

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

CASE NO. 2009-0098

ROGER AND JUDITH BEDARD,  
PLAINTIFFS

V.

TOWN OF ALEXANDRIA,  
DEFENDANT

---

REPLY BRIEF OF DEFENDANT, TOWN OF ALEXANDRIA

---

Christopher L. Boldt, Esq.  
NHBA # 15301  
John L. McGowan, Esq.  
NHBA # 18337

**To Be Argued by:**

Christopher L. Boldt, Esq.  
104 Congress Street, Suite 304  
Portsmouth, NH 03801  
T: (603) 766-1686  
F: (603) 766-1687

---

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

ARGUMENT ..... 1

    I.    THE PLAINTIFFS’ STATUTORY INTERPRETATION WOULD  
          RENDER THE 50 FOOT SETBACK PROVISION OF RSA 155-E:4, II  
          MEANINGLESS AND WOULD LEAD TO AN ABSURD RESULT  
          CONTRARY TO THE UNDERLYING PUBLIC POLICY  
          CONCERNING LATERAL SUPPORT ..... 1

        A. STATUTORY INTERPRETATION ..... 1

        B. PUBLIC POLICY ..... 5

CONCLUSION ..... 6

CERTIFICATE OF SERVICE ..... 7

---

**TABLE OF AUTHORITIES**

**CASES**

Appeal of Ashland Elec. Dept., 141 N.H. 336, 341 (1996) ..... 4

Atwood v. Owens, 142 N.H. 396, 398 (1997) ..... 4

Bean v. Dow, 84 N.H. 464, 466 (1930) ..... 5

Curtis v. Guaranty Trust Life Ins. Co., 132 N.H. 337, 342 (1989) ..... 3

Great Northern Ins. v. Leontarakis, 904 A.2d 846, 850, 851 (2006) ..... 5

Lachapelle v. Town of Goffstown, 134 N.H. 478, 479 (1991) ..... 4

Langdon v. Maine-New Hampshire Interstate Bridge Authority, 92 N.H. 432, 433-434 (1943) ... 5

North Country Environmental Services v. Town of Bethlehem, 150 N.H. 606, 616 (2004) ..... 3

Residents Defending Their Homes v. Lone Pine Hunter’s Club, 155 N.H. 486, 488 (2007) ..... 3

Rutkoski v. Zalaski, 90 Conn. 108, 111 (1916) ..... 5

Wheeler v. Wilder, 61 N.H. 2, 9 (1881)..... 5

**STATUTES AND OTHER AUTHORITIES**

New Hampshire RSA 155-E ..... 1, 2, 3, 6

New Hampshire RSA 155-E:1, II ..... 1, 2

New Hampshire RSA 155-E:2 ..... 3

New Hampshire RSA 155-E:2-a ..... 3

New Hampshire RSA 155-E:4 ..... 2

New Hampshire RSA 155-E:4, II ..... 1, 2, 3, 4, 5, 6

House Bill 661 (1979) ..... 2

## TEXT OF THE RELEVANT STATUTES

### **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.

...

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.

**155-E:2 Permit Required.** – No owner shall permit any excavation of earth on his premises without first obtaining a permit therefore, 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.

**155-E:4 Prohibited Projects.** – The regulator shall not grant a permit:

...

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;...

## ARGUMENT

### I. THE PLAINTIFFS' STATUTORY INTERPRETATION WOULD RENDER THE 50 FOOT SETBACK PROVISION OF RSA 155-E:4, II MEANINGLESS AND WOULD LEAD TO AN ABSURD RESULT CONTRARY TO THE UNDERLYING PUBLIC POLICY CONCERNING LATERAL SUPPORT.

#### A. Statutory Interpretation

The essence of the Plaintiffs' novel argument is that a pit operator can, categorically, move earth within 50 feet of a disapproving abutter without a permit, so long as that activity does not involve the "removing of earth for the purpose of placing it into the stream of commerce for compensation." Plaintiffs' Brief at 11. The Town asserts that this argument is contrary to the language of the statutory scheme established by RSA 155-E and contrary to the public policy concerns underlying this statute, including the common law doctrine of "lateral support".

RSA 155-E:4, II expressly states that "the regulator shall not grant a permit ... [f]or excavation within 50 feet of the boundary of a disapproving abutter ..." Furthermore, RSA 155-E:1, II defines "excavation" not necessarily in terms of "activities," but more in terms of "areas": "a land area which is used, or has been used, for the commercial taking of earth, including all slopes." While this definition clearly covers all slopes involved in an excavation site, the Plaintiffs now attempt to insert ambiguity into RSA 155-E:4, II's prohibition against "excavation within 50 feet of the boundary of a disapproving abutter" where none exists.

The Plaintiffs argue that the movement of earth within the 50 Foot Setback Area was not "commercial" activity because the moved earth was not moved off-site. Plaintiffs' Brief at 9. While the Plaintiffs claim to have "searched the New Hampshire case law in vain for a explication of the definition of the term 'commercial'" (Plaintiffs' Brief at 11), the Town

maintains that such effort is irrelevant in light of the above-noted definition of ‘excavation’ as ‘land area...including all slopes.’ Similarly, the Town asserts that it is likewise irrelevant that the Plaintiffs now contend that their movement of earth within that 50 Foot Setback Area was due in part to create a slope at a “natural repose” grade. Plaintiffs’ Brief at 10. Flatly, the Town asserts that the Plaintiffs should not be moving earth at all within the 50 Foot Setback Area since, by statute, the Plaintiffs could not obtain a permit to do such earth movement within such area. To hold otherwise would require this Court to (i) ignore the inclusion of the 50 Foot Setback provision under RSA 155-E:4’s list of “Prohibited Projects” and (ii) rule that the statute allows any pit operator to start a support slope at a disapproving abutter’s property line (as Plaintiffs did in this case) rather than at the 50 Foot Setback line.

The Plaintiffs claim that “[i]f [the Legislature] meant to prohibit all earth-moving activities within 50 feet of an objecting abutter’s property line, it would have said so.” The Town asserts that the Legislature did just that by defining “excavation” in such a way in RSA 155-E:1, II, so as to include the entire affected “land area ... including all slopes” and by establishing the 50 Foot Setback from disapproving abutters in RSA 155-E:4, II. To accept Plaintiffs’ desired interpretation would, in effect, remove the statutory prohibition of excavation within the 50 Foot Setback Area. While the Legislature did not speak directly to the intent of the 50 Foot Setback prohibition in passing House Bill 661 as the original enactment of RSA 155-E in 1979 (“the Act”), that Act’s “Declaration of Purpose” stated:

The purpose of this act is to grant municipalities the authority to cope with the recognized safety hazards which open excavations create; to safeguard the public health and welfare; to preserve our natural assets of soil, water, forests and wildlife; to maintain aesthetic features of our environment; to prevent land and water pollution; and to promote soil stabilization. (emphasis added)

See, Page 2 of the true and correct copy of the available Legislative history of the Act included as the Town's Appendix II, and incorporated herein by reference.

Thus, the Legislature recognized the importance of this Act to assist municipalities, such as the Town, in addressing the safety hazards and soil stabilization issues cause by open pit excavations such as the Plaintiffs. Similarly, the Legislature was silent with respect to the 50 Foot Setback prohibition when RSA 155-E was further amended in minor ways in 1989 and 1991. It is worthy to note, however, that at no time did the Legislature add the type of "earth-moving activities," as those presently at issue, to the enumerated exceptions to the requirement of a permit set forth in RSA 155-E:2 (Permit Required) and RSA 155-E:2-a (Other Exceptions).

This Court is charged to construe all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result. Residents Defending Their Homes v. Lone Pine Hunter's Club, 155 N.H. 486, 488 (2007). This Court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. Id. This Court can not delete language from a statute or add words that the Legislature did not see fit to include. North Country Environmental Services v. Town of Bethlehem, 150 N.H. 606, 616 (2004). The Plaintiffs' interpretation of the definition of "excavation" is unreasonably narrow and, when coupled with their desired elimination of the 50 Foot Setback provision of RSA 155-E:4, II, would lead to an absurd result and is therefore not the type of alternative interpretation that renders language ambiguous. Cf. Curtis v. Guaranty Trust Life Ins. Co., 132 N.H. 337, 342 (1989) (refusing to find ambiguity in an insurance policy when alternate interpretations would "inevitably lead to absurd results.").

Furthermore, this Court must first look to the plain meaning of the words used in the statute whenever possible. Atwood v. Owens, 142 N.H. 396, 398 (1997). The Court does not assume that the Legislature would enact statutory language that would lead to an absurd result. Id. When the Court begins its analysis with an examination of the statutory language, it must bear in mind that:

it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish. Therefore, while we give undefined language its plain and ordinary meaning, we must keep in mind the intent of the legislation ... and not simply ... examin[e] isolated words or phrases found therein.

Id., citing Appeal of Ashland Elec. Dept., 141 N.H. 336, 341 (1996). It is well-settled that the Court will not redraft a statute to evince a meaning not included in the statutory language. Id. at 339, citing Lachapelle v. Town of Goffstown, 134 N.H. 478, 479 (1991).

While the Plaintiffs stop short of expressly saying so, their reasoning would have the Court believe that the Plaintiffs could have engaged in the earth-moving activity presently at issue without a permit. Of course, this is not the case under the law; and it is one example of the absurd results that would flow from the Plaintiffs' novel interpretations. Therefore, the Town agrees in part with the Plaintiffs' statement that the Trial Court's decision "would mean, as a practical matter that actual excavation ("commercial taking of earth") could not take place closer to [an] objecting abutter's property line than 50 feet, plus any area of side slope that had to be graded in order to stabilize it, regardless [of] whether any earth material removed was entering the stream of commerce." Plaintiffs' Brief at 12. That is, after all, why RSA 155-E:4, II makes the distinction between disapproving abutters and approving abutters (who are only entitled to a

10 Foot Setback area). Frankly, the Town asserts that a pit operator can remove earth up to the 50 Foot Setback line so long as lateral support at that line remains in place and thereafter, as part of the restoration of the excavation area, a slope of “natural repose” is created with its peak at that 50 Foot Setback line. Unfortunately, the Plaintiffs did not do that in this case; rather, their slope runs up to the disapproving abutter’s property line itself, thereby completely ignoring and eliminating the 50 Foot Setback prohibition.

### **B. Public Policy**

The Town asserts that the Plaintiffs’ novel interpretation of RSA 155-E:4, II to justify their ignoring and elimination of the 50 Foot Setback in this case contravenes the well-settled, common-law right to lateral support; and the Town asserts that the Legislature implicitly recognized that right by its “Declaration of Purpose” as set forth above, its “land area” based definition of “excavation” to “include all slopes,” and its creation of the 50 Foot Setback area. This Court has repeatedly acknowledged the right of lateral support. *See Langdon v. Maine-New Hampshire Interstate Bridge Authority*, 92 N.H. 432, 433-434 (1943); *Bean v. Dow*, 84 N.H. 464, 466 (1930); and *Wheeler v. Wilder*, 61 N.H. 2, 9 (1881). The general rule upon this subject is that “every landowner has a right to have his land preserved unbroken, and that an adjoining owner excavating on his own land is subject to this restriction, that he must not remove the earth so near to the land of his neighbor that his neighbor’s soil will crumble away under its own weight and fall upon his land.” *Rutkoski v. Zalaski*, 90 Conn. 108, 111 (1916). *Also see Great Northern Ins. v. Leontarakis*, 904 A.2d 846, 850, 851 (N.J. 2006) (a New Jersey excavation case discussing the “significant risk of grave harm involved in removing lateral support from

adjoining land”).

To allow the activities in the manner proposed by the Plaintiffs would abrogate this common law right. The Town asserts that interpreting RSA 155-E:4, II, to include the common law right of lateral support as the basis of the statute’s 50 Foot Setback is eminently more reasonable than the contrary novel interpretations advanced by the Plaintiffs. The fact that the Legislature enacted RSA 155-E under RSA Title XII, Public Safety and Welfare, underscores the reasonableness of the Town’s interpretation. The Plaintiffs’ interpretation of the statute is inconsistent with the public safety and welfare and would lead to the absurd result of allowing a pit operator to remove the supporting earth up to a disapproving abutter’s property line (as in this case) and use that earth elsewhere within the excavation so long as they did not transport the earth out of the excavation area. Since a pit operator cannot obtain a permit under RSA 155-E to do such work, surely public policy cannot allow the pit operator to do such work without a permit. While the Plaintiffs sought to convince the Trial Court that such work does not violate the provisions of RSA 155-E, the Trial Court correctly ruled against such an inherently inconsistent interpretation of the Statute. The Town asks that this Court affirm the Trial Court’s decision on this point.

#### CONCLUSION

For all the foregoing reasons, this Court should affirm the decision of the Trial Court in granting summary judgment in favor of the Town. The Town stands on its previously-submitted Brief pertaining to the issue of attorney’s fees. Since the Plaintiffs have asked for oral arguments in this case, the Town respectfully requests the opportunity to present oral arguments if the Plaintiffs’ request is granted by this Court.

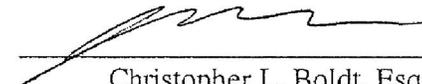
Respectfully Submitted,  
The Town of Alexandria  
By and through its attorneys,

**DONAHUE, TUCKER & CIANDELLA, PLLC**

By:   
\_\_\_\_\_  
Christopher L. Boldt, Esq.  
NHBA # 15301  
John L. McGowan, Esq.  
NHBA # 18337  
104 Congress Street, Suite 304  
Portsmouth, NH 03801  
T: (603) 766-1686  
F: (603) 766-1687

**CERTIFICATE OF SERVICE**

I hereby certify that an original and twelve (12) copies of the Reply Brief of the Defendant, the Town of Alexandria, has this 13 day of May, 2009, been forwarded to the Clerk, New Hampshire Supreme Court. In addition, two (2) copies of the Reply Brief have been mailed to Colin W. Robinson, Esquire.

  
\_\_\_\_\_  
Christopher L. Boldt, Esq.