fee for review of plans encompassing an area of at least 50,000 square feet but less than 200,000 square feet shall be $3,125. An additional fee of $1,250 shall be assessed for each additional area of up to 100,000 square feet to be disturbed. No application shall be accepted by the department until the fee required by this paragraph is paid. All fees required under this paragraph shall be paid when plans are submitted for review and shall be deposited in the water resources fund established in RSA 482-A:3, III.
(b) The department shall charge a non-refundable fee of $500 plus a $.10 per square foot fee for each request to amend a permit that requires plans to be reviewed.
II-a. [Repealed.]
II-b. In processing an application for permits under RSA 485-A:17:
(a) Within 50 days of receipt of the application, the department shall request any additional information required to complete its evaluation of the application, together with any written technical comments the department deems necessary. Any request for additional information shall specify that the applicant submit such information as soon as practicable and shall notify the applicant that if all of the requested information is not received within 120 days of the request, the department shall deny the application.
(b) If the department requests additional information pursuant to subparagraph (a), the department shall, within 30 days of the department's receipt of the information:
(1) Approve the application in whole or in part and issue a permit; or
(2) Deny the application and issue written findings in support of the denial; or
(3) Extend the time for rendering a decision on the application for good cause and with the written agreement of the applicant.
(c) If no request for additional information is made pursuant to subparagraph (b), the department shall, within 50 days of receipt of the application:
(1) Approve the application, in whole or in part and issue a permit; or
(2) Deny the application, and issue written findings in support of the denial; or
(3) Extend the time for rendering a decision on the application for good cause and with the written agreement of the applicant.
(d)(1) The time limits prescribed by this paragraph shall supersede any time limits provided in any other provision of law. If the department fails to act within

the applicable time frame established in subparagraphs (b) and (c), the applicant may ask the department to issue the permit by submitting a written request. If the applicant has previously agreed to accept communications from the department by electronic means, a request submitted electronically by the applicant shall constitute a written request.
(2) Within 14 days of the date of receipt of a written request from the applicant to issue the permit, the department shall:
(A) Approve the application, in whole or in part, and issue a permit; or
(B) Deny the application and issue written findings in support of the denial.
(3) If the department does not issue either a permit or a written denial within the 14-day period, the applicant shall be deemed to have a permit by default and may proceed with the project as presented in the application. The authorization provided by this subparagraph shall not relieve the applicant of complying with all requirements applicable to the project, including but not limited to requirements established in or under this section and RSA 485-A relating to water quality.
(4) Upon receipt of a written request from an applicant, the department shall issue written confirmation that the applicant has a permit by default pursuant to subparagraph (d)(3), which authorizes the applicant to proceed with the project as presented in the application and requires the work to comply with all requirements applicable to the project, including but not limited to requirements established in or under this section and RSA 485-A relating to water quality.
(e) The time limits under this paragraph shall not apply to an application from an applicant that has been found in violation of this chapter pursuant to RSA 485-A:22-a within the 5 years preceding the application or an application that does not otherwise substantially comply with the department's rules relative to the permit application process.
(f) The department may extend the time for rendering a decision under subparagraphs (b)(3) and (c)(3), without the applicant's agreement, on an application from an applicant who, within the 5 years preceding the application, has been determined, after the exhaustion of available appellate remedies, to have failed to comply with this section or any rule adopted or permit or approval issued under this section, or to have misrepresented any material fact made in connection with any activity regulated or prohibited by this section, pursuant to an action initiated under RSA 485-A:22. The length of such an extension shall be no longer than reasonably necessary to complete the review of the application, and shall not exceed 30 days unless the applicant agrees to a longer extension. The department shall notify the applicant of the length of the extension.
(g) The department may suspend review of an application for a proposed project on a property with respect to which the department has commenced an enforcement action against the applicant for any violation of this section, RSA 482-A, RSA 483-B, or RSA 485-A:29-44, or of any rule adopted or permit or approval issued pursuant to this section, RSA 482-A, RSA 483-B, or RSA 485-A:29-44. Any such suspension shall expire upon conclusion of the enforcement

action and completion of any remedial actions the department may require to address the violation; provided, however, that the department may resume its review of the application sooner if doing so will facilitate resolution of the violation. The department shall resume its review of the application at the point the review was suspended, except that the department may extend any of the time limits under this paragraph and its rules up to a total of 30 days for all such extensions. For purposes of this subparagraph, "enforcement action" means an action initiated under RSA 482-A:13, RSA 482-A:14, RSA 482-A:14-b, RSA 483-B:18, RSA 485-A:22, RSA 485-A:42, or RSA 485-A:43.

II-c. The department shall submit a biennial report to the house and senate finance committees, the house resources, recreation, and development committee, and the senate energy and natural resources committee relative to administration of the terrain alteration review program.

II-d. All permits issued, except for projects covered by paragraph II-e, pursuant to this section shall be valid for a period of 5 years. Requests for extensions of such permits may be made to the department. The department shall grant an extension of up to 5 additional years, provided the applicant demonstrates all of the following:

(a) The permit for which extension is sought has not expired prior to the date on which a written extension request from the permittee is received by the department.

(b) The permit for which extension is sought has not been revoked or suspended without reinstatement.

(c) Extension would not violate a condition of statute or rule.

(d) Surface water quality will continue to be protected as under the original permit.

(e) The project is proceeding towards completion in accordance with plans and other documentation referenced by the permit.

(f) If applicable, any inspection reports have been completed and submitted as required by the permit.

(g) The permit has not previously been extended, unless the subdivision plat or site plan associated with the permit has been deemed substantially complete by the governing municipal planning board in accordance with RSA 674:39, II, in which case subsequent extensions of the permit are allowed.

II-e. A permit issued under this section that is associated with the ongoing excavation or mining of materials from the earth shall not expire for the life of the project identified in the permit application, provided that the permit holder submits a written update of the project's status every 5 years from the date of the permit issuance using a form obtained from the department as specified in department rules.

III. Normal agricultural operations shall be exempt from the provisions of this section. The department may exempt other state agencies from the permit and fee provisions of this section provided that each such agency has incorporated appropriate protective practices in its projects which are substantially equivalent to the requirements established by the department under this chapter.

IV. Timber harvesting operations shall be exempt from the fee provisions of this section. Timber harvesting operations shall be considered in compliance with this section and shall be issued a permit by rule provided such operations are in accordance with procedures prescribed in the Best Management Practices for Erosion Control on Timber Harvesting Operations in New Hampshire, published by the department of natural and cultural resources, and provided that the department of revenue administration's intent to cut form is signed.
V. Trail construction operations for the purposes of modifying existing biking and walking trails shall be exempt from the provisions of this section. Such operations shall be considered in compliance with this section and shall be issued a general permit by rule provided such operations are implemented by a non-profit organization, municipality, or government entity, are limited to a disturbed area no more than 12 feet in width, and are in accordance with procedures prescribed in the Best Management Practices for Erosion Control During Trail Maintenance and Construction, published by the department of natural and cultural resources, bureau of trails in 2004.

RSA 674:33 Powers of Zoning Board of Adjustment.

I. (a) The zoning board of adjustment shall have the power to:
(1) Hear 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 adopted pursuant to RSA 674:16; and
(2) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:
(A) The variance will not be contrary to the public interest;
(B) The spirit of the ordinance is observed;
(C) Substantial justice is done;
(D) The values of surrounding properties are not diminished; and
(E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.
(b)(1) For purposes of subparagraph I(a)(2)(E), "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:
(A) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
(B) The proposed use is a reasonable one.
(2) If the criteria in subparagraph (1) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.
(3) The definition of "unnecessary hardship" set forth in subparagraphs (1) and (2) shall apply whether the provision of the ordinance from which a variance is

sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.
(c) The board shall use one voting method consistently for all applications until it formally votes to change the method. Any change in the board's voting method shall not take effect until 60 days after the board has voted to adopt such change and shall apply only prospectively, and not to any application that has been filed and remains pending at the time of the change.
I-a. (a) Variances authorized under paragraph I shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such variance shall expire within 6 months after the resolution of a planning application filed in reliance upon the variance.
(b) The zoning ordinance may be amended to provide for the termination of all variances that were authorized under paragraph I before August 19, 2013 and that have not been exercised. After adoption of such an amendment to the zoning ordinance, the planning board shall post notice of the termination in the city or town hall. The notice shall be posted for one year and shall prominently state the expiration date of the notice. The notice shall state that variances authorized before August 19, 2013 are scheduled to terminate, but shall be valid if exercised within 2 years of the expiration date of the notice or as further extended by the zoning board of adjustment for good cause.
II. In exercising its powers under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may 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.
III. The concurring vote of any 3 members of the board shall be necessary to take any action on any matter on which it is required to pass.
IV. (a) A local zoning ordinance may provide that the zoning board of adjustment, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance. All special exceptions shall be made in harmony with the general purpose and intent of the zoning ordinance and shall be in accordance with the general or specific rules contained in the ordinance.
(b) Special exceptions authorized under this paragraph shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such special exception shall expire within 6 months after the resolution of a planning application filed in reliance upon the special exception.
(c) The zoning ordinance may be amended to provide for the termination of all special exceptions that were authorized under this paragraph before August 19, 2013 and that have not been exercised. After adoption of such an amendment to the zoning ordinance, the planning board shall post notice of the termination in the city or town hall. The notice shall be posted for one year and shall prominently state the expiration date of the notice. The notice shall state that

special exceptions authorized before August 19, 2013 are scheduled to terminate, but shall be valid if exercised within 2 years of the expiration date of the notice or as further extended by the zoning board of adjustment for good cause.

V. Notwithstanding subparagraph I(a)(2), any zoning board of adjustment may grant a variance from the terms of a zoning ordinance without finding a hardship arising from the condition of a premises subject to the ordinance, when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises, provided that:

(a) Any variance granted under this paragraph shall be in harmony with the general purpose and intent of the zoning ordinance.

(b) In granting any variance pursuant to this paragraph, the zoning board of adjustment may provide, in a finding included in the variance, that the variance shall survive only so long as the particular person has a continuing need to use the premises.

VI. The zoning board of adjustment shall not require submission of an application for or receipt of a permit or permits from other state or federal governmental bodies prior to accepting a submission for its review or rendering its decision.

VII. Neither a special exception nor a variance shall be required for a collocation or a modification of a personal wireless service facility, as defined in RSA 12-K:2.

RSA 674:33-a Equitable Waiver of Dimensional Requirement.

I. When a lot or other division of land, or structure thereupon, is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance enacted pursuant to RSA 674:16, the zoning board of adjustment shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the board makes all of the following findings:

(a) That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;

(b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;

(c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any

such property; and
(d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.
II. In lieu of the findings required by the board under subparagraphs I(a) and (b), the owner may demonstrate to the satisfaction of the board that the violation has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directly affected.
III. Application and hearing procedures for equitable waivers under this section shall be governed by RSA 676:5 through 7. Rehearings and appeals shall be governed by RSA 677:2 through 14.
IV. Waivers shall be granted under this section only from physical layout, mathematical or dimensional requirements, and not from use restrictions. An equitable waiver granted under this section shall not be construed as a nonconforming use, and shall not exempt future use, construction, reconstruction, or additions on the property from full compliance with the ordinance. This section shall not be construed to alter the principle that owners of land are bound by constructive knowledge of all applicable requirements. This section shall not be construed to impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or property inspected by them.

CHAPTER Env-A 1000 PREVENTION, ABATEMENT, AND CONTROL OF OPEN SOURCE AIR POLLUTION

Statutory Authority: RSA 125-C:4, I(a)

PART Env-A 1002 FUGITIVE DUST

Env-A 1002.01 Purpose. The purpose of this part is to limit pollution from open air sources by regulating the direct emissions of particulate matter from those activities that are most likely to generate airborne particulate matter, also called fugitive dust.

Source. #1038, eff 10-15-78; amd 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; ss by #12831, eff 8-1-19

Env-A 1002.02 Applicability.

(a) Fugitive dust emissions that are carried by air currents beyond the boundary of the lot on which such emissions occur shall be subject to this part when created by any commercial or business activity that generates airborne particulate matter, including but not limited to the following:

(1) Commercial mining and quarrying, including the construction, maintenance, or operation of a commercial mining, quarrying, or strip mining facility or part thereof, as well as activities that involve the use of explosive materials in a way that creates airborne particulate matter;

(2) Construction or renovation of buildings, bridges or other structures, including paving, sweeping, trenching, excavating, filling, or other activity associated with the building of streets, roads, highways, parking lots, public walkways, shopping centers, housing developments, or other centers of business or residential development;

(3) Pavement maintenance, including sweeping, vacuuming, surface preparation for resurfacing, and any other activity involved with the upkeep of streets, roads, highways, parking lots, public walkways, shopping centers, housing developments or other centers of business or residential development, buildings, bridges, utilities, sewer lines, waterlines, or similar structures;

(4) Demolition, including the tearing down of buildings, bridges, or other structures; and

(5) Outdoor storage and material stockpiles, including the unloading, redistribution, and maintenance of materials.

(b) This part shall not apply to the following:

(1) Application of materials such as sand or de-icing chemicals to streets, roads, highways, parking lots, driveways, or walkways for pedestrian and vehicular safety;

(2) Driving on gravel or dirt roads;

(3) Using leaf blowers or compressed air, provided that on commercial properties and public ways such equipment shall:

a. Be used solely for the purpose of blowing leaves and vegetation; and

b. Not be used to blow dirt, sand, or gravel except as incidental and necessary to blowing leaves and vegetation in accordance with (a.), above;

(4) Resurfacing existing highways where the removal of asphalt, sand, or other material is not necessary; and

(5) Agricultural or forestry industry activities or operations.

Source. #1038, eff 10-15-78; amd 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; ss by #12831, eff 8-1-19

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; amd 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 1002.04); ss by #12831, eff 8-1-19

STATEMENT OF CASE

Julie and David Lonergan ("Plaintiffs") own and reside on the 12-acre parcel of land located at 181 Johnson Road in the Town of Sanbornton, New Hampshire ("Plaintiffs' Property"). Apx. I at 3 (blue). The Plaintiffs' Property is bounded to the east by the Interstate 93 right of way ("I-93") and located in the GAD, described in the Ordinance as "*... mainly a District of farms and dwellings.* Apx. I at 201. Article 5(A)(1) of the GAD also states: "*[N]o other purposes than those specified here will be permitted."* Id. The properties located in the general area of the Plaintiffs' Property, some of which are also bounded by I-93, are strictly residential. Apx. I at 3; Apx. I at 47. A gravel pit is not listed as a permitted use, or a use permitted by special exception, in the GAD Article IV(B) of the General Provisions in the Ordinance states "*sand, gravel, rock, soil or construction aggregate"* may be removed in the GAD and Forest Conservation District. Id.; Apx. I at 155.

R.D. Edmunds Land Holdings, LLC ("Intervener") is a general contractor with a principal office located in Franklin, New Hampshire, engaged in excavating, hauling and selling aggregate materials. Tr. 15 (13-14). On July 21, 2020, the Intervener submitted its Application to the ZBA requesting a special exception to operate a gravel pit pursuant to Article 18(B)(3) of the Ordinance on its vacant 19.9-acre tract ("Property") directly abutting the Plaintiffs' Property to the south. Apx. I at 3 (yellow). The Intervener had acquired the Property from Bullfish after it reportedly abandoned an almost identical application proposing the same use. Apx. I at 46. The ZBA Chairperson explained the Bullfish application had been denied in 2017, without prejudice, because it did not provide the investigative studies requested by the ZBA, one of which was to monitor groundwater levels for a reasonable period of normal precipitation by

drilling *"borings to bedrock"* wells to determine whether the Property was subject to the ACD. Id.

During the ZBA's August 25, 2020 first public hearing to consider the Application, T.F. Bernier, Inc. ("Bernier") represented to the ZBA it would be providing the noise and traffic studies done by Bullfish and more. Id. During its second and final public hearing held on February 23, 2021, the ZBA approved the Application without those studies or the Intervener providing evidence to show how it would abate and control fugitive dust to avoid impacting the abutters and their properties. Apx. I at 126. In addition, the ZBA implicitly waived the requirement of a noise study it accepted Bernier's statement it was not required because the Town did not have a noise ordinance. Apx. I at 125.

Plaintiffs' counsel submitted a motion for rehearing ("Rehearing") on March 24, 2021. Apx. I at 134. The Rehearing: (a) claimed the ZBA lacked jurisdiction to determine whether the Property was subject to the ACD; (b) the Ordinance expressly delegates determinations as to the location of the ACD to the Planning Board; (c) included a letter from Calex Environmental Consulting ("Calex") renewing the 2016 recommendation from Terracon that monthly groundwater monitoring take place over a reasonable period of time during a period of normal precipitation to more conclusively demonstrate whether the Property is located in the ACD; (d) requested the noise and traffic studies the ZBA represented would be provided be submitted; and (e) the Intervener had an obligation to address how it would prevent fugitive dust created by its operation and its associated truck traffic along Johnson Road from impacting the surrounding residential properties. Id. When the ZBA discussed the Rehearing on April 20, 2021, it denied it despite all but one ZBA member agreeing it would be beneficial to reopen the public hearing. Apx. I at 141. The Plaintiffs' appealed the ZBA's decision pursuant to RSA 677:4 but the

Belknap County Superior Court affirmed the ZBA's approval on February 15, 2022.

STATEMENT OF THE FACTS

The Intervener's July 21, 2020 Application stated its proposed use of the Property as a "*gravel pit excavation"* would comply with the Ordinance because:

> *"The proposed gravel pit excavation as designed will not impair the health or property of others create hazard to life or property. The property will be graded such that all runoff from the excavation will drain inwardly. No Runoff from the excavation area will enter streams or other surface waters. Proper slope benching and erosion and sediment controls will be implemented consistent with NHDES BMP's. Upon completion, excavations will be reclaimed per NH RSA 155-A. Additionally, an AOT permit (NHRSA 485:17) has been approved."*

Apx. I at 4. The Application was incomplete when submitted because it relied upon a plan prepared for Bullfish, its business plan was incomplete and the AOT permit on which it purportedly relied had expired. Apx. I at 4-23.

August 25, 2022 Public Hearing

During the ZBA's August 25, 2020 public hearing, Bernier introduced the Application as the excavation of 750,000 yards of material a 40-foot depth, ant its export offsite by 28-ton tractor dump trailers traveling south along Johnson Road to the I-93 interchange. Apx. I at 45. Bernier estimated the Intervener's excavation operation would take 3-7 years, operate from 7:00 a.m. to 4:30 p.m. weekdays with an occasional Saturday, and that its geotechnical engineer had confirmed there was no aquifer under the Property. Id.

The ZBA acknowledged there were open questions about whether a medium or high yield aquifer exists under the Property in which case it

would be subject to the ACD. Apx. I at 47. The ZBA Chair explained to the public that the Bullfish application had was denied without prejudice in 2017 after it failed to submit the investigative studies requested by the ZBA. Id. The ZBA Chair also advised Bernier those questions about the ACD remained open and must be addressed and the same reports requested from Bullfish would also be required from the Intervener. Id. The ZBA's August 25, 2020 minutes state Bernier agreed to provide "*noise and traffic"* studies. Apx. I at 46.

To address the special exception standard requiring evidence showing the proposed use would not diminish surrounding property values, Intervener's counsel submitted a local realtor sales summary of closed sales from Boscawen, Bow and Pembroke[1] where gravel pits are presumably located, but were not named in the report. Apx. I at 61-82. In response to this submission, one ZBA member commented the reported sales included both commercial and residential properties but uses along Johnson Road are strictly residential. Apx. I at 47.

Harry Weatherbee, of Geotechnical Services, Inc. ("GSI") also testified during the August 25 hearing about its April 24, 2020 report ("GSI Report"). Apx. I at 47. While the minutes quote GSI as stating "*There was not even a low-yield aquifer"* located under the Property, this statement does not appear in the GSI Report. Id; Apx. I at 24-44. GSI explained to the ZBA how it had drilled 3 non[2]-bedrock penetrating wells on the

[1] Upon information and belief there are gravel pit operations within Boscawen, Bow and Pembroke but their location was not provided. The computer-generated list of closed sales was not included in Appendix I due to its volume, but more importantly because the location of those properties in relation to those gravel pits was not provided.

[2] A non-bedrock penetrating well does not penetrate bedrock to reach the aquifer.

Property, 2 of which were purportedly adjacent to "those[3]" done by Geoinsight from which it extracted soil samples collected at 5 to 10-foot intervals to reach its conclusion. Apx. I at 25.

Referring to 2016 report prepared by Terracon for the ZBA when it considered the Bullfish application, GSI opined that requiring 3 bedrock penetrating wells to monitor static groundwater levels over time to determine the presence of a medium or high yield aquifer under the Property, was *"unnecessary and costly"*. Apx. I at 47. While GSI acknowledged it found the soil's hydraulic properties were not "insubstantial", the GSI Report states the Property was "*not underlain by a "High-Yield"* aquifer, provided no comment on whether a medium yield aquifer existed or whether the 2020 drought in New Hampshire may have impacted its results. Apx. I at 26 & 47. When the ZBA Chair began discussing seasonal fluctuations of groundwater tables, Bernier insisted they were not "*drastic*" and claimed other hydrogeologists told him bedrock wells are only done for municipal water supplies, but he offered no evidence to support this position. Id.

When the public hearing was opened, resident testimony focused on the noise, traffic and dust generated by the Intervener's operation and Bernier stated a second time:

> "*There will need to be road and noise studies submitted before answering questions about those items".*

Apx. I at 47. The Plaintiff testified she was most concerned about fugitive dust and submitted copies of a publication by New Hampshire Department of Environmental Services ("NHDES") entitled "*Fugitive Dust: Prevention, Abatement and Control*" dated February 2018 to hopefully initiate a more

[3] As further explained below, Geoinsight did soil corings to quantify the value of the material available for export. Apx. I at 35-38.

substantive discussion about possible methods to control it, as another resident stated: Apx. I at 47; 53-60.

> "*The applicant has not addressed the specifics on how the dust would be controlled, only that water will be used."*

Apx. I at 47. The Plaintiffs also reminded the ZBA a second time the questions about the ACD had yet to be resolved. Id. After Ms. McMahon asked what benefit approving the Application would bring to the Town, Abutter Seavey testified how her property abuts the Property to the south and she was very concerned about water quality, but more about dust because 4 of her 5 family members have asthma. Apx. I at 47. Seavey had already e-mailed Bernier on May 5, 2020 stating she was *"adamantly against this gravel pit"* because the Intervener's trucks would be passing over her driveway where her children play and present a hazard. Apx. I at 49-50. The hearing closed with the ZBA Chairman stating: *"The Board needs more studies with this application".* Apx. I at 48.

Interim Public Meetings

During its October 27, 2020 public meeting, the ZBA voted to engage Malone & MacBroom, Inc. ("MMI") to review the GSI Report and compare it to the 2016 Terracon Report, reemphasizing the Application was "new". Apx. I at 97-99. Bernier was present and objected to more wells being drilled and claimed: "[*T]here are already 5 wells"* on the Property. Apx. I at 98. This statement is inaccurate because although GSI had drilled 3 non-bedrock penetrating wells, Geoinsight, Inc. ("Geoinsight") had only performed 2 limited soil borings, the purpose of which was to determine for Bullfish how much gravel could be removed. Apx. I at 35-38. Before the public meeting closed, the Plaintiff reported to the ZBA the Bullfish AOT Permit had expired as it acknowledged the business plan, noise and traffic studies remained outstanding. Apx. I at 97.

MMI met with the ZBA on December 22, 2020 and reported it had examined the 1995 mapping, the Geoinsight Report, the 2016 Terracon Study and had remeasured the water levels in the GSI wells, concurring with the 2016 Terracon Report[4] but also agreeing with the GSI Report any aquifer would have a *"low potential yield"* leaving this question open. Apx. I at 102. MMI also opined seasonal water level fluctuations would likely not change its opinion and offered no comment as to whether the ongoing drought conditions would change its position. Apx. I at 101.

February 23, 2021 Public Hearing

Bernier introduced the 2/6/21 updated Business Plan ("Business Plan") during the February 23, 2021 continued hearing and represented the plan "*will meet RSA 155-E"* as he stated the Property had been previously used as a gravel pit, without any corroborating evidence, as he showed the ZBA the 100-foot setback from the Plaintiffs' pond. Apx. I at 124-125. Bernier also represented the driveway had been moved to bring trucks closer to the *"origin of excavation"* to reduce noise and improve site distance along Johnson Road. Id.

While Bernier represented the project's duration at 3.1 years, from 7:00 a.m. – 5:00 p.m., the Business Plan states the operation would take up to 7 years. Id. Apx. I at 118-119. Regarding traffic, the Business Plan stated material would be exported by 28-yard "dump trucks" 30 per day which Bernier characterized as "relatively" low volume while describing other details shown on the plan. Apx. I at 125. The Business Plan closes its discussion of traffic by stating if truck trips increase by more than 20% for more than 2 weeks, the Intervener would notify the Town. Apx. I at 119.

[4] The 2016 Terracon Report recommended groundwater levels be monitored for a reasonable time when there was normal precipitation.

When asked about the noise, Bernier told the ZBA, out of the blue, no noise study would be submitted because the Town had not adopted a noise ordinance. Apx. I at 125. The ZBA minutes suggest it did not respond to this statement and implicitly waived this requirement by not objecting, despite both having represented the contrary. Id. The Business Plan states noise generated by the operation would be less than the noise generated by traffic traveling along I-93, but the tree buffers surrounding the Property would be maintained. Apx. I at 119-120. At this point, the Plaintiff told the ZBA almost all the trees had been cleared up to her property line. Id.

The Business Plan also represents the 3 GSI would be used to monitor the 5-foot separation from groundwater requirement, but states nothing about what would be done, who would be told and when those results, if any would be reported to the Town. Apx. I. at 120. The Business Plan and concludes with a narrative addressing Paragraphs 18(B)(3)(c-f) of the Ordinance only without addressing Paragraphs (a) & (b). Apx. I at 121-122. Paragraph 10 under the Groundwater Protection and Operational Standards states: "*fully functional dust control water truck"* will remain on site for when "*dust is observed on the property"*. Id.

When asked by one ZBA member how fugitive dust would be controlled, Bernier told her OSHA regulates "silica", but dust problems are uncommon on excavation sites with less than 100 acres where materials are more likely to be stockpiled but a water truck would remain on site. Apx. I at 125. The ZBA appears to have accepted this representation as fact without any supporting evidence. Id.

When Abutter Seavey restated her concerns about fugitive dust and truck fumes, Member Cobb suggested a site walk by the ZBA but 3 of its members stated it was unnecessary. Id. Plaintiffs' counsel requested the

determination of the ACD be referred to the Planning Board for review, prompting one ZBA member to state the Property had been *"studied for more than 6 years*[5]*"* and "*this project is not going to the Planning Board"*. Apx. I at 125. Without making any findings of fact or confirming the evidence in the record was adequate to make a favorable finding for all the standards of Article 18(B)(3) or whether granting the Application would be harmonious with the residential nature of the entire area where the Property is located, Bernier requested the Board approve the Application subject to certain conditions and it voted 4-1 to approve. Apx. I at 126.

April 20, 2021 Rehearing

On February 25, 2021, Andy Sanborn, Chairman of the Planning Board, e-mailed the ZBA to express concerns about it not relying upon the 1978 aquifer map referenced in the Ordinance, stating Planning would now have a problem. Apx. I at 130. The e-mail included a copy of the Town's Water Resource map taken from the Town's Master Plan showing the Property "*in the middle of a large aquifer",* but no one responded. Id.

The Plaintiff's Rehearing was submitted on March 24, 2021 and requested the public hearing be reopened because:

(a) Article 12(B) of the Ordinance expressly vests the Planning Board with jurisdiction to resolve disputes about the location of the ACD and the Calex letter renewed the same recommendations made in 2016 by Terracon: and

(b) More evidence relative to the mitigation of noise and dust to satisfy the special exception requirements to protect public health, safety and welfare were required before approving the Application. Apx. I at 134-135.

[5] This is also factually untrue.

During its April 20, 2021 meeting, the ZBA reviewed the Rehearing (a) ZBA Member Cobb agreed the ZBA should have requested more information; (b) ZBA Member Anderson stated the Intervener should be held to the same standard as Bullfish; but (c) the ZBA Chair defended its decision stating: *"The exact map referred to in the ordinance from the 1970s was not used but the ZBA did meet the intent of the ordinance"*. Apx. I. at 141-142. ZBA Member Barriault claimed: *"The aquifer issue has been studied many times by different engineers and further studies would be unfair"*. Id. (emphasis supplied).

Abutter McMann and Ledgard agreed certain questions had not been answered and granting the Rehearing would allow that to occur as the Plaintiff reminded them no noise or other studies had been submitted as had been represented by the ZBA. Id. While Member Bormes agreed he favored additional testing he was not sure if the ZBA had the authority to make such a request as it promptly voted to deny the Rehearing. Id.

SUMMARY OF THE ARGUMENT

The trial court erred when it applied the deferential standard of RSA 677:6 to the sufficiency of the evidence submitted by the Intervener to the ZBA showing its efforts to prevent, abate and mitigate fugitive dust, traffic and noise generated from its gravel pit operation and its associated commercial truck traffic, leaving the abutters and other residents living along Johnson Road exposed to known public health, safety and welfare risks contrary to the protections provided by Article 18(B)(3)(a). Tidd v. Town of Alton, 148 N.H. 424, 425-427 (2002); Barrington East Cluster I Unit Owners' Ass'n v. Town of Barrington, 121 N.H. 627, 630-631 (1981); Jensen's Inc. v. City of Dover, 130 N.H. 761, 765 (1988). The Intervener's

failure to submit sufficient evidence to support a favorable finding on Article 18(B)(3)(a) requires the trial court order be reversed. Id.

The trial court also erred when it: (a) held the ZBA held concurrent jurisdiction with the Planning Board to resolve disputes about the location of the ACD due to the lack of language in the Ordinance disqualifying the ZBA; (b) held the ZBA may grant a special exception for a gravel pit in the ACD; (c) held the ZBA's approval of the Application also acted as the permit issued by the regulator required under RSA 155-E:3; and (d) failed to address the ZBA's implicit waiver of a noise, fugitive dust and traffic studies after representing to the public they would be submitted and in violation of RSA 674:33, IV(a). The trial court's confusion as how to interpret RSA 155-E and the Ordinance individually and collectively support this Court's reversal of the trial court order to prevent a gravel pit operating without the permit required by RSA 155-E:3.

ARGUMENT

I. THE EVIDENCE SUPPORTING THE STANDARDS OF ARTICLE 18(B)(3) WAS INSUFFICIENT.

Local zoning boards given authority to grant special exceptions authorized by local ordinance when a proposed use will be *"harmonious"* with the general spirit and intent of the ordinance, and the applicant submits sufficient evidence to support a favorable finding on each specific standard set out in the Ordinance. RSA 674:33, IV(a); Tidd at 427; Barrington East Cluster I Unit Owners' Ass'n at 630; Jensen's Inc. at 765-766. A board may also impose conditions to further control the use, but may not waive an applicant's compliance with the ordinance standards. Tidd at 427. *(referring to New London Land Use Assoc. v. New London Zoning Board, 130 N.H. 510, 517-518 (1988))*. (emphasis, supplied)

Unlike a variance granted under RSA 674:33(I) where an applicant must demonstrate the uniqueness of their property in its environment and the strict application of the regulation to it does not serve its intended purpose, special exception is a permitted use if appropriately placed within a particular zoning district. Barrington East Cluster I Unit Owners' Ass'n at 630. In most municipalities, uses permitted by special exception are listed under each zoning district and refer to specific standards met by the submission of evidence showing the use will be harmonious with other uses in that location. RSA 674:33, IV(a).

As to evidence, Board members may consider their personal knowledge but a favorable finding on each standard must be supported by more. Barrington East Cluster I Unit Owners' Assoc. at 631. Boards also may not ignore resident concerns relating to public health, safety and welfare especially when those residents are also abutters. Id. *(court reversed trial court finding insufficient evidence addressing traffic hazards, noise and smoke insufficient)*; Jensen, Inc. at 765 *(court affirmed lower court denial finding no evidence addressing pedestrian safety created by additional traffic from proposed a mobile home park).*

Article 18(B)(3) of the Ordinance

A special exception for a gravel pit under Article 18(B)(3) requires the applicant submit a plan with a detailed description of when the proposed activity will take place, a description and map of the area affected in relation to the entire parcel, an environmental impact statement, a reclamation plan of the affected area and the following:

(a) Evidence showing the proposed activity will not impair the health or property of others or create a hazard to life or property;

(b) Evidence showing the proposed operation will not adversely impact the environment, pollution of streams or surface waters, pollute air, cause landslides or cave-ins, create stagnant water,

cause flooding, damage a known aquifer, or adversely impact Town roads;

(c) Evidence the operation will not adversely impact the normal flow of traffic or use of Town roads by residents for which adequate surety may be required to repair Town roads where adverse effect is found;

(d) The Town may draw upon sources of gravel and other road building materials for the purpose of public use within the town without a hearing and permit; but with restoration applying; and

(e) Evidence all requirements of RSA 485:17 and RSA 155-E have been met, the relevant provisions at issue in this case include:

(i) A permit to operate as required by RSA 155-E:3;

(ii) Confirmation all vegetation within the subject property's 50-foot setbacks shall remain intact and not be removed as required by RSA 155-E:4-a(II); and

(iii) Compliance with N.H. Code Admin. R. Env-A-1000 as required by RSA 485:17.

Apx. I at 230-231. In Sanbornton, the Board of Selectmen is responsible to enforce the terms and conditions of a special exception issued for a gravel pit; and the ZBA, as the designated "regulator", is obligated to ensure the operator complies with the minimum standards set out in RSA 155-E:4-a but there is no evidence the Intervener complied with the following:

A. <u>The ZBA approved a special exception, NOT a 155-E:3 permit.</u>

Unless expressly exempted by RSA 155-E:2, a gravel pit operator must secure a permit under RSA 155:3 from the "*regulator"* named in the ordinance, in this case the ZBA, and a separate public hearing must be held relative to that permit application pursuant to RSA 155-E:7. RSA 155-E:3; <u>Town of North Hampton v. Sanderson</u>, 131 N.H. 614, 617 (1989). During

that public hearing, the merits of the proposed plan area examined by the regulator to ensure compliance with the minimum standards of RSA 155-E:4-a. Id. The regulator may also examine whether the plan complies with N.H. Code Admin. R. Env-A-1002 requiring specific measures being taken to control fugitive dust, traffic and noise with other investigative studies the regulator may require.

Contrary to statements made by the trial court in its order referring to the Town's argument, the approval of a special exception from zoning does not satisfy the permit requirement of RSA 155-E:3. NBAC v. Town of Weare, 147 N.H. 328, 329 (2001). The regulator's role under RSA 155-E is distinctly separate from the enforcement of conditions imposed on a special exception application because each derives its authority from a separate statute and the issues are different as was presumably recognized when the legislative body of Sanbornton granted enforcement authority to separate land use bodies. Apx. I at 231.

The Intervener was obligated to apply to the ZBA for a permit to operate its proposed gravel pit for which the ZBA was obligated to hold a separate public hearing. RSA 155-E:3; RSA 155-E:7-8. Since the Intervener did do that, it is currently operating its gravel pit illegally and the trial court order must be reversed.

B. A water truck parked onsite for use when fugitive dust is observed is not evidence of compliance with Env-A-1000.

Pursuant to RSA 21-0:1(g) the New Hampshire Department of Environmental Services ("NHDES") has granted authority to regulate air emissions in accordance with RSA Chapter 125-C to protect public health, welfare and safety. RSA 125-C:1. Air pollution is defined by RSA 125-C:2 as:

> *"…the presence in the outdoor atmosphere of one or more contaminants or any combination thereof in sufficient quantities and of such characteristics and duration as are or are likely to be injurious to public welfare, to the health of human, plant, or animal life, or cause damage to property or create a disagreeable or unnatural odor or obscure visibility or which unreasonably interfere with the enjoyment of life and property."*

(emphasis, supplied). Fugitive dust is included among "*air contaminants*" listed in RSA 125-C:2(II). N.H. Code Admin. R. Env-A 101.88 defines fugitive dust as:

> "*uncontaminated particulate matter arising from industrial activities, including but not limited to emissions from haul roads, wind erosion of exposed surfaces and storage piles, and other removal, storage, transportation or distribution*."

Fugitive dust hangs in the air when human activity disturbs earthen materials, causing them to be disbursed into the air where they are most often invisible to the human eye. RSA 125-C:2(IX-f); N.H. Code Admin. R. Env-A-1002. As reported by NHDES, silica, the small particulates of fugitive dust, have been found to cause cancer, bronchitis, lung damage and asthma, in addition to environmental damage. Apx. I at 56.

Almost all gravel pits, including the Intervener's require an alteration of terrain permit, a condition of which requires the operator take precautions to prevent, abate and control fugitive dust emissions carried beyond the boundary of their property. RSA 485-A:17; N.H. Code Admin. R. Env-A-1000; Apx. I at 113 (Note 5)*(emphasis, supplied).* Measures taken to abate fugitive dust and keep it from traveling beyond the limits of a gravel pit site include, but are not limited to, spraying with water and/or hydrophilic materials, constructing wind barriers, applying asphalt or tarps, or the use of vacuums to collect airborne particulates. N.H. Code Admin. R. Env-A 1002.03(a); See also N.H. Code Admin. R. Env-A 2805.01.

The Plaintiff, a direct abutter to the north and Abutter Seavey, a direct abutter to the south, both testified during ZBA's 2 public hearings about the gravel pit operation and its associated heavy commercial truck traffic creating fugitive dust and excess noise that would impact them and their property. Apx. I at 44 & 125. The Intervener's Business Plan estimated at least 60 dump trailers will pass by their homes each weekday, (approximately 1 every 10 minutes), raising fugitive dust and creating excess noise. Apx. 1 at 118.

The Business Plan States:

> *"A fully functional dust control water truck shall be maintained on the site through the excavation activities. The water truck shall be utilized for dust suppression at any time airborne dust is observed on the property".*

Apx. I. at 120. Despite Article 18(B)(3)(a) requiring evidence be submitted to show the public's health, safety and welfare would be protected and the Intervener's AOT Permit requiring compliance with N.H. Code Admin. R. Env-A-1002, this was the only evidence the Intervener provided to address fugitive dust other than telling one ZBA member during the February 23, 2021 hearing that OSHA regulates fugitive dust when OSHA protects workers, not residents living next to a gravel pit. Apx. I at 125. N.H. Code Admin. R. Env-A-1002.02(a).

In addition, although Bernier represented to the ZBA "*berms"* and a *"tree buffer"* would surround the Property to protect abutting property owners, both Seavey and the Petitioner reported to the ZBA the tree buffer had been removed in many areas originally identified by ZBA Member Bormes as very close to an abutter during the initial hearing. Apx. I at 45.

No evidence was submitted to the ZBA showing how fugitive dust would be prevented, abated or mitigated to protect abutting properties from fugitive dust being carried by air beyond the boundary of the Property was

submitted, other than a note in the Business Plan stating a water truck would be dispatched if fugitive dust was observed. Apx. I at 118. This is not enough because silica most often cannot be seen with the human eye. The conclusory statements made in the Business Plan without more are not enough evidence to support a favorable finding on the Intervener's efforts to protect public health, welfare and safety as required by Article 18(B)(3)(a) or to demonstrate compliance with N.H. Code Admin. R. Env-A-1000. Barrington East Cluster I Unit Owners' Assoc. at 631; Jensen's, Inc. at 765. Accordingly, the trial court's decision must be reversed.

C. The Trial Court Erred When It Held Evidence Addressing Noise Within the Limits of the Property Was Sufficient.

Noise is also a recognized health hazard and often rises to the level of private nuisance. Robie v. Lillis, 112 N.H. 492, 495 (1972). The Code of Federal Regulations and New Hampshire Department of Transportation ("NHDOT") regulate noise created by highway traffic and construction to protect public health and welfare by developing noise abatement criteria made available to local officials. https://www.ecfr.gov/current/title-23/chapter-I/subchapter-H/part-772. Noise abatement measures apply to all federal and state[6] highway construction projects in New Hampshire and is no different from a gravel pit operation. Id.

In addition to the Plaintiffs' Property, the Seavey property, the Property owned by the Intervener and several other residential properties with frontage along Johnson Road are bounded by I-93 to the east. Apx. I at 3. Adding the noise from a full-time gravel pit operation with its 60 dump trailers trips per day to the ongoing hum of high-speed traffic along I-93 may rise to the level of private nuisance and unreasonably interfere with

[6] https://www.nh.gov/dot/org/projectdevelopment/environment/units/program-management/noise-barrier.htm.

surrounding residents' quiet enjoyment of their land. Id. at 499.

At least twice, the ZBA represented to the public and the abutters, the Intervener would be submitting a noise study. Apx. I at 45 & 47. Yet during the February 23, 2021 hearing, when Bernier announced no noise study would be submitted because the Town does not have no noise ordinance, the ZBA minutes show it said nothing when it had previously required a noise study from Bullfish and had represented to the public a noise study would be submitted. The ZBA is without authority to waive a requirement they represented would be met. Tidd at 427. For this reason, the trial court's order must be reversed.

II. THE COURT ERRED WHEN IT HELD THE ZBA HAD CONCURRENT JURISDICTION WITH THE PLANNING BOARD TO RESOLVE DISPUTES ABOUT THE ACD LOCATION.

The interpretation of the language in a zoning ordinance is a question of law for the court. Town of Carroll v. Rines, 164 N.H. 523, 528 (2013). A zoning ordinance is permissive when it prohibits uses other than those it expressly permits. Id. at 52. Undoubtedly, and pursuant to Article 4(B) of the Ordinance, because only uses listed are permitted, the Ordinance is a permissive Ordinance. Id.

Town of Sanbornton Zoning Ordinance

Article II of the Ordinance describes property within the Town as divided into 6 zoning districts: (a) General Agricultural; (b) General Residence; (c) Forest Conservation; (d) Recreational; (e) Historical Preservation; and (f) Commercial.[7] Apx. I at 146. In addition to its baseline districts, land within Sanbornton is also subject to 5 overlay districts: (a) The Aquifer Conservation District; (b) Floodplain Conservation District; (c) Shorefront District; (d) Wetlands Conservation District; and (e) Steep

[7] The Highway Commercial District was eliminated in 2006.

Slope Conservation District. Apx. I at 210; 212, 220, 222 & 227.

The specific location of an overlay district is defined by reference to a specific map or by licensed professionals identifying the protected resource on the land to which the applicable setbacks are applied. Schroeder v. Windham, N.H. 187, 191 (2008). Each overlay district in the Ordinance, except for the Flood Plan Conservation District, expressly states conflicts between the baseline district and any overlay shall be resolved by the Planning Board, with the more restrictive regulations controlling. Apx. I at 210 (Art. 12(C)); Apx. I at 212 (Art. 13(B)); Apx. I at 220 (Art. 14(B)); Apx. I at 220 (Art. 14(B)); Apx. I at 224 (Art. 15(D)); Apx. I at 228 (Art. 16(C)).

Article 4(B), relative to the "*General Provisions"* of the Ordinance expressly provides that sand, gravel, rock, soil or construction aggregate may be removed from the General Agricultural or Forest Conservation District. Apx. I at 155. Article 4(D) makes clear: *"[N]o uses other than those specified in this ordinance shall be permitted."* Apx. I at 156. Other uses applicable across all Districts generally are also described in Article 4. Apx. I at 155-200. Although RSA 155-E:11 and RSA 674.19 both authorize municipalities to adopt regulations to control excavations, Sanbornton has not done so and despite the single statement in Article 4(B), the Ordinance does not define "excavation", "gravel" or "aggregate" under its Definitions section nor do these terms appear anywhere else in the Ordinance. Apx. I at 147-153.

Aquifer Conservation District

Article 12(A) of the ACD states its purpose is to promote the health, safety and welfare of Town residents by protecting groundwater resources. Apx. I at 210. The ACD's location is defined by reference to the Town Aquifer District Map (SP78001) prepared by the United States Geological

Survey ("USGS") which shows hatched areas where a medium or high yield aquifer at a very large scale may exist. Apx. I at 210 & 131-133. Article 12(B) expressly states conflicts as to the location of the ACD shall be resolved by the Planning Board. Id. Permitted uses listed in the ACD do not include gravel pits, excavation or the removal of aggregate. Apx. I at 210-211. As a permissive ordinance and contrary to the trial court's order, a gravel pit is not a permitted use in the ACD. Apx. I at 210-211.

Further supporting the Planning Board's exclusive authority, Andrew Sanborn, Chairman of the Sanbornton Planning Board emailed the Town planner after the Application was approved and attached a copy of the Town's Water Resource Map from the Master Plan and told him the Town's 1978 Aquifer Map was on file at the Town hall. Apx. I at 130-133. Mr. Sanborn had previously contacted the Town Planner on February 4, 2021 to alert him of caselaw he found regarding a variance where RSA 155-E was at issue, but presumably received no response. Apx. I at 116.

Contrary to certain statements by Bernier and the ZBA about the Town studying whether the Property is located in the ACD for 5-6 years also have no merit. Apx. I at 126. Bullfish retained Geoinsight, Inc. in 2015 to conduct corings on the Property to quantify how much gravel could be removed. Apx. I at 35-38. No wells were drilled and the Geoinsight report expressly states it offered no opinion on whether the Property was subject to the ACD. Id. In 2016 when Bullfish was before the ZBA, Terracon recommended to the ZBA that bedrock penetrating wells be drilled to monitor groundwater levels over time, which was when Bullfish abandoned its application because Bullfish did not want to drill wells. Apx. I at 45. GSI drilled non-bedrock penetrating wells in 2020, two months before the State of New Hampshire was declared to be in a historic drought. https://www.drought.gov/location/03220. Upon information and

belief, GSI measured the water levels in those well on or about April of 2020 and MMI remeasured those water levels before December 17, 2020, approximately, the water 8 months later. Apx. I at 100. The MMI report concurred with the 2016 Terracon report as well as GSI's, leaving the nature and character of any aquifer an open question.

The chart prepared by Calex attached to the Rehearing letter is instructive and shows how close the water levels measured during the drought period were to meeting the definition of a medium yield aquifer. Apx. I at 138. Since the question of whether the Property is subject to the ACD remains unanswered, the Plaintiffs request this Court reverse the trial court order and remand this case back to the Sanbornton Planning Board to determine whether the Property is encumbered by the ACD as was directed by Sanbornton's legislative body. Apx. I at 139.

CONCLUSION

The ZBA acted illegally and unreasonably when it did not demand the Intervener submit sufficient evidence to support a favorable finding on each standard to be met to secure an approval of its special exception under Article 18(B)(3)(a). Fugitive dust and noise are both recognized health hazards requiring the ZBA assure its own residents they will be protected from these risks by making sure a profit-making entity take measures to prevent, abate and mitigate them to the greatest extent possible as the proposed use of the Property is wholly inconsistent with the farms and dwellings described in the Ordinance as the GAD.

Having tractor trailer dump trucks barreling by your home every 8-10 minutes per day in addition to the ambient hum of high-speed traffic moving along I-93, is not reasonable, nor is it harmonious with the general location where the Property is located. The ZBA has a statutory obligation to enforce its Ordinance and ignored the safeguards found in Article

18(B)(3) of the Ordinance. The ZBA's decision regarding the Application was made under RSA 674:33 and does not also as the permit issued by the regulator required by RSA 155-E:3.

As to the ACD, the Ordinance says what it says and could not be clearer. The ZBA has no authority to unilaterally change the directive of the Town's legislative body that only the Planning Board may settle conflicts regarding the ACD, and an appearance of unfairness does not change the express language in the Ordinance. The Plaintiffs respectfully request the Court reverse the trial court decision or remand this matter back to the applicable boards for further review.

REQUEST FOR ORAL ARGUMENT

Pursuant to New Hampshire Supreme Court Rule 16, Plaintiffs' request 15 minutes for oral argument to be presented by Patricia M. Panciocco, Esq.

CERTIFICATION REGARDING THE APPEALED DECISION

I hereby certify that the appealed decision is in writing and appended to this brief.

Respectfully submitted,
Juliana Lonergan & David Lonergan

By their attorneys
Panciocco Law, LLC

August 22, 2022

/s/ Patricia M. Panciocco

Patricia M. Panciocco (Bar #15872)
One Club Acre Lane
Bedford, NH 03110
Phone: (603) 518-5370
E-mail: Pat@pancioccolaw.com

CERTIFICATE OF SERVICE

I hereby certify that pursuant to guidance from the Court Clerk's Office, the Brief and Appendices have been sent via e-mail to:

- Stephen M. Bennett, Esquire at sbennett@wadleighlaw.com
- Christopher J. Seufert, Esquire at cseufert@seufertlaw.com
- Christopher C. Snook, Esquire at csnook@seufertlaw.com

August 22, 2022 /s/ Patricia M. Panciocco

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within brief complies with Rule 16(11) of the New Hampshire Supreme Court Rules, and contains approximately 6,564 words, excluding the cover page, table of contents, table of authorities, statutes, rules, and appendix, etc.

August 22, 2022 /s/ Patricia M. Panciocco

DECISION BEING APPEALED

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

Hearing on the Merits held (12/16/21) on the appellants' Appeal of Decision by Town of Sanbornton Zoning Board of Adjustment Pursuant to RSA 677:4 (filed 5/19/21) and the Town's Answer to same (filed 6/25/21). Subsequent to review, the Court renders the following determination(s).

By way of brief background, this matter commenced on May 19, 2021 when the appellants, Juliana and David Lonergan, filed this appeal 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 ("the Intervenor"). Specifically, the appeal alleges the ZBA acted illegally and unreasonably when it granted a special exception for a use not permitted in the district (Count I), the ZBA had no authority to alter the aquifer delineation shown on the aquifer map (Count II), and the record does not support the special exception criteria in RSA 155-E:4, III or Article 18(B)(3) of the Ordinance (Count III). On October 19, 2021, the Court granted the Town's Partial Motion to Dismiss as to Count I. (See Index # 27.)

Factual Background

The Court draws the following relevant facts exclusively from the Certified Record ("CR").

The Intervenor owns a 19-acre tract in the Town of Sanbornton's Genera Agricultural Zoning District. (CR at 28.) The property boarders Interstate Route 93 on its east and Johnson Road on its west. (Id.) Johnson Road is a Class V town road with residential development. (Id.) The appellants own a home located on a 12-acre property, which the Intervenor's property directly abuts to the south. (Id. at 8.)

The Intervenor applied for a special exception to the Town of Sanbornton Zoning Ordinance ("Z.O.") to operate a gravel pit excavation on the property. (Id. at 34.) As background, the Z.O. provides the ZBA authority to decide applications for special exceptions to the Zoning Ordinance via public hearing. Z.O. Article 18.B. This includes, "the use of land for the excavation or removal of earth material for commercial use or sale within the town." Z.O. Article 18.B(3). In order to approve same, the ZBA must find the conditions in subsections (a) – (f) satisfied:

> (a) The activity will not impair the health or property of others or create a hazard to life or property generally;
> (b) 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;
> (c) The operation will not have an adverse effect on Town maintained roads and the ZBA requires adequate surety to repair Town roads if adverse effect on Town roads is in question or when the road is incapable of handling anticipated hauling;
> (d) The operation shall not adversely impact the normal flow of traffic or use of Town roads by residents and the ZBA may restrict commercial vehicles hauling to and from the operation to insure this requirement is met;
> (e) 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 who shall be responsible for an on-site inspection and control the release of any portion or all of the surety; and
> (f) All requirements of NH RSA 485-A:17 and NH RSA 155-E have been met with the enforcement powers of RSA 676:15, RSA 676:17 and RSA 676:17-a.

Id.

On August 25, 2020, the ZBA conducted its first hearing related to the application. (CR at 33.) Tim Bernier presented the Intervenor's position and explained that no crushing or blasting would occur on-site. (Id.) 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. (Id.) During this time, 30-ton trucks would drive down Johnson Road and exit south on I-93 to deliver the gravel. (Id.)

Counsel for the Intervenor, Attorney Chris Seufert, provided the ZBA the results of two studies on the impact of real estate values of homes located near gravel pits. (Id. at 35.) The first was a national study showing a negligible price difference. (Id.) The second focused on home sale prices within two miles of gravel pits in Boscawen, Bow, and Pembroke New Hampshire, finding a negligible price difference and even an actual increase in one area. (Id.) ZBA members pointed out the properties did still decrease, though negligibly, and that said studies were in mixed commercial and residential zones, whereas Johnson Road is only residential. (Id.)

At this point, the appellant Julie Lonergan expressed concern about fugitive dust and the location of an aquifer within the area. (Id.)

Another issue before the ZBA was whether the area lies within the Town's Aquifer Conservation District ("ACD"). Only medium or high-yield aquifers constitute ACD districts. Z.O. Article 12.B.

The Z.O. defines same as the following:

> . . . [T]hose areas which are delineated as having medium and high potential to yield ground water by the United States Geological Survey and shown on the Town Aquifer District Map (SP78001). Where the bounds, as delineated, are in doubt or in dispute the burden of proof shall be upon the owner(s) of the land in question to show where they should properly be located. At the request of the owner(s), the Planning Board may engage a professional geologist, hydrologist, or soil scientist to determine more accurately the location and extent of an aquifer area, and may charge the owner(s) for all or part of the cost of the investigation. The delineation can be modified by the Planning Board upon receipt of findings of the detailed on-site survey techniques.

Id.

The Z.O. continues to list several permitted uses, none of which contain reference to excavation or gravel pits. Id.

Harry Weatherbee from Geotechnical Services Inc. provided a new geological study of the aquifer and found not even the presence of a low-yield aquifer. (Id.) The ZBA noted a previous study conducted by a third-party firm had determined instead that more testing was needed. (Id.) The ZBA noted seasonal changes could impact same, but the Intervenor responded said changes would not be drastic. (Id.) The meeting ended with the determination that more studies were needed. (Id.)

On October 27, 2020, the ZBA held another meeting to review quotes for third-party review of the property's hydrogeological study. (Id. at 37-38.) The ZBA selected Milone & Macbroom over proposals submitted by Calex and Keach-Nordstrom. (Id. at 38.) The scope of work Milone & Macbrook proposed was more extensive than the

others and included testing and site reconnaissance as well as reviewing the existing study, though ZBA Member Paul Dexter noted same was not in line with that which was asked. (Id.)

On December 22, 2020, the ZBA held a third meeting on the application to review the third-party review of the hydrogeological study. (Id. at 41.) Gina Gulseth of Milone & MacBroom explained her findings: having remeasured the water levels in the existing wells she was in agreement that only a low-yield aquifer was present on the property. (Id.) She did not believe precipitation would cause a significant rebound. (Id.)

On February 23, 2021, the ZBA held a meeting to vote on the application. (Id. at 42–44.) Within same, Bernier represented that the gravel pit operation will meet RSA 155-E. (Id.)

He also 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 origin of excavation. (Id. at 42.) Trucks would be equipped with white noise back-up alarms. (Id. at 43.) No blasting or hammering of ledge would occur on site. (Id.) To protect the groundwater table, no digging was to occur within five feet of the water table. (Id. at 43.) Three test wells would remain on the property. (Id.)

The operation of the gravel pit was now to be within 7 AM and 5 PM Monday through Friday, except for holidays. (Id.) The Intervenor estimated the pit would operate for 3.1 years, pending market conditions. (Id.) No more than five acres would be mined at a time. (Id.)

Trucks entering and leaving the site would only travel south on Johnson Road. (Id.) In addition, the Intervenor would post surety bond of $35,000 for the Road. (Id.)

An asphalt skirt at the access point would protect the shoulder of Johnson Road. (Id. at 42.)

Fugitive dust was also discussed, as the Intervenor presented that same is only usually seen in large operations of 100 acres or more, with tall piles of material; this operation would cover only 19 acres and no stockpiling would occur. (Id. at 43.) Furthermore, a water truck would be on-site to assist in mitigating dust. (Id.) Crushed stone was to be added to clean truck tires when exiting. (Id. at 42.)

Counsel for the appellants averred at the hearing that the ZBA was not using the Town's 1978 ACD map to determine the presence of an aquifer ordinance. (Id. at 44.) She further stated that the Intervenor would need to prove to the Planning Board that a significant aquifer was not present. (Id.) The ZBA reiterated its study of same and that it would not be presented to the Planning Board as a medium or high yield aquifer was not present. (Id.)

The ZBA passed the Motion 4-1 to grant the special exception. (Id.)

On March 24, 2021, the appellants filed their Motion for Rehearing. (Id. at 236–241.) On April 20, 2021, the ZBA met to discuss the appellants' request for rehearing, denying same by 4-1 vote. (Id. at 45–46.) Thereafter, the appellants filed this appeal on May 19, 2021. (See Index # 1.)

Standard of Review

"Any person aggrieved by any order or decision of the zoning board of adjustment . . . 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 . . . ." RSA 677:4 (2016). "The petition shall set forth that such decision or order is illegal or unreasonable." Id.

"In an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the [ZBA] . . . to show that the order or decision is unlawful or unreasonable." RSA 677:6 (2016). When reviewing a decision of the ZBA, the "factual findings of [the ZBA] are deemed prima facie lawful and reasonable, and [its] decision will not be set aside by the [Court] absent errors of law unless it is persuaded by the balance of probabilities, on the evidence before it, that the [ZBA's] decision is unlawful or unreasonable." Roberts v. Town of Windham, 165 N.H. 186, 189–90 (2013); see also id.. The standard of review is not whether the Court would find as the ZBA did, but whether the evidence reasonably supports the ZBA's findings. See Hussey v. Town of Barrington, 135 N.H. 227, 231 (1992). If any of the ZBA's reasons "support its decision, then [the petitioner's] appeal must fail." Bayson Props., Inc. v. City of Lebanon, 150 N.H. 167, 173 (2003).

On appeal, the appellants argue the ZBA erred in two ways.[1] (See generally Index # 32.) First, they argue that only the Planning Board may establish the geographic limits of the ACD. (Id. at 16.) In addition, they submit that the Intervenor's evidence does not satisfy the special exception criteria of Article 18(B)(3). (Id. at 12.) Specifically, they emphasize same in the context of fugitive dust and noise as air pollution. (Id. at 13-16.)

The Town disagrees, arguing first that the ZBA did not alter the aquifer delineation shown on the Aquifer Map. (Index # 30 at 4-5.) In addition, it argues that the ZBA did not err in granting the Intervenor's special exception application. (Id. at 5-8.)

[1] As noted above, the Court dismissed Count I in its October 19, 2021 Order. (See Index # 27.)

The Intervenor further disagrees with the appellants, first arguing that their application was not subject to the ACD and that the ZBA had sufficient evidence to find that no damage to a known aquifer would result from the gravel pit. (Index # 29 ¶18.) In addition, they submit that the ZBA did not err in granting the application as it addressed the requirements of both Z.O. Article 18(B)(3) and RSA 155-E:4, III. (Id. ¶¶28, 31.)

Discussion

Aquifer Delineation, Count II

The appellants submit that Article 12(B) of the Ordinance defines the Aquifer Conservation District ("ACD") and that only the Planning Board may modify same. Furthermore, they aver that the ACD does not list excavations as a permitted use; therefore, the stricter regulations of same apply, as per Z.O. Article 4(D). They further aver that contrary to certain ZBA members' statements, whether the property is located within the ACD has not been studied for 5–6 years. They submit that the first engineer to study whether the property was located within the ACD produced a report in 2020, two months before New Hampshire was declared to be in a historic drought. The chart Calex Environmental Consulting prepared in its proposal demonstrated that the property was close to being within a medium-yield aquifer. They assert the ZBA ignored said report and declined the appellants' request for an independent third party to monitor the water levels as a condition of approval.

The Town argues that the Ordinance permits excavation for commercial use within any zoning district by special exception. Furthermore, a requirement of granting same is that the ZBA find no adverse impact on the environment including damage to a

known aquifer. They submit that none of the reports concluded the excavation would damage said aquifer. With regards to the ACD, they aver that the property is not within same as it is a low-yield aquifer.

The Intervenor argues that the ZBA did not alter the boundaries of the ACD, as the site is located within a low-yield aquifer. Furthermore, it avers that the Z.O. allows the ZBA to permit the use of land for excavation in any zone within the Town regardless of ACD status, so long as a known aquifer would not be damaged. It also notes that it has been found to be in compliance with its Alteration of Terrain permit by the New Hampshire Department of Environmental Services on 02/22/2021.

Upon review, the Court finds that the ZBA had authority to grant the special exception, regardless of whether the site is located within the ACD. The Z.O. provides the ZBA a general authority to grant special exceptions for "excavation and removal of earth material." Z.O. Article 18(B)(3). Nothing within the relevant ordinances can reasonably be construed to limit or eliminate this authority within the ACD. Accordingly, the Court finds an insufficient basis to overturn the ZBA's decision on this matter.

Furthermore, the Court also notes that nothing in the Z.O. grants exclusive authority to the Planning Board to modify the delineation of the ACD. That the Z.O. states "the Planning Board may engage a professional geologist" or "[t]he delineation can be modified by the Planning Board" does not mean that the ZBA lacks concurrent authority over same. Furthermore, that the Z.O. requires the ZBA to consider whether or not an excavation would harm an aquifer when granting special exception, without any qualifying language limiting same to only

the low-density aquifers that would be outside the purview of the ACD, suggests that the ZBA has authority not only to modify the ACD but also to grant special exceptions for excavations within same.

In reference to Count II, the Court finds the appellants have not satisfied their statutory burden, as reviewed above, and accordingly the Court rules in favor of the Town and Intervenor.

Special Exception Criteria, Count III

The appellants argue that the application ignores air and noise pollution and how the property's proposed use will impact abutters and residents of Johnson Road. Specifically, they argue that other than the presence of a water truck, the Intervenor's plan offers no efforts to prevent and control "fugitive dust" created by trucks. Furthermore, they aver that the Intervenor's compliance with RSA 485-A:17 is not dispositive of same. They also submit that the berms and tree buffer were removed in many areas. In addition, they submit that the noise the gravel trucks create constitutes a nuisance by creating a tangible interference with their quiet enjoyment of their land. They aver that the Intervenor did not submit a noise study only because the Town has no noise ordinance.[2]

The Town argues that, contrary to the appellants' claims, the provisions of RSA 155-E:4 do not apply, because the Town directly addresses excavation permits via special exception within the Ordinance. Furthermore, they submit that two studies demonstrated negligible, if any diminution of value in residential

[2] Although omitted from their Trial Memorandum, the underlying Appeal initially submitted that no evidence was submitted to confirm residential property values would not be diminished, to evaluate noise and dust caused by trucks traveling down Johnson Road, or to determine whether a medium or high-yield aquifer existed along with plans for monitoring the water levels of same.

property. In addition, they aver that the Intervenor will provide mitigating measures for dust and noise. They argue that the Intervenor addressed the issue of "fugitive dust" and that same does not apply to this excavation. They submit that the excavation has not been shown to be unsafe to Johnson Road; they have required the Intervenor post a surety bond to cover potential wear and tear. Also, to prevent damage to a known aquifer, the Intervenor must not excavate within five feet of the groundwater table and it shall maintain three test wells to monitor the level of same. The Intervenor provides further detail to the ZBA's arguments and joins in their position.

Upon review, the Court finds that the provisions of RSA 155-E:4, III do not apply to the Intervenor's application. Specifically, the statute applies only in instances "when excavation is not permitted by zoning or other applicable ordinance." RSA 155-E:4, III. Here, Article 18.B(3) provides the ZBA broad authority to grant special exception for the purpose of excavation. See Article 18.B(3). The Court finds this Z.O. sufficient to remove the ZBA from the purview of RSA 155-E:4, III. See Arthur Whitcomb, Inc. v. Town of Carroll, 141 N.H. 402, 408 (1996) ("The inclusion of § E:4, III makes sense only if the legislature generally intended chapter 155–E to preempt local land use regulations except where specifically indicated to the contrary") (emphasis added).

Furthermore, the Court finds the appellants have not met their burden in establishing that the ZBA acted unreasonably or unlawfully in evaluating the issues of diminution of property values, the widening of Johnson Road, fugitive dust, noise, and potential damage to a known aquifer.

A. Property Values

Although the Court notes that the provisions of RSA 155-E:4, III do not apply, had same been relevant, the appellants still did not meet their burden. Specifically, the Intervenor supplied the ZBA with two reports that demonstrated negligible, if any negative impact on same. CR at 146–182; 183–228. Both reports specifically studied residential properties. As these reports support the ZBA's position, the appellants' arguments are ineffective. Bayson Props., Inc. 150 N.H. at 173.

B. Johnson Road

Consistent with the requirements of Article 18.B(3)(c)-(d), the Intervenor's application provided evidence for the ZBA to find the excavation would not adversely impact the Town's roads. Specifically, Johnson Road is a Class V road that has been recently improved and repaved. CR at 23. In consideration of potential wear and tear, the ZBA required the Intervenor to post a $35,000 surety bond. Id. at 43. Furthermore, the relevant portion of the road will only see traffic during normal business hours. Id. at 23. Accordingly, the above provides sufficient support for the ZBA's position and the Court will affirm same. Hussey, 135 N.H. at 231.

C. Fugitive Dust

The Court finds the evidence presented to the ZBA to be sufficient to support that the excavation will not impair the health of others. Specifically, the evidence established that fugitive dust is only a problem with excavations of over 100 acres with standing piles of material. CR. at 43. This excavation will consist

of only 19 acres in total and no earth materials will be stockpiled on site. Id. Furthermore, the Intervenor provided additional actions to reduce dust, including a crushed stone area to clean truck tires while exiting, a water truck on site to prevent escaping dust, and the covering of all trucks exiting the property. Id. Accordingly, the evidence reasonably supports the ZBA's findings. Hussey, 135 N.H. at 231.

D. Noise

In the context of noise, the Court finds he ZBA had sufficient evidence that the noise produced by the proposed use would not impair the health of others.[3] The noise mitigation efforts, including "white noise" alarms, a berm around the site, and required setbacks provide a reasonable basis for the ZBA's determination. CR at 20–21. Accordingly, the ZBA had reasonable evidence to believe the noise would be no louder than the existing noise from I-93. Id. Therefore, the evidence reasonably supports the ZBA's findings. Hussey, 135 N.H. at 231.

E. Aquifer

The Court finds the ZBA had reasonable evidence to determine that the gravel pit would not damage a known aquifer. The ZBA provided a variety of safeguards and obligations on the Intervenor to ensure the safety of same. Specifically, the Intervenor must maintain three wells to monitor groundwater levels and is prohibited from excavating within five feet of the groundwater table,

[3] Although the appellants argue that the excavation constitutes a private nuisance, the Court views a ZBA appeal to be the improper context to make said determination. Specifically, this appeal was brought to determine if whether the ZBA's decision was unreasonable or unlawful, not to maintain a private nuisance cause of action against the Intervenor.

as measured by said wells. CR. at 21. Accordingly, the ZBA had reasonable evidence to believe a known aquifer would not be damaged and therefore the Court will uphold its determination. Hussey, 135 N.H. at 231.

In reference to Count III, the Court finds the appellants have not satisfied their statutory burden, as reviewed above, and accordingly the Court rules in favor of the Town and Intervenor.

Conclusion

In sum, the ZBA considered the facts and testimony before it and concluded that the Intervenor met the criteria for a special exception. After a review of the Record, the Court finds ample evidence to support the ZBA's decision, as discussed above. This evidence reasonably supports the ZBA's findings.

Accordingly, the petitioner's Verified Appeal Pursuant to RSA 677:4 is DENIED, consistent with the above. The respective determinations of the ZBA are AFFIRMED.

SO ORDERED.

2/15/22
Date

James D. O'Neill, III
Presiding Justice