THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0479

Paul Richardson & a.

v.

Town of Pittsfield

Brief of petitioners/appellants;
appeal from Merrimack County Superior Court.

James A. Pritchard
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Table of Applicable New Hampshire Statutes

	Pages where statute is cited
New Hampshire Statutes	
RSA 236:112, II, in whole	4, 5, 9, 11
RSA 236:114 in whole	4, 5, 6, 7, 9, 10, 11
RSA 236:115 in part	4, 5, 7, 9, 10, 11, 12

Questions Presented for Review

1. Does the Zoning Board of Adjustment Notice of Decision grant a "certificate of approval for the location of [a] junk yard" pursuant to RSA 236:114? (See footnote 1, ZBA Notice of Decision.)

   Chain of issue preservation:

   (a) petitioners' Motion for Rehearing, Reason 2 (at Certified Record, page 143);

   (b) petitioners' Amended Motion for Rehearing, Reason 3 (at Certified Record, page 152); and

   (c) petitioners' Petition, Claim 5, ¶¶ 109 - 112 (at Appendix to Brief, page 41).

2. If the answer to Question 1 is "yes," then do RSA 236:112, II, and RSA 236:115 provide that, for a town, only the selectmen may grant a "certificate of approval for the location of [a] junk yard" pursuant to RSA 236:114?

   Chain of issue preservation:

   (a) petitioners' Motion for Rehearing, Reason 2 (at Certified Record, page 143);

   (b) petitioners' Amended Motion for Rehearing, Reason 3 (at Certified Record, page 152); and

   (c) petitioners' Petition, Claim 5, ¶¶ 109 - 112 (at Appendix to Brief, page 41).

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1. ZBA Notice of Decision, August 14, 2008, says in part, "Public Hearing with respect to an application for a Certificate of Approval pursuant to RSA 236:114 for the location of a junk yard business, filed by James Snedeker, 629 Tilton Hill Road, Pittsfield, NH 03263." "The Certificate of Approval was **GRANTED**." (At Certified Record, page 137; also at Appendix, page 3.)

Text of Applicable New Hampshire Statutes

RSA 236:112, II, in whole (underline emphasis added):

> "Local governing body" means the mayor and board of aldermen or the council of a city, the selectmen of a town, or the commissioners of a village district.

RSA 236:114 in whole (underline emphasis added):

> A person shall not operate, establish, or maintain a junk yard or machinery junk yard until he (1) has obtained a license to operate a junk yard business and (2) has obtained a certificate of approval for the location of the junk yard.

RSA 236:115 in part (underline emphasis added):

> Application for the license and the certificate of approved location shall be made in writing to the local governing body of the municipality where it is proposed to locate the junk yard or automotive recycling yard. In municipalities having a zoning ordinance and a zoning board of adjustment, the application must be accompanied by a certificate from the board of adjustment that the proposed location is not within an established district restricted against such uses or otherwise contrary to the prohibitions of the zoning ordinance.

Statement of the Case and Material Facts

On August 14, 2008, the Pittsfield Zoning Board of Adjustment (ZBA) held a "Public Hearing with respect to an application for a Certificate of Approval pursuant to RSA 236:114 for the location of a junk yard business, filed by James Snedeker, 629 Tilton Hill Road, Pittsfield, NH 03263." (See footnote 2, ZBA Notice of Decision.) "The Certificate of Approval was **GRANTED**." (Ibid.) The ZBA also found the Snedeker junk yard to be lawfully nonconforming. (Ibid.)

The petitioners claim that the "Certificate of Approval pursuant to RSA 236:114 for the location of a junk yard business" is obviously a "certificate of approval for the location of [a] junk yard" pursuant to RSA 236:114. (See footnote 3.) The petitioners also claim that the ZBA, in granting the "Certificate of Approval pursuant to RSA 236:114 for the location of a junk yard business," "acted outside of [the ZBA's] jurisdiction in part because an application for a certificate of approved location can only be made to the board of selectmen." (See footnote 4.)

By contrast, the Town and the Superior Court claim that the "Certificate of Approval pursuant to RSA 236:114 for the location of a junk yard business" is not a "certificate of approval for the location of [a] junk yard" pursuant to RSA 236:114 but is

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2. ZBA Notice of Decision, August 14, 2008 (at Certified Record, page 137; also at Appendix, page 3).

3. Petition, Claim 5, ¶¶ 109 - 112 (at Appendix to Brief, page 41); also see Questions Presented for Review, No. 1 (at Brief, page 4).

4. Petition, Claim 5, ¶¶ 109 - 112 (at Appendix to Brief, page 41); also see Questions Presented for Review, No. 2 (at Brief, page 4).

instead what the Town calls a "junkyard location certification." See Superior Court order, page 16, ¶ 3 (at Brief, page 31):

> [The Town] argue[s] that the petitioners have confused the 'certificate of approved location,' which must be applied for and granted by the Board of Selectmen, with the ZBA's 'junkyard location certification.' Id at 12. The Court agrees.

The Superior Court defines "the ZBA's 'junkyard location certification'" as a "certificate from the board of adjustment" pursuant to RSA 236:115, not RSA 236:114. Compare Superior Court order, page 12, ¶ 3, and page 13, ¶ 1 (at Brief, pages 27 and 28; underline emphasis added):

> [RSA 236:115] requires that the ZBA first determine and certify that the proposed location is not within an established districted restricted against such uses or otherwise contrary to the prohibitions of the zoning ordinance."

to RSA 236:115 (underline emphasis added):

> Application for the license and the certificate of approved location shall be made in writing to the local governing body of the municipality where it is proposed to locate the junk yard or automotive recycling yard. In municipalities having a zoning ordinance and a zoning board of adjustment, the application must be accompanied by a certificate from the board of adjustment that the proposed location is not within an established district restricted against such uses or otherwise contrary to the prohibitions of the zoning ordinance.

Thus, the Superior Court claims that the "Certificate of Approval pursuant to RSA 236:114 from the location of a junk yard business" is not a "certificate of approval for the location of [a] junk yard" pursuant to RSA 236:114 but is instead a "certificate from the board of adjustment" pursuant to RSA 236:115.

The petitioners also complained that "The ZBA lacked sufficient evidence to find that the junk yard was a lawful nonconforming use under the Town of Pittsfield Zoning Ordinance." (See footnote 5.) "Furthermore, the evidence available to the ZBA indicated that the allegedly proposed junk yard had expanded since the March 8, 1988, adoption of the Town of Pittsfield Zoning Ordinance. See [Petition] ¶¶ 40, 52, and 53." (See footnote 6.) The petitioners' complaint of expansion and thus their whole appeal have become moot. (See footnote 7.) The Pittsfield code enforcement officer found the Snedeker junk yard in violation of the Pittsfield Zoning Ordinance on April 27, 2009, because of the junk yard's expansion on that date. (See footnote 8.) No one appealed the code enforcement officer's decision (see footnote 9), and the deadline to appeal has passed (see footnote 10).

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5. Petition, Claim 4, ¶¶ 103 - 108 (at Appendix to Brief, page 40).

6. Petition, Claim 4, ¶ 108 (at Appendix to Brief, page 41). Petition ¶¶ 40, 52, and 53 are at Appendix to Brief, pages 24 and 27.

7. Petitioners' Motion to dismiss.

8. (a) Complaint letter of Paula Belliveau, dated April 27, 2009 (at Appendix to Brief, page 5) and (b) Violation Notice, 4/29/2009 (at Appendix to Brief, page 8).

9. ZBA minutes (June 11, 2009), ITEM 5, New Business, f, Letter Paula Belliveau; only page 1 and part of page 2 are included in the Appendix to Brief (at Appendix to Brief pages 9 and 10) because this matter is at the top of the minutes page 2.

10. Petitioner's Motion to dismiss, ¶ 7, quoting RSA 676:5, I, in part and ZBA Rules of Procedure, XI, 2.

Summary of Argument

The petitioners presented several appeal grounds to the ZBA and to the Superior Court, but they have chosen to present to the Supreme Court only the most obvious appeal ground:

Supreme Court Appeal Ground 1. The ZBA acted outside of its jurisdiction in part because an application for a certificate of approved location can only be made to the board of selectmen. (See footnote 11.)

The "Certificate of Approval pursuant to RSA 236:114 for the location of a junk yard business" (see footnote 12, ZBA Notice of Decision) is obviously a "certificate of approval for the location of [a] junk yard" pursuant to RSA 236:114. RSA 236:115 and RSA 236:112, II, together provide that an application for a certificate of approval pursuant to RSA 236:114 for the location of a junk yard can only be made to the board of selectmen. Thus, the ZBA's grant of such a certificate is outside the ZBA's jurisdiction.

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11. See Questions Presented for Review, Nos. 1 and 2 (at Brief, page 4). Chain of issue preservation: (a) petitioners' Motion for Rehearing, Reason 2 (at Certified Record, page 143); (b) petitioners' Amended Motion for Rehearing, Reason 3 (at Certified Record, page 152); and (c) petitioners' Petition, Claim 5, ¶¶ 109 - 112 (at Appendix to Brief, page 41).

12. ZBA Notice of Decision, August 14, 2008 (at Certified Record, page 137; also at Appendix to Brief, page 3).

Argument

This section presents the Supreme Court appeal ground of the preceding section and details the argument on which that ground rests.

Supreme Court Appeal Ground 1. The ZBA acted outside of its jurisdiction in part because an application for a certificate of approved location can only be made to the board of selectmen. (See footnote 13.)

The "Certificate of Approval pursuant to RSA 236:114 for the location of a junk yard business" (see footnote 14, ZBA Notice of Decision) is obviously a "certificate of approval for the location of [a] junk yard" pursuant to RSA 236:114.

RSA 236:114 says in whole as follows (underline emphasis added):

> A person shall not operate, establish, or maintain a junk yard or machinery junk yard until he (1) has obtained a license to operate a junk yard business and (2) has obtained a certificate of approval for the location of the junk yard.

RSA 236:115 says in part as follows (underline emphasis added):

> Application for the license and the certificate of approved location shall be made in writing to the local governing body of the municipality where it is proposed to locate the junk yard or automotive recycling yard.

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13. See Questions Presented for Review, Nos. 1 and 2 (at Brief, page 4). Chain of issue preservation: (a) petitioners' Motion for Rehearing, Reason 2 (at Certified Record, page 143); (b) petitioners' Amended Motion for Rehearing, Reason 3 (at Certified Record, page 152); and (c) petitioners' Petition, Claim 5, ¶¶ 109 - 112 (at Appendix to Brief, page 41).

14. ZBA Notice of Decision, August 14, 2008 (at Certified Record, page 137; also at Appendix to Brief, page 3).

RSA 236:112, II, says in whole as follows (underline emphasis added):

> "Local governing body" means the mayor and board of aldermen or the council of a city, the selectmen of a town, or the commissioners of a village district.

RSA 236:115 and RSA 236:112, II, together provide that "an application for a certificate of approved location can only be made to the board of selectmen." (See footnote 15.) Thus, the ZBA's grant of such a certificate is outside the ZBA's jurisdiction. (Ibid.)

As the Statement of the Case and Material Facts explained, the Town and the Superior Court claim that the "Certificate of Approval pursuant to RSA 236:114 for the location of a junk yard business" is not a "certificate of approval for the location of [a] junk yard" pursuant to RSA 236:114 but is instead a "certificate from the board of adjustment" pursuant to RSA 236:115.

The "Certificate of Approval pursuant to RSA 236:114" that the ZBA granted is not a "certificate from the board of adjustment" pursuant to RSA 236:115. First, the ZBA Notice of Decision clearly cites RSA 236:114, not RSA 236:115. Second, the Notice of Decision does not say or mean what RSA 236:115 specifies for a "certificate

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15. Petition, Claim 5, ¶¶ 109 - 112 (at Appendix to Brief, page 41).

from the board of adjustment." Contrast Notice of Decision (see footnote 16):

> The Zoning Board of Adjustment finds that the junkyard is not a permitted use under the Zoning Ordinances in the RURAL zone.

with RSA 236:115, second sentence (underline emphasis added):

> In municipalities having a zoning ordinance and a zoning board of adjustment, the application must be accompanied by a certificate from the board of adjustment that the proposed location is not within an established district restricted against such uses or otherwise contrary to the prohibitions of the zoning ordinance.

The ZBA found that the Snedeker junk yard was lawfully nonconforming, but no nonconforming junk yard, lawful or unlawful, can satisfy the two conditions that RSA 236:115 specifies for a "certificate from the board of adjustment," namely, (1) that the proposed location is not within an established district restricted against such uses, and (2) that the proposed location is not otherwise contrary to the prohibitions of the zoning ordinance.

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16. ZBA Notice of Decision, August 14, 2008 (at Certified Record, page 137; also at Appendix to Brief, page 3).

Relief Requested

The petitioners have moved to dismiss their own appeal because the ZBA decision that they appeal has become moot. (See Brief, page 8.) If the Supreme Court does not grant the motion for dismissal, then the petitioners respectfully request that the Supreme Court reverse the trial court's order in 2008-E-0400 and remand for further proceedings consistent with the Supreme Court's opinion.

Statement Waiving Oral Argument

The petitioners/appellants waive oral argument.

Decision of the Superior Court That Is Being Appealed,
Merrimack County Superior Court Order in
2008-E-0400

Names of Petitioners/Appellants and Their Representative

Respectfully submitted,
Paul and Carole Richardson,
by their non-lawyer representative,
James A. Pritchard

October 26, 2009 _____

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Certificate of Service

I certify that two copies of the foregoing brief were mailed, first class and postage prepaid, this date to Judith Whitelaw, counsel of record.

October 26, 2009 _____

James A. Pritchard