THE SUPREME COURT OF NEW HAMPSHIRE

Coos
No. 2011-776

TOWN OF CARROLL

v.

WILLIAM RINES

Argued: June 13, 2012
Opinion Issued: November 9, 2012

Gardner Fulton and Waugh, P.L.L.C., of Lebanon (H. Bernard Waugh, Jr. on the brief and orally), for the petitioner.

D'Amante Couser Pellerin & Associates, P.A., of Concord (Bruce J. Marshall on the brief and orally), for the respondent.

CONBOY, J. The respondent, William Rines, appeals an order of the Superior Court (Vaughan, J.) that enjoined him from excavating on certain real property until he obtained a local use variance from the petitioner, Town of Carroll (Town), and that imposed civil penalties and attorney's fees. See RSA ch. 155-E (2002 & Supp. 2012) (Local Regulation Excavations). We reverse and remand.

The parties stipulated to, or the record supports, the following facts. The respondent owns two lots in Carroll and controls two additional lots for

excavation purposes. In October 2009, the Town filed an action to enjoin him from excavating on all four lots. On December 29, 2009, the trial court approved a stipulation between the parties pursuant to which the respondent agreed not to excavate during the pendency of the lawsuit unless he obtained a variance under Section VI of the Town's zoning ordinance, which regulates "Excavation of Earth Resources." After he entered into the stipulation, the respondent began removing material from the lots for use on highway projects.

In May 2010, the respondent received approval from the planning board to subdivide the two lots he owned; thereafter, he began excavating on those lots. Further court proceedings ensued, resulting in a court order of June 22, 2010, denying the respondent's request for relief from the variance requirement. According to the parties' stipulation, following that court order, the respondent "did not sever any more materials from the ground."

A year later, in June 2011, the trial court held a final hearing on the Town's original petition. At issue was the extent to which the respondent was required to obtain a variance pursuant to Section VI of the Town's zoning ordinance before excavating. The trial court found that the respondent engaged in two types of excavation on the four lots: (1) from the date of the stipulation, December 29, 2009, until the date on which the respondent ceased all excavation, June 22, 2010, the respondent excavated for highway purposes; and (2) from the date of subdivision approval, May 2010, to the date on which the respondent ceased all excavation, June 22, 2010, he excavated for purposes incidental to constructing a building.

The court concluded that: (1) both types of excavation were exempt from the permitting requirements of RSA chapter 155-E; (2) Section VI of the zoning ordinance was not preempted by RSA chapter 155-E; and (3) because RSA chapter 155-E did not preempt Section VI of the zoning ordinance, the respondent could not engage in either type of excavation absent a variance. The court did not find the respondent in contempt for violating the stipulation. Instead, the court imposed civil penalties pursuant to RSA 676:17 (Supp. 2012) for the period between December 29, 2009, and June 22, 2010. This appeal followed.

On appeal, the respondent does not challenge the trial court's determination that both types of excavation are exempt from the permitting requirements of RSA chapter 155-E. He argues, however, that the trial court erred when it determined that RSA chapter 155-E did not preempt the zoning ordinance provisions applicable to both types of excavation.

"The preemption doctrine flows from the principle that municipal legislation is invalid if it is repugnant to, or inconsistent with, State law." Forsberg v. Kearsarge Reg'l Sch. Dist., 160 N.H. 264, 269 (2010) (quotation

omitted). "Preemption may be express or implied." N. Country Envtl. Servs. v. Town of Bethlehem, 150 N.H. 606, 611 (2004). Here, the respondent argues implied preemption. Implied preemption may be found when the comprehensiveness and detail of the State statutory scheme evinces legislative intent to supersede local legislation. Id. State law impliedly preempts local law also when there is an actual conflict between the two. Id. A conflict exists when a municipal ordinance or regulation permits that which a State statute prohibits or vice versa. Id. Even when a local ordinance does not expressly conflict with a State statute, it will be preempted when it frustrates the statute's purpose. Id.

A trial court's determination of whether a State statute preempts local law is a question of law, which we review de novo. Guildhall Sand & Gravel v. Town of Goshen, 155 N.H. 762, 764 (2007). "In matters of statutory interpretation we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole." Id. "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id.

We begin with the statute. RSA chapter 155-E regulates local excavation, and distinguishes between excavations that require permits and those that do not. See RSA 155-E:2, :2-a. Excavation for highway purposes and for building construction purposes is exempt from the statute's permitting requirements. See RSA 155-E:2, IV, :2-a, I(a).

In deciding preemption issues under RSA chapter 155-E, we are guided by two prior cases. First, in Arthur Whitcomb, Inc. v. Town of Carroll, 141 N.H. 402 (1996), we considered whether "RSA chapter 155-E as a whole preempts local legislation pertaining to excavation." Arthur Whitcomb, 141 N.H. at 405. In that case, we held that "the legislature intended to preempt the field of excavation." Id. at 409. We emphasized that:

> The legislature's purpose in enacting RSA chapter 155-E was, in part, to increase the supply of construction materials and decrease the cost of roads and other government infrastructure to the public by curtailing simultaneous state and local regulations of the same activity.

Id. at 407 (quotations omitted). We did not "conclude, however, that all local legislation applicable to an excavation is therefore void." Id. at 409. "RSA chapter 155-E preempts only local ordinances and regulations that would have the effect or intent of frustrating State authority." Id. We determined that regulations that would not frustrate State authority include those relating to

"traffic and roads, landscaping and building specifications, snow, garbage, and sewage removal, signs, and other related subjects." Id.

Next, in Guildhall, we once again considered whether, by enacting RSA chapter 155-E, the legislature intended to preempt the entire field of excavation. Guildhall, 155 N.H. at 764. We held that "[b]ecause the legislature has clearly stated that RSA chapter 155-E contains only 'minimum' requirements for excavations that require a permit, it follows that municipalities are not preempted from imposing more stringent regulations upon those types of excavations." Id. at 765. Also, we clarified that our holding in Arthur Whitcomb "applies only to permit-exempt excavations." Id. at 767. That is, "RSA chapter 155-E does not authorize municipalities to burden [permit-exempt] excavation[s] with their own substantive requirements." Id.

Thus, here, Section VI of the ordinance is preempted if it purports to regulate excavations that are permit-exempt pursuant to RSA chapter 155-E and if it "frustrates State authority." See Arthur Whitcomb, 141 N.H. at 409. Accordingly, we first look to the language of the ordinance. The interpretation of a zoning ordinance is a question of law, which we review de novo. Pike Indus. v. Woodward, 160 N.H. 259, 262 (2010). We construe the words and phrases of an ordinance according to the common and approved usage of language. Id. When the language of an ordinance is plain and unambiguous, we need not look beyond the ordinance itself for further indications of legislative intent. Id.

Section VI of the ordinance requires a variance for "excavation, grading, filling or removal of any earth, loam, topsoil, sand, gravel, clay or stone on public or private land in the Town of Carroll." Section VI is broadly worded and provides no exceptions for excavations for highway purposes or excavations incidental to building construction. Thus, it applies to the excavations in this case. Furthermore, the ordinance imposes substantive requirements on permit-exempt excavations and, as a result, frustrates State authority. Because Section VI purports to regulate excavations that are permit-exempt under RSA chapter 155-E and because the regulations frustrate State authority, Section VI is preempted by that chapter.

In arguing for a contrary result, the Town misconstrues our decisions in Guildhall and Arthur Whitcomb. Those cases plainly establish that local regulations that apply to excavations that are permit-exempt and that have the effect of frustrating State authority are preempted. As a result, we find the Town's arguments unpersuasive.

Accordingly, we hold that the trial court erred in finding that the requirements of Section VI of the Town's zoning ordinance are not preempted

by RSA chapter 155-E. Given our conclusion, we do not reach the other issues raised in the respondent's appeal. See Lakeside Lodge v. Town of New London, 158 N.H. 164, 174 (2008).

Reversed and remanded.

DALIANIS, C.J., and HICKS and LYNN, JJ., concurred.