THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2022-0142

TOWN OF DUNBARTON
JULIANA LONERGAN & DAVID LONERGAN

v.

TOWN OF SANBORNTON

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

Docket No.: 211-2021-CV-00102

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

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INTRODUCTION

Julie and David Lonergan ("Plaintiffs") who reside on the 12-acre parcel known as 181 Johnson Road in the Town of Sanbornton, New Hampshire ("Plaintiffs' Property") submit this Appellants' Reply Brief in support of this Court vacating the February 15, 2022 order issued by the Belknap County Superior Court affirming the Town of Sanbornton Zoning Board of Adjustment ("ZBA") approval of the Application for Appeal submitted by R.D. Edmunds Land Holdings, LLC ("Intervener") requesting a special exception to operate a gravel pit on the 19.9-acre tract directly abutting the Plaintiffs' Property ("Intervener Property" or "Property").

ISSUES PRESERVED

Questions presented to the Court for review must be expressed in terms and circumstances of the case, without unnecessary detail and be generally the same issues raised to the lower tribunal. N.H. Sup. Ct. R. 16(b). Those questions also necessarily include subsidiary questions. Id. This policy encourages early review and correction of errors, but this Court is not bound by this rule. State v. Batista-Salva, 171 N.H. 818, 822 (2019). Further, acknowledging the plain language of a statute, or the express language appearing in an ordinance, does not raise a new issue for Court review.

The Brief of Appellee Town of Sanbornton ("Town" or "Appellee") and the Intervener's Memorandum of Law claim various issues were not preserved for review despite the "Questions Presented" in the Plaintiffs' Rule 7 Notice of Mandatory Appeal ("Notice of Appeal") being almost identical to the issues raised in the Plaintiffs' March 24, 2021 Motion for Rehearing ("Rehearing"). Apx. I at 123. The Plaintiffs do not request the

Court review other "issues" not within the ambit of those formerly raised in the Notice of Appeal.

I. A GRAVEL PIT IS NOT HARMONIOUS WITH RESIDENTIAL USE.

All the properties discussed in this case are in the General Agricultural District ("GAD"). The Town of Sanbornton Zoning Ordinance ("Ordinance") describes the GAD as "*... mainly a District of farms and dwellings…"*. Apx. I at 201. Article 4(A) [1] of the Ordinance permits "*sand, gravel, rock, soil or construction aggregate"* to be removed in the GAD, but only when it is for a public use. Apx. I at 155. Other uses permitted in the GAD include tourist and manufactured homes, churches, schools, hospitals, sanitoria, golf courses and private airfields. Apx. I at 155 & 201. Gravel pits and excavations are not included amount the permitted uses listed in Article V(A)(1) which also states: *"No other purposes than those specified here will be permitted."* Apx. I at 201.

The area in which the Plaintiffs' Property, the Intervener's Property and other single-family homes along Johnson Road are located is described as "*strictly residential"*. Apx. I at 47. Even the Trial Court's Order acknowledged: *"Johnson Road is a Class V town road with residential development"*. Ord. at 2. The Intervener's Application requested the ZBA approve a *"special exception"* pursuant to Article 18(B)(3) to operate a commercial gravel pit in a *"strictly residential"* area. Apx. I at 4. The Application did not request an excavation permit from the local regulator pursuant to RSA 155-E:3 as part of the Application. Id.

Zoning boards have authority under RSA 674:33, IV to approve special exceptions when the proposed use will be *"harmonious"* with the

[1] Article IV describes provisions applicable to all zoning districts.

general spirit and intent of the ordinance, provided the applicant submits sufficient evidence to satisfy the elements set forth in the ordinance. RSA 674:33, IV(a). When a proposed use of property will be disruptive or injurious to abutters and existing residents, or the evidence submitted does not fully satisfy the ordinance elements, the board must deny the application as contrary to the public welfare. Tidd v. Town of Alton, 148 N.H. 424, 427 (2002)*(trial court affirmed board decision denying application due to traffic, noise, smoke and dust being a serious hazard and potential nuisance)*; Barrington East Cluster I Unit Owners' Ass'n v. Town of Barrington, 121 N.H. 627, 630-631 (1981) *(trial court reversed board decision and remanded due to lack of evidence supporting elements of ordinance)*; Jensen's Inc. v. City of Dover, 130 N.H. 761, 765 (1988) *(trial court reversed board approval due to lack of evidence confirming pedestrian safety)*. Traffic, noise and dust are particularly problematic when proposed by a non-permitted use in a residential/rural setting as is demonstrated by these authorities referenced above. Id.

The *"public welfare"* has been found to include spiritual, physical, aesthetic and monetary benefits, all of which are especially important in residential areas or where schools are located. NBAC Corp. v. Town of Weare, 147 N.H. 328, 333 (2001) (*affirming denial of an excavation permit close to downtown and local schools due to concerns about traffic, safety, aesthetics and a potential aquifer).* A commercial gravel pit operating daily from 7:00 am to 5:00 pm from a parcel located in the middle of a residential area is not only invasive to residential uses it is contrary to public health, safety and welfare, and explains why a special exception for excavation allowed under RSA 155-E:4(III) when zoning wholly excludes that use only applies to non-residential sites.

A. Gravel Pits Create Noisy Traffic.

As represented in the Intervener's *"Business Plan & Mitigation Standards"* ("Business Plan") submitted by T.F. Bernier, Inc. ("Bernier") shortly before the ZBA's February 23, 2021 public hearing, sixty-four (64) 18-wheel dump trailers, each weighing approximately 30 tons, will travel by the residential homes located along Johnson Road each weekday at the rate of one (1) dump trailer every 8-9 minutes, for the next 3-4 years until the excavation reaches a depth of 40 feet. Apx. I at 118; Apx. I at 46. Contrary to claims made in Appellee's Brief, the noise generated by this operation is not limited to dump trailers entering and exiting the Property and the operation of onsite equipment. Appellee's Br. at 26. The Business Plan also attempts to minimize the noise and dust created by this type of traffic traveling every 8-9 minutes along Johnson Road by stating it is "*less than that generated from the Interstate",* when in fact the noise created by this truck traffic will be in addition to the Interstate noise. Apx. I at 119. Although Article 18(B)(3)(b) allows the ZBA to restrict commercial vehicles hauling to and from an approved excavation, the ZBA minutes confirm this option was not considered to protect the Plaintiffs and other residents. Apx. I at 231.

The complete lack of evidence in the record supporting various statements made by T.F. Bernier, Inc. ("Bernier") and the ZBA's decision is perhaps best illustrated when certain ZBA member expressed concerns about being unfair to the Intervener when the Plaintiffs reminded them about the noise study they promised and questioned why matters relating to the Aquifer Conservation District ("ACD") where not presented to the Planning Board despite it being responsible to protect the welfare and property rights of existing residents. Apx. I at 124-126. This misguided reversal of priorities is also illustrated by the ZBA representing the Intervener would need to provide the same studies as the prior applicant, a

noise study but not requiring their submission before approving the Application. Apx. I at 46; Apx. I at 124-126. Noise abatement is required for all federal and state road construction projects, regardless of where they are located. Pl. Br. at 45. Yet, the ZBA accepted Bernier's statement that no noise study would be submitted because the Town had no noise ordinance and remained silent. Apx. I at 125. Rather than pushing back and advocating for its own residents because such a study would provide meaningful data as to whether a gravel pit operation would be harmonious with other permitted residential uses in the area, the ZBA said nothing and went on to approve the Application. Apx. I. at 126. Bernier opposed the submission of a noise study because he knew its results would show not harmonious with the strictly residential use in the area.

B. Gravel Pits Create Unnecessary Fugitive Dust.

Fugitive dust is an air contaminant defined by N.H. Code Admin. R. Env-A-101.88 and the New Hampshire Department of Environmental Services ("NHDES") is authorized to regulate its mitigation under RSA 125-C. Municipal regulators are also obligated to ensure excavation operators comply with N.H. Code Admin. R. Eng-A-1000 & 1002. RSA 485-A:17 and RSA 155-E, also require the measures described in N.H. Code Admin. R. Env-A 2805.01 be reasonably implemented by gravel pit operators.

As was the case with the Plaintiffs' concerns about noise, the only evidence submitted by the Intervener relative to the control of fugitive dust was the last statement made in the Business Plan stating:

> *"A fully functional dust control water truck shall be maintained on site throughout 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. The problem with this statement is that silica from gravel pits cannot be seen with the human eye. https://www.cdc.gov/niosh/topics/silica/risks.html. Ongoing exposure to silica particles hanging in the air is a known health hazard because it accumulates in the lungs over time without warning. Id. The installation of a water truck to be used *"when airborne dust is observed"* is wholly inadequate to address this concern because fugitive dust cannot be seen and will be left in the lungs of the residents long after the Intervener has exhausted the Property's resources. Id.

The Appellee's Brief also tries to argue other aspects of the Intervener's proposed excavation such as no blasting, no stockpiling and stone placed in access road, these factors were not presented to the ZBA as mitigating fugitive dust and are not listed in N.H. Code Admin. R. Env-A 2805.01. Although the Plaintiffs submitted the NHDES publication describing how to mitigate fugitive dust to the ZBA, they never discussed it. Apx. I at 53-60. Appellee's Br. At 32-34. In addition, although Bernier represented "*berms"* and a *"tree buffer"* surrounding the Property would protect the abutters, both Tracey Seavey and the Plaintiffs told the ZBA most of the tree buffer had already been removed before the August 25, 2020 initial public hearing. Apx. I at 45.

The problem here is the Intervener's proposed excavation is wholly incompatible with other uses permitted in the GAD and wholly misplaced in this residential neighborhood where its impacts extend well beyond the boundaries of the Property. Contrary to Article 18(B)(3)(a), the Intervener submitted no evidence demonstrating its proposed gravel pit would not harm the health, safety or welfare of the residents who live in the area and the ZBA is without authority to waive or alter this standard. Tidd at 427; Barrington East Cluster I Unit Owner's Ass'n at 630; Jensen's Inc. at 765.

II. THE ZBA HAS NO AUTHORITY TO ALTER OR LOCATE THE ACD.

It is undisputed that the Intervener's Property is in the GAD which also states: *"No other purposes than those specified here will be permitted."* Apx. I at 201. However, the Intervener's Property also appears as a hatched area on the *Town of Aquifer District Map (SP78001)* referenced in the Ordinance as showing potential areas the Town believed to be within the ACD. Apx. I at 210; Apx. I at 130-133. Article 12(B) defines the ACD as including areas where a medium or high yield aquifer exist and places the burden of proving otherwise on the property owner.

The Ordinance is also a permissive zoning ordinance because it expressly authorizes primary and incidental uses and excludes those not listed. Town of Carroll v. Rines, 164 N.H. 523, 526; Apx. I at 155. Article 18(B)(3) of the Ordinance initially appears to indiscriminately authorize the ZBA to grant special exceptions for excavation or the removal of earth material for commercial use in any zoning district within, or outside the Town limits. Apx. I at 230. Article 12(C) states to the extent a property is located in another district and also subject to the ACD, the stricter regulations of the ACD shall apply. Apx. I at 210. Gravel pits, excavations and the removal of aggregate are not listed as permitted uses in the ACD. Id. Consistent with RSA 155-E:11(II), the ACD is intended to promote the health, safety and welfare of Town residents by protecting the Town's groundwater resources. Apx. I at 210. To qualify, a special exception applicant under Article 18 (B)(3) must submit evidence showing its proposed use will not have an adverse impact on the environment or damage a known aquifer. Apx. I at 210. There is nothing in the record to show this other than a self-imposed depth restriction without any enforcement mechanism. Apx. I at 120.

However, rather than submitting evidence to demonstrate how it intended to protect a potential aquifer, the Intervener's efforts were exclusively invested toward proving to the ZBA the Property was not subject to the ACD restrictions. Apx. I at 24.

When construing the language in a zoning ordinance, the court applies the rules of statutory construction and is not bound by a local board interpretation. Dartmouth Corp. of Alpha Delta v. Town of Hanover, 169 N.H. 743, 754 (2017); Town of Carroll v. Rines, 164 N.H. 523, 528 (2013). The plain language of Article 12(B) of the Ordinance states the Planning Board is charged with resolving questions regarding the location and extent of the ACD. Apx. I at 210. This language could not be more clear and states:

> *"The Aquifer Conservation District is defined as those 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 of 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 detailed on-site survey techniques."*

(emphasis, supplied). Contrary to the trial court's Order, the "ZBA" is not mentioned anywhere within Article 12. Apx. I at 210. Further, the ZBA has no authority under RSA 674:33 or any other enabling statute, to determine the location or extent of an environmental resource. Unfounded claims made by certain ZBA members about whether the Property being located in the ACD being studied for 5-6 years and concerns about being

fair to the Intervener are wholly irrelevant because the delegation of this authority to the Planning Board is crystal clear. Further statements that *"this project is not going to the Planning Board"* do not change the relevant language in Article 12(B) of the Ordinance and the zoning board is not authorized to legislate. Stone v. Cray, 89 N.H. 483, 487 (1938). For these reasons, the trial court erred when it held that the ZBA and Planning Board have concurrent jurisdiction to determine the location and extent of the ACD and the Court must vacate the trial court decision affirming the ZBA's approval.

CONCLUSION

Before approving the Application, the ZBA held only 2 public hearings[2] and purportedly also issued a regulator excavation permit to the Intervener for a commercial gravel pit on a 19.9 acre parcel located in a strictly residential area. Residents in this area may now except to experience at least one large dump trailer barreling by their home every 8-9 minutes, Monday through Friday because the ZBA made fairness to the Applicant's priority over the concerns raised by the Plaintiffs and other residents about the misplacement of a commercial gravel pit in their strictly residential neighborhood. If that wasn't enough, the ZBA then refused to send questions about the location and extent of the ACD to the Planning Board for review as expressly required by the Ordinance. The Plaintiffs request the Court vacate the trial court decision affirming the ZBA's approval and restore peace to their neighborhood.

[2] The other gatherings were public meetings.

STATEMENT REGARDING ORAL ARGUMENT

Juliana Lonergan & David Lonergan respectfully request 15 minutes for oral argument to be presented by Patricia M. Panciocco, Esq.

Respectfully submitted,
Juliana Lonergan & David Lonergan

By their attorneys
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October 11, 2022 /s/ Patricia M. Panciocco

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RULE 26(7) CERTIFICATE OF SERVICE

I hereby certify that pursuant to guidance from the Court Clerk's Office, the Reply Brief 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

October 11, 2022 /s/ Patricia M. Panciocco

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within reply brief complies with Sup. Ct. R. 16 (11) and contains 2,679 words, excluding the cover page, table of contents, table of authorities, statutes, rules, and appendix, etc.

October 11, 2022 /s/ Patricia M. Panciocco