STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION

IN THE MATTER OF: Local Government Center, Inc.; Local Government Center Real Estate, Inc.; Local Government Center HealthTrust; LLC; Local Government Center Property-Liability Trust, LLC; HealthTrust, Inc.; New Hampshire Municipal Association Property-Liability Trust, Inc.; LGC-HT, LLC; Local Government Center Workers' Compensation Trust, LLC; and the Following individuals: Maura Carroll, Keith R. Burke, Stephen A. Moltenbrey, Paul G. Beecher, Robert A. Berry, Roderick MacDonald, Peter J. Curro, April D. Whittaker, Timothy J. Ruehr, Julia N. Griffin, Paula Adriance, John P. Bohenko, and John Andrews	)	Case No.: C-2011000036

OBJECTION OF RESPONDENTS LOCAL GOVERNMENT CENTER, INC. , et al. TO NEW ENGLAND POLICE BENEVOLENT ASSOCIATION'S MOTION TO INTERVENE, AND REQUEST FOR A HEARING ON THE MOTION

Respondents Local Government Center, Inc. and affiliated entities (hereafter, "LGC") object to the New England Police Benevolent Association's (hereafter, "NEPBA") Motion to Intervene, and request a hearing on the Motion. NEPBA's motion should be rejected because there is no support in the statutes or case law for such intervention; NEPBA has no interest in the proceeding; to the extent that NEPBA alleges an interest as a third party in the proceeding, that interest is well represented; and permitting the intervention of multiple parties with duplicative interests risks an inefficient and disorderly proceeding, threatening the due process rights of the Respondents.

I. FACTUAL BACKGROUND.

1. The State of New Hampshire, Department of State, Bureau of Securities Regulation commenced this Adjudicative Proceeding (hereafter, "Proceeding") on September 2, 2011, via a Notice of Order (hereafter, the "Notice").

2. On September 19, 2011, NEPBA submitted a motion requesting permission to intervene in the Proceeding and to be considered an "interested party."

3. NEPBA argues that it has a property interest in any monies paid by municipalities to LGC, because employees represented by NEPBA were employed by municipalities which obtained products and services offered by Respondents. NEPBA argues because of this incipient relationship, it has a pecuniary interest in the outcome of the proceeding and is an "interested party."

II. ARGUMENT: NEPBA LACKS STANDING TO INTERVENE, THERE IS NO STATUTORY SUPPORT FOR SUCH AN INTERVENTION, AND PERMITTING INTERVENTION WOULD UNNECESSARILY DELAY AND HINDER THIS PROCEEDING.

A. NEPBA Lacks Standing to Intervene.

1. NEPBA Lacks a Statutory Interest.

4. NEPBA fails to establish a legal or equitable right sufficient to grant it standing in this matter. To begin, NEPBA is not a political subdivision. While LGC has an obligation to "return all earnings and surplus…to the participating political subdivisions", RSA 5-B: 5, I, c, NEPBA is not one of them.

5. Rather, NEPBA attempts to manufacture standing by asserting that it is an interested party by association with the political subdivisions which may benefit from additional returns of surplus. In short, NEPBA is a third party to the relationships under examination by the Bureau, at best, and merely asserts the interest of a non-party. See Benson v. N.H. Ins. Guaranty

Ass'n, 151 N.H. 590, 593 (2004) (claimant's "status as the 'representative membership organization for medical practitioners statewide' does not give it a clear and direct interest in the litigation.'"). As NEPBA lacks any direct pecuniary interest in this proceeding, it therefore lacks grounds for entry into the proceeding.

6. Further, insofar as the relevant political subdivisions have an interest in this proceeding, their interests are well represented. Item four of the Notice, and item seven of the Relief Requested section of the Staff Petition, request an order that the Respondents pay restitution to member political subdivisions of LGC's Pooled Risk Management Programs. If the allegations in the Notice and the Petition are sufficiently proved, then LGC will be ordered to pay restitution to the same parties to whom NEPBA cites as giving it interest. There is nothing to suggest the Bureau will fail to adequately undertake the task of trying to prove the allegations of the Petition. Accordingly, NEPBA's participation would be duplicative of the role assumed by the Bureau in filing the Petition.

7. NEPBA may be interested in this proceeding, but interest alone is insufficient to create standing. "[M]ere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." Sierra Club v. Morton, 405 U.S. 727, 739 (1972). Similarly, the New Hampshire Supreme Court has held that "[n]o individual or group of individuals has standing to appeal when the alleged injury caused by an administrative agency's action affects the public in general, particularly when the affected public interest is represented by an authorized official or agent of the state." Appeal of Richards, 134 N.H. 148, 156 (1991).

8. NEPBA's interests are insufficient to create standing. To the extent any such interests exist, in the political subdivisions or elsewhere, they are well represented in this proceeding by the New Hampshire Bureau of Securities Regulation.

2. The Secretary of State has Exclusive Authority and Jurisdiction to Enforce RSA 5-B, and therefore NEPBA has no Standing to Intervene.

9. RSA 5-B:4-a provides the Secretary of State with "exclusive authority and jurisdiction" to investigate violations of, and to bring administrative actions to enforce, Chapter 5-B. There is no discussion in the statute, or elsewhere, of a private right of action or of a right to intervene in an adjudicative proceeding. NEPBA seeks to create a private right of action where there is none, and its motion should be denied. Blagbrough Family Realty Trust v. A&T Forest Products, 155 N.H. 29, 45 (2007) (citing Cross v. Brown, 148 N.H. 485, 487 (2002) ("Where there is no explicit or implicit private right of action to seek a declaration of the statute's violation, we will conclude that the statute does not do so.")).

10. As the Secretary of State has exclusive authority and jurisdiction over this adjudicative proceeding, that leaves no room or role for the NEPBA or any other party that seeks to intervene. Allowing them to intervene would allow them to fabricate a right of action contrary to the expressed intent of the legislature. See Marquay v. Eno, 139 N.H. 708, 715 (1995) ("We would expect that if the legislature … intended to impose civil liability it would expressly so provide." (Citation omitted)).

B. There is no Statutory Support for Intervention, and Permitting Intervention would be an Impermissible and Unsupported Expansion of this Proceeding's Jurisdiction.

11. There is no provision in the statute governing this proceeding, RSA 421-B:26-a, which permits, discusses, or contemplates intervention. NEPBA seeks to create a procedural right out of whole cloth, and to permit that is beyond the authority of this proceeding. "An agency may not add to, change, or modify the statute by regulation or through case-by-case adjudication." In re Jack O'Lantern, Inc., 118 N.H. 445, 448 (1978); see also, Appeal of David Duvernay, 160 N.H. 132, 133 (2010); North Country Envtl. Servs. v. Town of Bethlehem, 150 N.H. 606, 617 (2004) ("We can neither delete language from a statute nor add words that the legislature did not see fit to include."). The statute lacks any provision allowing for intervention, nor does it provide any instruction or guidance as to what concerns should guide the procedural or substantive questions surrounding a motion to intervene. In fact, the statute grants the Secretary of State "exclusive authority and jurisdiction" to investigate and enforce RSA 5-B, thereby prohibiting third parties from intervening to enforce any asserted right they may claim. RSA 5-B: 4-a, I. Therefore, this proceeding should reject NEPBA's intervention.

1. NEPBA's argument for intervention is unsupported, as the term "interested party" is undefined in the statute.

12. RSA 421-B:26-a does not define the terms "interested parties" and "interested person." Furthermore, the statute does not grant either "interest parties" or "interested persons" with the right to intervene.

13. Instead, RSA 421-B:26-a only speaks of "interested persons" and "interested parties" when discussing notice requirements, the determination of hearing dates, and requests for continuance. See RSA 421-B:26-a, VI(a), VIII, and X. The direct interest of a named party in those events is apparent; the indirect interest in those events of any and all third parties much

less so. The difference in quality of the interest suggests that "interested party" should be defined as a named party.

14. There is no basis for the claim that the limited reference to "interested parties" within the statutory discussion of notice and hearing dates confers the right on a third party to intervene, and the motion should be denied.

C. Permitting Intervention would be a Procedural Quagmire, Threaten Respondents' Due Process Rights, and Greatly Diminish the Efficient Disposition of this Proceeding.

1. Multiple Parties May Appear, if NEPBA's Motion is Granted.

15. If NEPBA is permitted to intervene, it would open the floodgates of this proceeding to intervention by all manner of persons. Other municipal entities and labor organizations associated with municipalities which have participated in LGC's insurance pools would have an equal claim to appear. The tens of thousands of individual employees of those towns, whether or not they were members in a labor organization, would have even a superior claim as "interested parties".

16. In fact, additional intervenors have already appeared in the wake of NEPBA's motion. The Professional Fire Fighters of New Hampshire (hereafter, "PFFNH"), who also seek to intervene, amended its motion on September 21, 2011 to add four additional labor organizations presently without counsel, who assert their desire to intervene. The amended motion makes no new arguments in favor of intervention.

17. Respondents anticipate that even more parties may seek to intervene. On information and belief, Attorney Milner, who represents PFFNH, is actively seeking to represent individual, retired teachers in this proceeding. (See Legal Representation Form, Exhibit A.)

2. The Addition of Multiple Parties Will Seriously Impede the Process, and Raise Significant Procedural Questions.

18. The inclusion of additional parties would increase the workload, lessen the efficiency, and increase the duration of this proceeding unnecessarily. Each additional party would exponentially increase the difficulty of this proceeding in safeguarding the due process rights of the parties before it.

19. If NEPBA is allowed to intervene, the parties and Presiding Officer will have to immediately grapple with several subsidiary procedural issues: what standards determine which subsequent parties could intervene?; can the interveners participate in discovery?; will they be permitted to introduce witnesses or to cross-examine other witnesses?

20. For example, the difficulty of scheduling a deposition will increase as each new party brings with it a new set of calendars and schedules to coordinate with each other party. Similarly, motion practice surrounding each deposition will also increase – each additional party will have their own pleadings to submit, creating additional pleadings for the other parties to respond to, leading to counter-responses *ad infinitum*. This will greatly increase the time required for this proceeding to make any progress, and any hope at a prompt and efficient process will be but an aspirational dream.

21. Furthermore, the Notice directs Respondents to pay all costs associated with this investigation and administrative action. If additional parties are permitted to intervene, they will substantially drive up the costs associated with this proceeding, if only through delay alone. Additionally, would the intervening parties be responsible for their own costs? Or would it be incumbent upon the Respondents to pay the costs of the interveners as well?

3. The Hearing Officer Must Protect the Respondents' Due Process Rights by Denying the Motion to Intervene.

22. As a quasi-judicial hearing, it is incumbent upon this proceeding to recognize and protect the due process rights, both procedural and substantive, of the parties which appear before it. Appeal of Concord Steam Corp., 130 N.H. 422, 427-28 (1988). Where an agency action would affect legally protected interests or private rights, "meticulous compliance" with the requirements of the due process clause of the New Hampshire constitution is required. Id.; see Thompson v. Board of Medicine, 143 N.H. 107, 110 (1998) (permitting an interlocutory appeal from an administrative hearing to the superior court to address a due process violation).

23. The holder of the right or interest affected by the adjudicative proceeding has both the right to be heard at a meaningful time, and also the right to be heard "in a meaningful manner." Id. (emphasis added). Ensuring that the right to be heard of the parties before it is being protected in a meaningful manner will only become more difficult, laborious, and sluggish as additional parties are added.

24. The interests of this proceeding in an efficient, prompt, orderly, and fair process will be obstructed by the addition of multiple parties with redundant interests. The addition of NEPBA, PFFNH, or any other similarly situation organization will unnecessarily drive up the time and money expended on this proceeding, by clogging it with duplicative and superfluous filings, submitted by parties whose interests are redundant and already well represented.

25. This hearing may well be the first proceeding addressing the topics of the Staff Petition. There are two other entities operating risk pools in the state. Allowing other persons to intervene in this matter, and making determinations on the sort of procedural questions listed here, threatens LGC with inconsistent results compared to other proceedings on the same or similar topics. Such a threat is a violation of due process.

III. CONCLUSION.

As NEPBA lacks standing; as the statute not only fails to allow for interveners but indeed gives exclusive authority to proceed with this action to the Bureau; and as any other process would foreseeably and seriously impede the efficient and fair disposition of these charges, thereby imperiling Respondents' rights; the motion to intervene should be denied.

WHEREFORE, Respondents respectfully request that:

A. The Presiding Officer set a date for a hearing to discuss the Motion to Intervene by NEPBA, and similar motions by all other interveners;

B. Following the hearing, the Presiding Officer deny the request by the New England Police Benevolent Association to intervene; and

C. The Presiding Officer grant such other relief as fairness and due process require.

Respectfully submitted,

Local Government Center, Inc.;
Local Government Center Real Estate, Inc.;
Local Government Center HealthTrust, LLC;
Local Government HealthTrust, LLC;
Local Government Center Property-Liability Trust, LLC;
HealthTrust, Inc.;
New Hampshire Municipal Association Property-Liability Trust, Inc.;
LGC-HT, LLC;
Local Government Center Workers' Compensation Trust, LLC; and
Maura Carroll,

By Their Attorneys:
PRETI FLAHERTY BELIVEAU & PACHIOS PLLP

Dated: October 3, 2011

By: /s/ Brian M. Quirk
William C. Saturley, NHBA #2256
Brian M. Quirk, NHBA #12526
PO Box 1318
Concord, NH 03302-1318
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CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of October 2011, provided copies of the within Objection of Respondents Local Government Center, Inc., et al. to New England Police Benevolent Association's Motion to Intervene, and Request for a Hearing on the Motion *via* electronic transmission to all counsel of record.

/s/ Brian M. Quirk

EXHIBIT A

LEGAL EFFORT TO RECOVER MONIES PAID FOR HEALTH INSURANCE IMPROPERLY DIVERTED BY THE NH LOCAL GOVERNMENT CENTER

For you to sign on to this effort, you must receive your health insurance from the "Local Government Center Health Trust"

Please fill out this document and return to:

Attorney Glenn Milner
Molan, Milner & Krupski, PLLC
100 Hall Street, Suite 101
Concord, NH 03301

Or you can e-mail it to:

Attorney Glenn Milner glenn@molanmilner.com
cc: to Renee Chouinard, Legal Assistant renee@molanmilner.com

PLEASE COMPLETE THE FOLLOWING INFORMATION

Retiree Name: _____

Unit/Local: _____

Retiree Address: _____

_____

CHECK HERE ☐ **Yes, I agree to the terms of the arrangement between the NEA-NH and Molan, Milner, and Krupski, PLLC, in which 30% of any settlement award shall be considered payment in full for attorney's fees and costs related to this action.**

Richard Benson, M.D. & a. v. New Hampshire Insurance Guaranty Association

No. 2004-052

SUPREME COURT OF NEW HAMPSHIRE

151 N.H. 590*; *864 A.2d 359*; *2004 N.H. LEXIS 201

September 23, 2004, Argued
December 29, 2004, Opinion Issued

SUBSEQUENT HISTORY: **[***1]** Released for Publication December 29, 2004.

PRIOR HISTORY: Merrimack.

DISPOSITION: Affirmed in part; reversed in part; and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, two doctors and the New Hampshire Medical Society, appealed an order of the Superior Court (New Hampshire), which dismissed, for failure to state a claim upon which relief could be granted, their petition seeking a declaratory judgment that the New Hampshire Insurance Guaranty Association (NHIGA) was obligated under N.H. Rev. Stat. Ann. ch. 404-B to undertake all contractual obligations owed by the doctors' insolvent insurer.

OVERVIEW: The doctors' insurer was declared insolvent by a Pennsylvania court. Upon the insolvency of the insurer, NHIGA issued a notice to the insolvent insurer's policyholders and claimants stating that under New Hampshire law, NHIGA was obligated to pay covered claims existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency. The notice informed policyholders that all covered claims under extended reporting period policies arising more than thirty days after the notice would be denied. Plaintiffs filed a petition seeking a declaration that NHIGA was obligated "to undertake all contractual obligations owed" by the insurer. The trial court dismissed the petition. On appeal, the court reversed, finding that NHIGA was obligated to provide coverage to the doctors, though only to the extent of claims that arose prior to or within 30 days of the declaration of insolvency. The court found that it was unlikely that the legislature intended NHIGA to act as substitute insurer when a member became insolvent because that would result in the public paying for more than the occasional covered claim arising within the stated time period.

OUTCOME: The court reversed the order and remanded to the trial court for entry of a declaratory judgment that NHIGA was obligated to provide coverage to the doctors to the extent of claims that arose prior to or within 30 days of the declaration of insolvency.

LexisNexis(R) Headnotes

Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview

[HN1] In order to maintain a petition for a declaratory judgment, a plaintiff must claim a present legal or equitable right or title. *N.H. Rev. Stat. Ann. § 491:22*, I (1997). A party will not be heard to question the validity of a law, or of any part of it, unless he shows that some right of his is impaired or prejudiced thereby.

Civil Procedure > Declaratory Judgment Actions > General Overview
[HN2] See *N.H. Rev. Stat. Ann. § 491:22*, I (1997).

Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview
Civil Procedure > Judgments > Relief From Judgment > General Overview
[HN3] Where a plaintiff seeks a declaratory judgment, he is not seeking to enforce a claim against the defendant, but rather a judicial declaration as to the existence and effect of a relation between him and the defendant. The remedy of declaratory judgment affords relief from uncertainty and insecurity created by a doubt as to rights, status or legal relations existing between the parties. Petitions for declaratory relief must be liberally construed so as to effectuate the evident purpose of the law.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
Civil Procedure > Appeals > Standards of Review > General Overview
[HN4] The standard of review in considering a motion to dismiss is whether the plaintiffs' allegations are reasonably susceptible of a construction that would permit recovery. Although the reviewing court assumes the truth of the facts alleged in the plaintiffs' pleadings and construes all reasonable inferences in the light most favorable to the plaintiffs, it will uphold the grant of the motion to dismiss if the facts pled do not constitute a basis for legal relief.

Governments > Legislation > Interpretation
[HN5] The court is the final arbiter of the intent of the legislature as expressed in the words of a statute. Where a statute fails to define a disputed term, the court assigns its plain and ordinary meaning. Moreover, the court interprets the plain meaning of a statute to effectuate its underlying purpose.

Civil Procedure > Jurisdiction > Jurisdictional Sources > Statutory Sources
Governments > Legislation > Types of Statutes
Insurance Law > Industry Regulation > Insurance Guaranty Associations > General Overview
[HN6] N.H. Rev. Stat. Ann. ch. 404-B is based upon the Post-Assessment Property and Liability Insurance Guaranty Association Model Act (Model Act). The Model Act is virtually identical in both purpose and language to statutes in numerous other jurisdictions. The court interprets it by focusing first upon its language, then by considering the context of the overall statutory scheme, and finally, by looking for guidance to other States' interpretations of similar statutes.

Insurance Law > Industry Regulation > Insurance Guaranty Associations > Coverage
[HN7] At least eleven States, including New Hampshire, have adopted a version of the National Association of Insurance Commissioners Post-Assessment Property and Liability Insurance Guaranty Association Model Act without including a filing deadline. While the legislature chose not to include the simple expedient of a filing deadline in N.H. Rev. Stat. Ann. ch. 404-B, it did provide that the New Hampshire Insurance Guaranty Association would only be obligated to the extent of the covered claims existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency. *N.H. Rev. Stat. Ann. § 404-B:8*, I(a) (1998). In order to determine the New Hampshire Insurance Guaranty Association's obligations under the statute, the court must determine when a covered claim exists and arises.

Insurance Law > Industry Regulation > Insurance Guaranty Associations > General Overview
[HN8] See *N.H. Rev. Stat. Ann. § 404-B:5*, IV.

Insurance Law > Claims & Contracts > Claims Made Policies > Coverage
Insurance Law > Claims & Contracts > Claims Made Policies > Extended Coverage
Insurance Law > Claims & Contracts > Claims Made Policies > Occurrence Policies
[HN9] An occurrence-based policy is one in which coverage is triggered by the occurrence of a negligent act or omission during the coverage period.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Tolling > Discovery Rule
Civil Procedure > Discovery > General Overview
Torts > Procedure > Statutes of Limitations > Accrual of Actions > Discovery Rule

[HN10] Under the discovery rule, if a harm and its causal relationship to a negligent act is not discovered or could not reasonably have been discovered when the negligent act occurred, the statute of limitations does not begin to run until a plaintiff discovers or in the exercise of reasonable diligence should have discovered this causal relationship. The discovery rule extends the time during which a person may bring suit based upon when he discovered, or should have discovered, the harm done. However, a claim does not arise until harm is suffered; therefore, the New Hampshire Insurance Guaranty Association (NHIGA) remains obligated on claims that arise within the thirty-day period after an insurer is declared insolvent. Any claim that has not arisen until after the expiration of the thirty-day period is not covered under N.H. Rev. Stat. Ann. ch. 404-B.

Insurance Law > Industry Regulation > Insurance Guaranty Associations > General Overview

[HN11] The statutory framework of the New Hampshire Insurance Guaranty Association (NNHIGA) prevents it from becoming a substitute insurer. Unlike a regular insurance company, NHIGA does not have a store of profits from which to draw money to pay out claims.

Insurance Law > Industry Regulation > Insurance Guaranty Associations > General Overview

[HN12] See *N.H. Rev. Stat. Ann. § 404-B:8*, I(c) (1998).

Healthcare Law > Actions Against Healthcare Workers > Doctors & Physicians

Insurance Law > Industry Regulation > Insurance Guaranty Associations > Coverage

Torts > Malpractice & Professional Liability > Healthcare Providers

[HN13] Limitations on the New Hampshire Insurance Guaranty Association's obligations provide another form of protection against increased premiums for policyholders.

Insurance Law > Industry Regulation > Insurance Guaranty Associations > General Overview

[HN14] There appears to be no reason why the New Hampshire Insurance Guaranty Association should become in effect an insurer in competition with member insurers by continuing existing policies, possibly for several years.

Insurance Law > Industry Regulation > Insurance Guaranty Associations > General Overview

Insurance Law > Industry Regulation > Insurer Insolvency > General Overview

[HN15] Other States that have adopted similar statutes to N.H. Rev. Stat. Ann. ch. 404-B have found that their respective guaranty associations were not intended to become new insurers for all purposes. The legislative desire to assist claimants cannot be, and is not intended to be, bureaucratic benevolence.

COUNSEL: Jordan, Gfroerer & Weddleton, of Concord (Michael G. Gfroerer on the brief and orally), for the plaintiffs.

Nixon Peabody LLP, of Manchester (W. Scott O'Connell & a. on the brief, and Mark D. Robins orally), for the defendant.

JUDGES: Dalianis, J. BRODERICK, C.J., and NADEAU, DUGGAN and GALWAY, concurred.

OPINION BY: Dalianis

OPINION

[361]** **[*591]** Dalianis, J. The plaintiffs, Dr. Richard Benson, Dr. Dennis Card and the New Hampshire Medical Society, appeal the order of the Superior Court (*McGuire*, J.) dismissing their petition for declaratory judgment for failure to state a claim upon which relief can be granted. We affirm in part, reverse in part and remand.

The relevant facts follow. Benson and Card carried "claims-made" medical malpractice liability insurance from PHICO Insurance Company (PHICO). Claims-made policies provide liability coverage for claims that are made against the insured and reported to the insurer during the policy period. *Bianco Prof. Assoc. v. Home Ins. Co., 144 N.H. 288, 296, 740 A.2d 1051 (1999).* **[***2]** By the time they retired, Benson and Card separately purchased extended reporting period (ERP) coverage (also known as "tail" coverage) from PHICO. Tail coverage is designed to extend malpractice insurance coverage for acts which may have occurred during practice, but are not reported until later.

[*592] PHICO was declared insolvent by the Commonwealth Court of Pennsylvania on February 1, 2002. Upon the insolvency of PHICO, the New

Hampshire Insurance Guaranty Association (NHIGA) issued a notice to PHICO policyholders and claimants stating, "Under New Hampshire law, [NHIGA] is obligated to pay covered claims existing prior to the determination **[**362]** of insolvency and arising within 30 days after the determination of insolvency . . . ." The notice informed policyholders that all covered claims under extended reporting period policies arising more than thirty days after February 1, 2002, would be denied.

The plaintiffs filed a petition on March 21, 2003, naming NHIGA and PHICO as defendants, seeking a declaration that NHIGA was obligated "to undertake all contractual obligations owed" by PHICO, and a judgment that NHIGA must provide tail coverage to individual plaintiffs and similarly affected **[***3]** policyholders in New Hampshire. The action against PHICO was indefinitely stayed by the trial court, pursuant to the Pennsylvania Commonwealth Court's Liquidation Order.

NHIGA filed a plea in abatement to dismiss the Medical Society for lack of standing. The trial court granted the plea in abatement, finding that the Medical Society failed to challenge the merits of the plea in abatement, and noting it was unaware of any grounds upon which the Medical Society could do so. The Medical Society appeals this issue, arguing that the trial court erred by not allowing the Medical Society to amend its pleading to cure the alleged defects.

NHIGA then filed a motion to dismiss for failure to state a claim upon which relief can be granted against the remaining plaintiffs. NHIGA argued that the plaintiffs failed to allege the existence of any covered claims as defined by *RSA 404-B:5, IV* (1998) (amended 2003, 2004). The trial court agreed, finding that possible future claims, as alleged by the plaintiffs, are not covered claims within NHIGA's statute of origin. *See RSA 404-B:8, I(a)* (1998). Benson and Card then filed a motion for reconsideration, which was denied. They appeal, arguing that **[***4]** NHIGA has the same obligations under extant insurance contracts as insolvent insurer PHICO would have had. They also argue that possible future claims must be treated as covered claims under *RSA chapter 404-B*.

We first address the Medical Society's appeal from the order granting the plea in abatement. The Medical Society argues that where grounds for abatement exist, the appropriate remedy is for the court to allow the plaintiff to cure the defect by amending its pleadings. *See* 4 R. Wiebusch, *New Hampshire Practice, Civil Practice and Procedure* § 10.11, at 250 (1997). The Medical Society argues that the trial court erred by not **[*593]** allowing it to amend its initial petition for declaratory judgment; however, the Medical Society never moved to amend its petition.

We assume the allegations set forth in the petition for declaratory judgment are true. For purposes of determining whether the Medical Society could have cured the defect by amending its pleadings, we will also assume that the allegations set forth in the plaintiffs' brief are true. We conclude that the Medical Society has not asserted a legal or equitable right sufficient to bring a declaratory judgment action. [HN1] In order **[***5]** to maintain a petition for a declaratory judgment, a plaintiff must claim a "present legal or equitable right or title." *RSA 491:22, I* (1997). A party will not be heard to question the validity of a law, or of any part of it, unless he shows that *some right of his* is impaired or prejudiced thereby. *Silver Brothers, Inc. v. Wallin, 122 N.H. 1138, 1140, 455 A.2d 1011 (1982)*.

Despite the Medical Society's assertion, its status as the "representative membership organization for medical practitioners statewide" does not give it a "clear and direct interest in the litigation." Only those with a present legal or equitable **[**363]** right have standing to sue NHIGA; *i.e.*, those who carried tail coverage through PHICO. The Medical Society admits that it was not insured by PHICO. Consequently it has no tail coverage, and no rights to enforce against NHIGA. In addition, the Medical Society's presence is completely unnecessary, because all New Hampshire doctors holding tail coverage from PHICO are likely to be equally affected. Therefore, we hold that the Medical Society lacks standing as a matter of law, and we affirm the trial court's order granting the plea in abatement.

Next **[***6]** we turn to NHIGA's argument that the order granting the motion to dismiss should be upheld on the grounds that a declaratory judgment petition is not the appropriate vehicle for the remaining plaintiffs' claims. [HN2] "Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive." *RSA 491:22, I (1997)*. NHIGA argues that Benson and Card are not seeking a present legal or equitable right because they

seek coverage for future claims. We disagree.

[HN3] Where a plaintiff seeks a declaratory judgment, he is not seeking to enforce a claim against the defendant, but rather a judicial declaration as to the existence and effect of a relation between him and the defendant. *N. Country Envtl. Servs. v. Town of Bethlehem, 150 N.H. 606, 621, 843 A.2d 949 (2004)*. The remedy of declaratory judgment affords relief from uncertainty and **[*594]** insecurity created by a doubt as to rights, status or legal relations existing between the parties. Petitions for declaratory relief must be liberally construed so **[***7]** as to effectuate the evident purpose of the law. *Radkay v. Confalone, 133 N.H. 294, 296-97, 575 A.2d 355 (1990)*.

While the plaintiffs' claims may be couched in hypothetical language, they are seeking a judicial declaration of NHIGA's present legal obligations. An insurer who signs a contract with a customer is legally obligated to provide coverage to that customer, and thus has a present obligation, notwithstanding the possibility that its specific duties under the policy may not arise until sometime in the future. The plaintiffs are seeking a declaration that NHIGA has such a present obligation as guarantor of insolvent insurer PHICO. The notice sent to policyholders by NHIGA created uncertainty as to the status of the PHICO tail coverage which the plaintiffs purchased. The plaintiffs seek relief from this uncertainty by means of a declaratory judgment action. Accordingly, we find that this matter is properly brought as a petition for declaratory judgment.

Next we turn to the plaintiffs' appeal from the order granting NHIGA's motion to dismiss. [HN4] The standard of review in considering a motion to dismiss is whether the plaintiffs' allegations are reasonably susceptible **[***8]** of a construction that would permit recovery. Although we assume the truth of the facts alleged in the plaintiffs' pleadings and construe all reasonable inferences in the light most favorable to the plaintiffs, we will uphold the grant of the motion to dismiss if the facts pled do not constitute a basis for legal relief. *Estate of Ireland v. Worcester Ins. Co., 149 N.H. 656, 657-58, 826 A.2d 577 (2003)*.

The plaintiffs argue that since there is no deadline for *filing* claims in *RSA chapter 404-B*, NHIGA should be liable on any claims that arise under PHICO's tail coverage policies. They argue first that the claims which may be brought in the future must be treated as covered claims, alternatively, **[**364]** that NHIGA must "stand in the shoes" of the insolvent insurer by the terms of the statute, and still alternatively, that NHIGA must act as the insurer of last resort. NHIGA argues that since the plaintiffs have not alleged any claims arising within the thirty-day period prescribed by the statute, it is not required to provide coverage to the plaintiffs. *See RSA 404-B:8, I(a)*.

In order to evaluate whether the pleadings constitute a basis for legal relief, we must examine **[***9]** the New Hampshire Insurance Guaranty Act (Guaranty Act), *RSA chapter 404-B*. [HN5] We are the final arbiter of the intent of the legislature as expressed in the words of a statute. Where a statute **[*595]** fails to define a disputed term, we assign its plain and ordinary meaning. Moreover, we interpret the plain meaning of a statute to effectuate its underlying purpose. *State v. Beckert, 144 N.H. 315, 316-17, 741 A.2d 63 (1999)*.

In 1969, the National Association of Insurance Commissioners (NAIC) promulgated the Post-Assessment Property and Liability Insurance Guaranty Association Model Act (Model Act). *See Harold Ives Trucking Co. v. Pickens, 355 Ark. 407, 139 S.W.3d 471, 475 n.1 (Ark. 2003)*. Nearly every State has since adopted the Model Act in some form. *See American Employers' v. Elf Atochem, 157 N.J. 580, 725 A.2d 1093, 1097 (N.J. 1999)*. [HN6] *RSA chapter 404-B* is based upon the Model Act and is virtually identical in both purpose and language to statutes in numerous other jurisdictions. *N.H.S. Jour*. 574 (1975); *N.H. Ins. Guaranty Assoc. v. Pitco Frialator, 142 N.H. 573, 577, 705 A.2d 1190 (1998)*. We interpret it by focusing first **[***10]** upon its language, then by considering the context of the overall statutory scheme, and finally, by looking for guidance to other States' interpretations of similar statutes. *Pitco Frialator, 142 N.H. at 577-78*.

Of the States that have adopted a version of the Model Act, most include a filing deadline, after which claims against the State's guaranty association may not be brought. For example, Connecticut law states that the guaranty association will not be "obligated for any claim filed with [it] after the expiration of two years from the date of the declaration of insolvency . . . ." *Conn. Gen. Stat. § 38a-841(1)(a)(ii)(B)* (2000 & Supp. 2004). Some States, like Rhode Island, require the bankruptcy court to establish a bar date, excluding from the meaning of "covered claim" "any claim filed with the [guaranty

association] after the final date set by the court for the filing of claims . . . ." *R.I. Gen. Laws § 27-34-8(a)(1)(iii)* (2002).

[HN7] At least eleven States, including New Hampshire, adopted a version of the NAIC Model Act without including a filing deadline. *See, e.g., RSA ch. 404-B*; *Mass. Gen. Laws ch. 175D (1998)* (amended 2002). While the legislature **[***11]** chose not to include the simple expedient of a filing deadline in *RSA chapter 404-B*, it did provide that NHIGA would only be "obligated to the extent of the covered claims *existing prior* to the determination of insolvency and *arising within 30 days after* the determination of insolvency . . . ." *RSA 404-B:8, I(a)* (1998) (emphasis added). In order to determine NHIGA's obligations under the statute, we must determine when a covered claim exists and arises.

A covered claim is defined in relevant part as [HN8] "a net unpaid claim . . . which arises out of and is within coverage and not in excess of the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if such insurer after the effective date of this chapter is declared insolvent . . . ." *RSA 404-B:5, IV*.

[*596] **[**365]** The plaintiffs argue that a covered claim arises when the tortious act occurs, contending that their original claims-made policies were converted into occurrence-based policies by the addition of the tail coverage. [HN9] An occurrence-based policy is one "in which coverage is triggered by the occurrence of a negligent act or omission during the coverage period . . . ." *Bianco Prof. Assoc., 144 N.H. at 296.* **[***12]** Since *RSA chapter 404-B* has no filing deadline, the plaintiffs argue, NHIGA should be held liable for all claims resulting from negligent acts that occurred prior to or within thirty days of the insolvency declaration, no matter when filed, so long as the underlying statute of limitations for the tort has not expired.

The plaintiffs argue that all of the statutory criteria for covered claims are either alleged or undisputed, except that no liability claims have actually been made against them. The plaintiffs urge us to find that the absence of a filing deadline in the Guaranty Act requires NHIGA to honor completely the PHICO tail coverage policies, in effect serving as substitute insurer.

In support of their argument, the plaintiffs submitted a version of the July 1996 Model Act in which the comments indicate that the thirty-day limit was intended merely to be a transitional period during which policyholders could procure new coverage. *Post-Assessment Property and Liability Insurance Guaranty Association Model Act* § 8(A)(1)(b) cmt. (NAIC 1996) *in* III NAIC, *Model Laws Regulations and Guidelines* at 540-46. The plaintiffs further note that most States that have a statutory **[***13]** filing deadline also include "transitional" language similar to that found in *RSA 404-B:8, I(a)*, arguing that the thirty-day limit was not intended to serve as a filing deadline in those States.

NHIGA, on the other hand, urges us to read the thirty-day period as a filing deadline, arguing that the plaintiffs must allege an "actual covered claim" which arose prior to the expiration of the thirty-day period. NHIGA argues that since no claims were filed or alleged, it has no further obligation to the plaintiffs under the statute. By NHIGA's interpretation, a claim "arises" when filed with it, or otherwise brought to its attention.

We disagree with both parties' interpretation of the words "arise" and "exist." Any malpractice claims against the plaintiffs, who retired prior to PHICO's insolvency declaration, would necessarily be the result of events that took place prior to or within thirty days of PHICO's insolvency. However, for a claim to arise, a person must have suffered harm caused by the alleged malpractice, since a cause of action arises only when all the necessary elements are present. A cause of action for tort arises when causal negligence is coupled with *harm* to the plaintiff. **[***14]** **[*597]** *Conrad v. Hazen, 140 N.H. 249, 252, 665 A.2d 372 (1995).* A potential medical malpractice claimant has a cause of action the moment harm is suffered. If the claimant suffered harm prior to the expiration of the thirty-day period during which claims can arise under the statute, then NHIGA will be obligated on that claim no matter when it is filed, within the underlying statute of limitations, because *RSA chapter 404-B* does not contain a filing deadline. If the harm was not suffered before the expiration of the thirty-day period, however, the claim did not arise within the period, and NHIGA is not obligated on that claim.

At the hearing on the motion for reconsideration, the plaintiffs expressed their concern about the operation of the discovery rule, *RSA 508:4, I* (1997), and the minority rule, *RSA 508:8* (1997). [HN10] Under **[**366]** the discovery rule, if the harm and its causal relationship to the negligent act is not discovered or could not reasonably have been discovered when the negligent act

occurred, the statute of limitations does not begin to run until the plaintiffs discover or in the exercise of reasonable diligence should have discovered this causal relationship. *Pichowicz v. Watson Ins. Agency, 146 N.H. 166, 167, 768 A.2d 1048 (2001).* **[***15]** The discovery rule extends the time during which a person may bring suit based upon when he discovered, or should have discovered, the harm done. However, as noted above, a claim does not arise until harm is suffered; therefore, NHIGA remains obligated on claims that arose within the thirty-day period. Any claim that has not arisen until after the expiration of the thirty-day period is not covered under *RSA chapter 404-B.*

The minority rule, however, could extend the period during which NHIGA is obligated on a claim. The minority rule provides that a minor has until two years after having reached the age of majority to bring a personal injury action. *Norton v. Patten, 125 N.H. 413, 414, 480 A.2d 190 (1984).* If a minor suffered harm before the expiration of the thirty-day period, resulting from the negligent act of one of the plaintiffs, the minor has a claim which arose within the statutory time limit. Since *RSA chapter 404-B* has no filing deadline, NHIGA is obligated on the claim, as long as it is filed within two years after the minor reaches majority.

The plaintiffs next argue, in the alternative, that NHIGA is obligated on all claims, even those that arise after **[***16]** the thirty-day period, because NHIGA must "stand in the shoes" of the insolvent insurer. As support for their argument, the plaintiffs point to one of the stated purposes of the Guaranty Act: to provide a "mechanism . . . to avoid financial loss to claimants or policyholders because of the insolvency." *RSA 404-B:2* (1998). The Act provides that the NHIGA shall "be deemed the insurer to the **[*598]** extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not been insolvent." *RSA 404-B:8, I(b)* (1998). The plaintiffs read the statute as requiring NHIGA to "stand in the shoes" of the insolvent insurer, and so argue that they do not need to allege the existence of covered claims. We disagree.

We find the words "to the extent" and "to such extent" in *RSA 404-B:8, I(b)* controlling, and find that they refer back to "covered claims." Contrary to the plaintiffs' argument, NHIGA has no duty to act as the insolvent insurer would have beyond its obligation for covered claims as defined by the statute. As discussed above, if no claims arise as required by *RSA chapter 404-B,* NHIGA has no statutory obligation **[***17]** to "stand in the shoes" of the insolvent insurer.

Finally, the plaintiffs argue that our case law establishes NHIGA as the "insurer of last resort" and, as such, it should function as a substitute insurer. *See Pitco Frialator, 142 N.H. at 579.* Although we identified the Guaranty Act's overall objective as establishing NHIGA as an insurer of last resort in *Pitco Frialator,* that case addressed a claimant's duty to exhaust workers' compensation and other available insurance funds before NHIGA becomes obligated on a claim. Because the plaintiff in *Pitco Frialator* had already received workers' compensation benefits, he could not seek further relief from NHIGA. *See id.* Our recognition that NHIGA is the insurer of last resort in that limited respect does not support the argument that it must act as a **[**367]** substitute insurer and provide full recovery.

[HN11] The statutory framework of NHIGA prevents it from becoming a substitute insurer. The Guaranty Act created a nonprofit unincorporated legal entity, comprised of member insurers - entities that write and transact insurance in New Hampshire. *RSA 404-B:5, VI*; *RSA 404-B:6* (1998). NHIGA assesses its members the costs of claims **[***18]** brought against it, in proportion to their market share for the previous year, with the exception that no assessment shall be "greater than 2 percent of that member insurer's net direct written premiums for the preceding calendar year . . . ." *RSA 404-B:8, I(c)* (1998). The protection it provides is limited based upon its status as a nonprofit entity and the method by which it is funded. *See Hunnihan v. Mattatuck Mfg. Co., 243 Conn. 438, 705 A.2d 1012, 1018 (Conn. 1997).* It is governed by a board of directors, selected by the member insurers, with the approval of the commissioner of insurance. *RSA 404-B:7, I* (1998). NHIGA is authorized to refund any assets found by the board of directors to exceed liabilities, at the end of a calendar year, to its members in proportion to their contribution. *RSA 404-B:8, II(f)* (1998). **[*599]** Unlike a regular insurance company, NHIGA does not have a store of profits from which to draw money to pay out claims.

The Act also provides that [HN12] "rates and premiums charged for insurance policies to which this chapter applies shall include amounts sufficient to recoup a sum equal to the amounts paid to the association by the

member insurer . . . ." *RSA* **[***19]** *404-B:16* (1998). This section effectively requires the member insurers to pass on the costs of membership in NHIGA to their customers through insurance rates and premiums. The insurance-buying public pays for covered claims brought against NHIGA under the statute. It is therefore unlikely that the legislature intended NHIGA to act as substitute insurer when a member became insolvent. This would result in the public paying for more than the occasional covered claim arising within the stated time period; the public would, in fact, bear the costs of all malpractice claims brought against the plaintiff doctors until the underlying statute of limitations expired. [HN13] "Limitations on the association's obligations, therefore, provide another form of protection against increased premiums for policyholders . . . ." *Hunnihan, 705 A.2d at 1019.*

Finally, the comment to the July 1996 Model Act that the plaintiffs submitted indicates that guaranty associations based upon the act were not intended to act as substitute insurers. "The basic principle is to permit policyholders to make an orderly transition to other companies. [HN14] There appears to be no reason why the association should become **[***20]** in effect an insurer in competition with member insurers by continuing existing policies, possibly for several years." *Post-Assessment Property and Liability Insurance Guaranty Association Model Act* § 8(A)(1)(b) cmt. (NAIC 1996).

[HN15] Other States that have adopted similar statutes have found that their respective guaranty associations were not intended to become new insurers for all purposes. "The legislative desire to assist claimants cannot be, and is not intended to be, bureaucratic benevolence." *Carpenter Tech. v. Admiral Ins. 172 N.J. 504, 800 A.2d 54, 61 (N.J. 2002).* "While CIGA's general purpose is to pay the obligations of an insolvent insurer, it is not itself an insurer and does not 'stand in the shoes' of the insolvent insurer for all purposes." *R.J. Reynolds v. Cal. Ins. Guarantee Ass'n, 235 Cal. App. 3d 595, 1 Cal. Rptr.2d 405, 408 (Ct. App. 1991)* (quotation omitted). "[CIGA] is *not* in the **[**368]** 'business' of insurance . . . . CIGA issues no policies, collects no premiums, makes no profits, and assumes no contractual obligations to the insureds. Its 'business' is providing insureds with a limited form of protection from financial loss **[***21]** occasioned by the insolvency of their insurer." *Isaacson v. California Ins. Guar. Ass'n, 44 Cal. 3d 775, 750 P.2d 297, 305, 244 Cal. Rptr. 655 (Cal. 1988).*

[*600] Because we conclude that NHIGA is obligated to provide coverage to the plaintiffs, though only to the extent of claims that arose prior to or within thirty days of the declaration of insolvency, we reverse the order granting the motion to dismiss. We remand to the trial court for entry of a declaratory judgment in accordance with this opinion.

Affirmed in part; reversed in part;

and remanded.

BRODERICK, C.J., and NADEAU, DUGGAN and GALWAY, concurred.

SIERRA CLUB v. MORTON, SECRETARY OF THE INTERIOR, ET AL.

No. 70-34

SUPREME COURT OF THE UNITED STATES

405 U.S. 727*; *92 S. Ct. 1361*; *31 L. Ed. 2d 636*; *1972 U.S. LEXIS 118*; *3 ERC (BNA) 2039*; *2 ELR 20192

November 17, 1971, Argued
April 19, 1972, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: *433 F.2d 24*, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff nature preservation organization appealed an order from the United States Court of Appeals for the Ninth Circuit, which reversed the trial court's judgment holding plaintiff had standing to object to defendant federal forest service's development of national forest into a ski resort and granting a preliminary injunction. Plaintiff claimed it possessed standing to sue under the Administrative Procedure Act, *5 U.S.C.S. § 701 et seq.*

OVERVIEW: Defendant federal forest service and a private corporation sought to develop part of a national forest into a ski resort and recreational area. Plaintiff filed suit seeking a declaratory judgment that the development contravened federal laws for the preservation of national forests and seeking a preliminary injunction. Plaintiff claimed standing under the Administrative Procedure Act, *5 U.S.C.S. § 701 et seq.* The trial court granted the injunction and found plaintiff had standing where plaintiff alleged statutory authority was exceeded. The appellate court reversed, denied the injunction, and held plaintiff lacked standing where it failed to allege development would affect plaintiff's members. Plaintiff appealed. The Court affirmed, holding an injury in fact required more than an injury to a cognizable interest and required the party seeking review be injured himself. Where plaintiff failed to allege development would injure it or its members, plaintiff lacked standing.

OUTCOME: The Court affirmed the appellate court's holding denying standing to plaintiff nature preservation organization and reversing the trial court's grant of plaintiff's motion for an injunction. Where plaintiff failed to allege its complaint for declaratory action that development of a national forest affected it or its members, plaintiff lacked standing.

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Reviewability > General Overview
Civil Procedure > Justiciability > Standing > Personal Stake
Constitutional Law > The Judiciary > Case or Controversy > Standing > General Overview

[HN1] Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such

a personal stake in the outcome of the controversy, as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.

Administrative Law > Judicial Review > Reviewability > Standing
Civil Procedure > Justiciability > Standing > General Overview
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN2] See § 10 of the Administrative Procedure Act, *5 U.S.C.S. § 702*.

Civil Procedure > Justiciability > Standing > Injury in Fact
[HN3] The "injury in fact" test in determining standing requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.

Administrative Law > Judicial Review > Reviewability > Standing
Civil Procedure > Justiciability > Standing > General Overview
[HN4] An organization whose members are injured may represent those members in a proceeding for judicial review. But a mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization adversely affected or aggrieved within the meaning of the Administrative Procedure Act, *5 U.S.C.S. § 701, et seq.*

SUMMARY:

Alleging its "special interest in the conservation and sound maintenance of the national parks, games refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested," a conservation club brought suit against federal officials in the United States District Court for the Northern District of California, seeking declaratory and injunctive relief against the granting of approval or issuance of permits for commercial exploitation of Mineral King Valley, a national game refuge adjacent to Sequoia National Park. The District Court granted a preliminary injunction, but the United States Court of Appeals for the Ninth Circuit reversed (*433 F2d 24*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Stewart, J., expressing the views of four members of the court, it was held that the club lacked standing to maintain the suit, because it failed to allege that it or its members were adversely affected by the proposed action.

Douglas, J., dissented on the ground that environmental issues should be litigable in the name of the despoiled inanimate object where the injury is the subject of public outrage.

Brennan, J., dissented on the ground that organizations such as the conservation club should be allowed to litigate environmental issues.

Blackmun, J., dissented on the grounds that either (1) organizations such as the conservation club should be allowed to litigate environmental issues or (2) the District Court's judgment should be approved on condition that the club forthwith amend its complaint to meet the court's requirements for standing.

Powell and Rehnquist, JJ., did not participate.

LAWYERS' EDITION HEADNOTES:

[*LEdHN1]**

PARTIES §3

standing to sue --

Headnote:[1]

Where a party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing to sue depends on whether the party has alleged such a personal stake in the outcome of the controversy that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.

[*LEdHN2]**

PARTIES §2

standing to sue --

Headnote:[2]

When Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing to sue must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.

[*LEdHN3]**

ACTION OR SUIT §31

COURTS §49

COURTS §229

jurisdiction --

Headnote:[3]

Congress may not confer jurisdiction on Article 3 federal courts to render advisory opinions, or to entertain "friendly" suits, or to resolve "political questions," because suits of this character are inconsistent with the judicial function under Article 3.

[*LEdHN4]**

PARTIES §2

standing to sue --

Headnote:[4]

Where a dispute is otherwise justiciable, the question whether the litigant is a proper party to request an adjudication of a particular issue is one within the power of Congress to determine.

[*LEdHN5]**

PARTIES §3

standing to sue --

Headnote:[5]

A palpable economic injury is sufficient to lay the basis for standing to sue, with or without a specific statutory provision for judicial review.

[*LEdHN6]**

ADMINISTRATIVE LAW §220

right to review --

Headnote:[6]

Injury to the aesthetics and ecology of an area may amount to an "injury in fact" sufficient to lay the basis for standing under the provision of the Administrative Procedure Act (*5 USCS 702*) that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof; however, the "injury in fact" test also requires that the party seeking review be himself among the injured.

[*LEdHN7]**

PLEADING §81

amendment --

Headnote:[7]

A United States Supreme Court decision that a suit to enjoin federal officials from granting approval of commercial exploitation of a national game refuge cannot be maintained by a conservation club merely by reason of its alleged "special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested," does not bar the club from seeking in the Federal District Court to amend its complaint under *Rule 15 of the Federal Rules of Civil Procedure* to allege that it would be significantly affected by the proposed government action.

[*LEdHN8]**

COMMUNICATIONS §23

COMMUNICATIONS §24

FCC -- review --

Headnote:[8]

The fact of economic injury is what gives a person

standing to seek judicial review under the Communications Act of 1934, but once review is properly invoked, that person may argue that the agency has failed to comply with its statutory mandate.

[*LEdHN9]**

PARTIES §23

organizations -- representation --

Headnote:[9]

An organization whose members are injured may represent those members in a proceeding for judicial review.

[*LEdHN10]**

ADMINISTRATIVE LAW §223

judicial review -- aggrieved persons --

Headnote:[10]

A mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render an organization "adversely affected" or "aggrieved" within the meaning of the Administrative Procedure Act provision (*5 USCS 702*) that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

[*LEdHN11]**

ADMINISTRATIVE LAW §237

judicial review -- standing --

Headnote:[11]

The test of "injury in fact" -- required to lay the basis for standing under the Administrative Procedure Act provision (*5 USCS 702*) that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof--goes only to the question of standing to obtain judicial review; once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief.

[*LEdHN12]**

PUBLIC LANDS §270

judicial review -- standing --

Headnote:[12]

A conservation club, alleging its "special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested," but not alleging any facts showing itself or its members adversely affected, lacks standing to maintain an action for declaratory and injunctive relief restraining federal officials from granting approval of commercial exploitation of a national game refuge.

SYLLABUS

Petitioner, a membership corporation with "a special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country," brought this suit for a declaratory judgment and an injunction to restrain federal officials from approving an extensive skiing development in the Mineral King Valley in the Sequoia National Forest. Petitioner relies on § 10 of the Administrative Procedure Act, which accords judicial review to a "person suffering legal wrong because of agency action, or [who is] adversely affected or aggrieved by agency action within the meaning of a relevant statute." On the theory that this was a "public" action involving questions as to the use of natural resources, petitioner did not allege that the challenged development would affect the club or its members in their activities or that they used Mineral King, but maintained that the project would adversely change the area's aesthetics and ecology. The District Court granted a preliminary injunction. The Court of Appeals reversed, holding that the club lacked standing, and had not shown irreparable injury. *Held*: A person has standing to seek judicial review under the Administrative Procedure Act only if he can show that he himself has suffered or will suffer injury, whether economic or otherwise. In this case, where petitioner asserted no individualized harm to itself or its members, it lacked standing to maintain the action. Pp. 731-741.

COUNSEL: Leland R. Selna, Jr., argued the cause for

petitioner. With him on the briefs was Matthew P. Mitchell.

Solicitor General Griswold argued the cause for respondents. With him on the brief were Assistant Attorney General Kashiwa, Deputy Assistant Attorney General Kiechel, William Terry Bray, Edmund B. Clark, and Jacques B. Gelin.

Briefs of amici curiae urging reversal were filed by Anthony A. Lapham and Edward Lee Rogers for the Environmental Defense Fund; by George J. Alexander and Marcel B. Poche for the National Environmental Law Society; and by Bruce J. Terris and James W. Moorman for the Wilderness Society et al.

Briefs of amici curiae urging affirmance were filed by E. Lewis Reid and Calvin E. Baldwin for the County of Tulare; by Robert C. Keck for the American National Cattlemen's Assn. et al.; and by Donald R. Allen for the Far West Ski Assn. et al.

JUDGES: Stewart, J., delivered the opinion of the Court, in which Burger, C. J., and White and Marshall, JJ., joined. Douglas, J., post, p. 741, Brennan, J., post, p. 755, and Blackmun, J., post, p. 755, filed dissenting opinions. Powell and Rehnquist, JJ., took no part in the consideration or decision of the case.

OPINION BY: STEWART

OPINION

[*728] [*639] [**1363]** MR. JUSTICE STEWART delivered the opinion of the Court.

I

The Mineral King Valley is an area of great natural beauty nestled in the Sierra Nevada Mountains in Tulare County, California, adjacent to Sequoia National Park. It has been part of the Sequoia National Forest since 1926, and is designated as a national game refuge by special Act of Congress. [1] Though once the site of extensive mining activity, Mineral King is now used almost exclusively for recreational purposes. Its relative inaccessibility and lack of development have limited the number of visitors each year, and at the same time have preserved the valley's quality as a quasi-wilderness area largely uncluttered by the products of civilization.

1 Act of July 3, 1926, § 6, 44 Stat. 821, *16 U. S. C. § 688*.

[*729] The United States Forest Service, which is entrusted with the maintenance and administration of national forests, began in the late 1940's to give consideration to Mineral King as a potential site for recreational development. Prodded by a rapidly increasing demand for skiing facilities, the Forest Service published a prospectus in 1965, inviting bids from private developers for the construction and operation of a ski resort that would also serve as a summer recreation area. The proposal of Walt Disney Enterprises, Inc., was chosen from those of six bidders, and Disney received a three-year permit to conduct surveys and explorations in the valley in connection **[***640]** with its preparation of a complete master plan for the resort.

The final Disney plan, approved by the Forest Service in January 1969, outlines a $ 35 million complex of motels, restaurants, swimming pools, parking lots, and other structures designed to accommodate 14,000 visitors daily. This complex is to be constructed on 80 acres of the valley floor under a 30-year use permit from the Forest Service. Other facilities, including ski lifts, ski trails, a cog-assisted railway, and utility installations, are to be constructed on the mountain slopes and in other parts of the valley under a revocable special-use permit. To provide access to the resort, the State of California proposes to construct a highway 20 miles in length. A section of this road would traverse Sequoia National Park, as would a proposed high-voltage power line needed to provide electricity for the resort. Both the highway and the power line require the approval of the Department of the Interior, which is entrusted with the preservation and maintenance of the national parks.

Representatives of the Sierra Club, who favor maintaining Mineral King largely in its present state, followed the progress of recreational planning for the valley **[*730]** with close attention and increasing dismay. They unsuccessfully sought a public hearing on the proposed development in 1965, and in subsequent correspondence with officials of the Forest Service and the Department of the Interior, they expressed the Club's objections to Disney's plan as a whole and to particular features included in it. In June 1969 the Club filed the present suit in the United States District Court for the Northern District of California, seeking a declaratory judgment that various aspects of the proposed

development **[**1364]** contravene federal laws and regulations governing the preservation of national parks, forests, and game refuges, [2] and also seeking preliminary and permanent injunctions restraining the federal officials involved from granting their approval or issuing permits in connection with the Mineral King project. The petitioner Sierra Club sued as a membership corporation with "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country," and invoked the judicial-review provisions of the Administrative Procedure Act, *5 U. S. C. § 701 et seq.*

> 2 As analyzed by the District Court, the complaint alleged violations of law falling into four categories. First, it claimed that the special-use permit for construction of the resort exceeded the maximum-acreage limitation placed upon such permits by *16 U. S. C. § 497*, and that issuance of a "revocable" use permit was beyond the authority of the Forest Service. Second, it challenged the proposed permit for the highway through Sequoia National Park on the grounds that the highway would not serve any of the purposes of the park, in alleged violation of *16 U. S. C. § 1*, and that it would destroy timber and other natural resources protected by *16 U. S. C. §§ 41* and *43*. Third, it claimed that the Forest Service and the Department of the Interior had violated their own regulations by failing to hold adequate public hearings on the proposed project. Finally, the complaint asserted that *16 U. S. C. § 45c* requires specific congressional authorization of a permit for construction of a power transmission line within the limits of a national park.

[*731] After two days of hearings, the District Court granted the requested preliminary injunction. It rejected the respondents' challenge to the Sierra Club's standing to sue, and determined that the hearing had raised questions "concerning possible **[***641]** excess of statutory authority, sufficiently substantial and serious to justify a preliminary injunction . . . ." The respondents appealed, and the Court of Appeals for the Ninth Circuit reversed. *433 F.2d 24*. With respect to the petitioner's standing, the court noted that there was "no allegation in the complaint that members of the Sierra Club would be affected by the actions of [the respondents] other than the fact that the actions are personally displeasing or distasteful to them," *id., at 33*, and concluded:

"We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority." *Id., at 30*.

Alternatively, the Court of Appeals held that the Sierra Club had not made an adequate showing of irreparable injury and likelihood of success on the merits to justify issuance of a preliminary injunction. The court thus vacated the injunction. The Sierra Club filed a petition for a writ of certiorari which we granted, *401 U.S. 907*, to review the questions of federal law presented.

II

[*LEdHR1]** [1] **[***LEdHR2]** [2] **[***LEdHR3]** [3] **[***LEdHR4]** [4]The first question presented is whether the Sierra Club has alleged facts that entitle it to obtain judicial review of the challenged action. [HN1] Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what **[*732]** has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," *Baker v. Carr, 369 U.S. 186, 204*, as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast v. Cohen, 392 U.S. 83, 101*. Where, however, Congress has authorized public officials **[**1365]** to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff. [3]

> 3 Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, *Muskrat v. United States, 219 U.S. 346*, or to entertain "friendly" suits, *United States v. Johnson, 319 U.S. 302*, or to resolve "political questions," *Luther v. Borden, 7 How. 1*, because suits of this character are inconsistent with the

judicial function under Art. III. But where a dispute is otherwise justiciable, the question whether the litigant is a "proper party to request an adjudication of a particular issue," *Flast v. Cohen, 392 U.S. 83, 100*, is one within the power of Congress to determine. Cf. *FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477*; *Flast v. Cohen, supra, at 120* (Harlan, J., dissenting); *Associated Industries v. Ickes, 134 F.2d 694, 704*. See generally Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 Yale L. J. 816, 837 *et seq*. (1969); Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033 (1968).

The **[***642]** Sierra Club relies upon § 10 of the Administrative Procedure Act (APA), *5 U. S. C. § 702*, which provides:

[HN2] "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency **[*733]** action within the meaning of a relevant statute, is entitled to judicial review thereof."

Early decisions under this statute interpreted the language as adopting the various formulations of "legal interest" and "legal wrong" then prevailing as constitutional requirements of standing. [4] But, in *Data Processing Service v. Camp, 397 U.S. 150*, and *Barlow v. Collins, 397 U.S. 159*, decided the same day, we held more broadly that persons had standing to obtain judicial review of federal agency action under § 10 of the APA where they had alleged that the challenged action had caused them "injury in fact," and where the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated. [5]

4 See, *e. g., Kansas City Power & Light Co*. v. *McKay, 96 U. S. App. D. C. 273, 281, 225 F.2d 924, 932*; *Ove Gustavsson Contracting Co*. v. *Floete, 278 F.2d 912, 914*; *Duba v. Schuetzle, 303 F.2d 570, 574*. The theory of a "legal interest" is expressed in its extreme form in *Alabama Power Co*. v. *Ickes, 302 U.S. 464, 479-481*. See also *Tennessee Electric Power Co*. v. *TVA, 306 U.S. 118, 137-139*.

5 In deciding this case we do not reach any questions concerning the meaning of the "zone of interests" test or its possible application to the facts here presented.

[*LEdHR5]** [5]In *Data Processing*, the injury claimed by the petitioners consisted of harm to their competitive position in the computer-servicing market through a ruling by the Comptroller of the Currency that national banks might perform data-processing services for their customers. In *Barlow*, the petitioners were tenant farmers who claimed that certain regulations of the Secretary of Agriculture adversely affected their economic position *vis-a-vis* their landlords. These palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory **[*734]** provision for judicial review. [6] Thus, neither *Data Processing* nor *Barlow* addressed itself to the question, which has arisen with increasing **[**1366]** frequency in federal courts in recent years, as to what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared. [7] That question is presented in this case.

6 See, *e. g., Hardin v. Kentucky Utilities Co., 390 U.S. 1, 7*; *Chicago v. Atchison, T. & S. F. R. Co., 357 U.S. 77, 83*; *FCC v. Sanders Bros. Radio Station, supra, at 477*.

7 No question of standing was raised in *Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402*. The complaint in that case alleged that the organizational plaintiff represented members who were "residents of Memphis, Tennessee who use Overton Park as a park land and recreation area and who have been active since 1964 in efforts to preserve and protect Overton Park as a park land and recreation area."

III

[*643]** **[***LEdHR6]** [6]The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area. Thus, in referring to the road to be built through Sequoia National Park, the complaint alleged that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like

economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. [HN3] But the "injury in fact" test requires more than an injury to a cognizable **[*735]** interest. It requires that the party seeking review be himself among the injured.

[*LEdHR7]** [7]The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort. The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents. [8]

> 8 The only reference in the pleadings to the Sierra Club's interest in the dispute is contained in paragraph 3 of the complaint, which reads in its entirety as follows:
>
> "Plaintiff Sierra Club is a non-profit corporation organized and operating under the laws of the State of California, with its principal place of business in San Francisco, California since 1892. Membership of the club is approximately 78,000 nationally, with approximately 27,000 members residing in the San Francisco Bay Area. For many years the Sierra Club by its activities and conduct has exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested. One of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains. Its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants as hereinafter more fully appears."
>
> In an *amici curiae* brief filed in this Court by the Wilderness Society and others, it is asserted that the Sierra Club has conducted regular camping trips into the Mineral King area, and that various members of the Club have used and continue to use the area for recreational purposes. These allegations were not contained in the pleadings, nor were they brought to the attention of the Court of Appeals. Moreover, the Sierra Club in its reply brief specifically declines to rely on its individualized interest, as a basis for standing. See n. 15, *infra*. Our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under *Rule 15, Federal Rules of Civil Procedure*.

[*736] [1367]** The Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a "public" action involving **[***644]** questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a "representative of the public." [9] This theory reflects a misunderstanding of our cases involving so-called "public actions" in the area of administrative law.

> 9 This approach to the question of standing was adopted by the Court of Appeals for the Second Circuit in *Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97, 105*:
>
> "We hold, therefore, that the public interest in environmental resources -- an interest created by statutes affecting the issuance of this permit -- is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest."

The origin of the theory advanced by the Sierra Club may be traced to a dictum in *Scripps-Howard Radio v. FCC, 316 U.S. 4*, in which the licensee of a radio station in Cincinnati, Ohio, sought a stay of an order of the FCC allowing another radio station in a nearby city to change its frequency and increase its range. In discussing its power to grant a stay, the Court noted that "these private litigants have standing only as representatives of the public interest." *Id., at 14*. But that observation did not describe the basis upon which the appellant was allowed to obtain judicial review as a "person aggrieved" within the meaning of the statute involved in that case, [10] since Scripps-Howard **[*737]** was clearly "aggrieved" by

reason of the economic injury that it would suffer as a result of the Commission's action. [11] The Court's statement was, rather, directed to the theory upon which Congress had authorized judicial review of the Commission's actions. That theory had been described earlier in *FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477*, as follows:

"Congress had some purpose in enacting § 402 (b)(2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal."

10 The statute involved was § 402 (b)(2) of the Communications Act of 1934, 48 Stat. 1093.

11 This much is clear from the *Scripps-Howard* Court's citation of *FCC v. Sanders Bros. Radio Station, 309 U.S. 470*, in which the basis for standing was the competitive injury that the appellee would have suffered by the licensing of another radio station in its listening area.

[*LEdHR8]** [8]Taken together, *Sanders* and *Scripps-Howard* thus established a dual proposition: the fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate. [12] It was in the latter sense that the "standing" of the appellant in *Scripps-Howard* existed only as a "representative of the public interest." It is in a similar sense **[***645]** that we have used the phrase "private attorney general" to **[*738]** describe the function performed by persons upon whom Congress has conferred the right to seek judicial review of agency action. See *Data Processing, supra, at 154*.

12 The distinction between standing to initiate a review proceeding, and standing to assert the rights of the public or of third persons once the proceeding is properly initiated, is discussed in 3 K. Davis, Administrative Law Treatise §§ 22.05-22.07 (1958).

The trend of cases arising under the APA and other statutes authorizing judicial **[**1368]** review of federal agency action has been toward recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and toward discarding the notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review. [13] We noted this development with approval in *Data Processing, 397 U.S., at 154*, in saying that the interest alleged to have been injured "may reflect 'aesthetic, conservational, and recreational' as well as economic values." But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.

13 See, *e. g., Environmental Defense Fund v. Hardin, 138 U. S. App. D. C. 391, 395, 428 F.2d 1093, 1097* (interest in health affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); *Office of Communication of the United Church of Christ v. FCC, 123 U. S. App. D. C. 328, 339, 359 F.2d 994, 1005* (interest of television viewers in the programing of a local station licensed by the FCC); *Scenic Hudson Preservation Conf.* v. *FPC, 354 F.2d 608, 615-616* (interests in aesthetics, recreation, and orderly community planning affected by FPC licensing of a hydroelectric project); *Reade v. Ewing, 205 F.2d 630, 631-632* (interest of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration); *Crowther v. Seaborg, 312 F.Supp. 1205, 1212* (interest in health and safety of persons residing near the site of a proposed atomic blast).

[*LEdHR9]** [9] **[***LEdHR10]** [10]Some courts have indicated a willingness to take this latter step by conferring standing upon organizations **[*739]** that have demonstrated "an organizational interest in the problem" of environmental or consumer protection. *Environmental Defense Fund v. Hardin, 138 U. S. App. D. C. 391, 395, 428 F.2d 1093, 1097*.[14] It is clear that [HN4] an organization whose members are injured may represent those members in a proceeding for judicial review. See, *e. g., NAACP v. Button, 371 U. S. 415, 428*.But a mere "interest in a problem," no matter how longstanding the

interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. **[***646]** But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the **[*740]** same bona fide special interest would not also be entitled to do so.

14 See *Citizens Committee for the Hudson Valley v. Volpe, n. 9, supra; Environmental Defense Fund, Inc*. v. *Corps of Engineers, 325 F.Supp. 728, 734-736*; *Izaak Walton League v. St. Clair, 313 F.Supp. 1312, 1317*. See also *Scenic Hudson Preservation Conf*. v. *FPC, supra, at 616*:

"In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties under § 313 (b) [of the Federal Power Act]."

In most, if not all, of these cases, at least one party to the proceeding did assert an individualized injury either to himself or, in the case of an organization, to its members.

[*LEdHR11]** [11]The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected **[**1369]** through the judicial process. [15] It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process. [16] The principle that the Sierra Club would have us establish in this case would do just that.

15 In its reply brief, after noting the fact that it might have chosen to assert individualized injury to itself or to its members as a basis for standing, the Sierra Club states:

"The Government seeks to create a 'heads I win, tails you lose' situation in which either the courthouse door is barred for lack of assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which does not warrant an injunction adverse to a competing public interest. Counsel have shaped their case to avoid this trap."

The short answer to this contention is that the "trap" does not exist. The test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief. See n. 12 and accompanying text, *supra*.

16 Every schoolboy may be familiar with Alexis de Tocqueville's famous observation, written in the 1830's, that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." 1 Democracy in America 280 (1945). Less familiar, however, is De Tocqueville's further observation that judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury.

"It will be seen, also, that by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution." *Id., at 102*.

[*741] [*LEdHR12]** [12]As we conclude that the Court of Appeals was correct in its holding that the Sierra Club lacked standing to maintain this action, we do not reach any other questions presented in the petition,

and we intimate no view on the merits of the complaint. The judgment is

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

DISSENT BY: DOUGLAS; BRENNAN; BLACKMUN

DISSENT

[*647]** MR. JUSTICE DOUGLAS, dissenting.

I share the views of my Brother BLACKMUN and would reverse the judgment below.

The critical question of "standing" [1] would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern **[*742]** for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Stone, Should Trees Have Standing? -- **[**1370]** Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450 (1972). This suit would therefore be more properly labeled as *Mineral King* v. *Morton*.

1 See generally *Data Processing Service v. Camp, 397 U.S. 150 (1970)*; *Barlow v. Collins, 397 U.S. 159 (1970)*; *Flast v. Cohen, 392 U.S. 83 (1968)*. See also MR. JUSTICE BRENNAN'S separate opinion in *Barlow v. Collins, supra, at 167*. The issue of statutory standing aside, no doubt exists that "injury in fact" to "aesthetic" and "conservational" interests is here sufficiently threatened to satisfy the case-or-controversy clause. *Data Processing Service v. Camp, supra, at 154*.

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. [2] The corporation sole -- a creature of ecclesiastical law -- is an acceptable adversary and large fortunes ride on its cases. [3] The ordinary corporation is a "person" for purposes of the adjudicatory processes, **[*743]** whether it represents proprietary, spiritual, aesthetic, or charitable causes. [4]

2 *In rem* actions brought to adjudicate libelants' interests in vessels are well known in admiralty. G. Gilmore & C. Black, The Law of Admiralty 31 (1957). But admiralty also permits a salvage action to be brought in the name of the rescuing vessel. *The Camanche, 8 Wall. 448, 476 (1869)*. And, in collision litigation, the first-libeled ship may counterclaim in its own name. *The Gylfe v. The Trujillo, 209 F.2d 386 (CA2 1954)*. Our case law has personified vessels:

"A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron . . . . In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed . . . . She acquires a personality of her own." *Tucker v. Alexandroff, 183 U.S. 424, 438*.

3 At common law, an officeholder, such as a priest or the king, and his successors constituted a corporation sole, a legal entity distinct from the personality which managed it. Rights and duties were deemed to adhere to this device rather than to the officeholder in order to provide continuity after the latter retired. The notion is occasionally revived by American courts. *E. g., Reid v. Barry, 93 Fla. 849, 112 So. 846 (1927)*, discussed in Recent Cases, 12 Minn. L. Rev. 295 (1928), and in Note, 26 Mich. L. Rev. 545 (1928); see generally 1 W. Fletcher, Cyclopedia of the Law of Private Corporations §§ 50-53 (1963); 1 P. Potter, Law of Corporations 27 (1881).

4 Early jurists considered the conventional corporation to be a highly artificial entity. Lord Coke opined that a corporation's creation "rests only in intendment and consideration of the law." *Case of Sutton's Hospital*, 77 Eng. Rep. 937, 973 (K. B. 1612). Mr. Chief Justice Marshall added that the device is "an artificial being, invisible, intangible, and existing only in contemplation of law." *Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819)*. Today, suits in the names of corporations are taken for granted.

So **[***648]** it should be as respects valleys, alpine

meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes -- fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water -- whether it be a fisherman, a canoeist, a zoologist, or a logger -- must be able to speak for the values which the river represents and which are threatened with destruction.

I do not know Mineral King. I have never seen it nor traveled it, though I have seen articles describing its proposed "development" [5] notably Hano, Protectionists **[**1371]** vs. recreationists -- The Battle of Mineral King, **[*744]** N. Y. Times Mag., Aug. 17, 1969, p. 25; and Browning, Mickey Mouse in the Mountains, Harper's, March 1972, p. 65. The Sierra Club in its complaint alleges that "one of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains." The District Court held that this uncontested allegation made the Sierra Club "sufficiently aggrieved" to have "standing" to sue on behalf of Mineral King.

> 5 Although in the past Mineral King Valley has annually supplied about 70,000 visitor-days of simpler and more rustic forms of recreation -- hiking, camping, and skiing (without lifts) -- the Forest Service in 1949 and again in 1965 invited developers to submit proposals to "improve" the Valley for resort use. Walt Disney Productions won the competition and transformed the Service's idea into a mammoth project 10 times its originally proposed dimensions. For example, while the Forest Service prospectus called for an investment of at least $ 3 million and a sleeping capacity of at least 100, Disney will spend $ 35.3 million and will bed down 3,300 persons by 1978. Disney also plans a nine-level parking structure with two supplemental lots for automobiles, 10 restaurants and 20 ski lifts. The Service's annual license revenue is hitched to Disney's profits. Under Disney's projections, the Valley will be forced to accommodate a tourist population twice as dense as that in Yosemite Valley on a busy day. And, although Disney has bought up much of the private land near the project, another commercial firm plans to transform an adjoining 160-acre parcel into a "piggyback" resort complex, further adding to the volume of human activity the Valley must endure. See generally Note, Mineral King Valley: Who Shall Watch the Watchmen?, 25 Rutgers L. Rev. 103, 107 (1970); Thar's Gold in Those Hills, 206 The Nation 260 (1968). For a general critique of mass recreation enclaves in national forests see Christian Science Monitor, Nov. 22, 1965, p. 5, col. 1 (Western ed.). Michael Frome cautions that the national forests are "fragile" and "deteriorate rapidly with excessive recreation use" because "the trampling effect alone eliminates vegetative growth, creating erosion and water runoff problems. The concentration of people, particularly in horse parties, on excessively steep slopes that follow old Indian or cattle routes, has torn up the landscape of the High Sierras in California and sent tons of wilderness soil washing downstream each year." M. Frome, The Forest Service 69 (1971).

Mineral King is doubtless like other wonders of the Sierra Nevada such as Tuolumne Meadows and the John Muir Trail. Those who hike it, fish it, hunt it, camp **[*745]** in it, frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be few or many. **[***649]** Those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.

The Solicitor General, whose views on this subject are in the Appendix to this opinion, takes a wholly different approach. He considers the problem in terms of "government by the Judiciary." With all respect, the problem is to make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed. It is, of course, true that most of them are under the control of a federal or state agency. The standards given those agencies are usually expressed in terms of the "public interest." Yet "public interest" has so many differing shades of meaning as to be quite meaningless on the environmental front. Congress accordingly has adopted ecological standards in the National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852, *42 U. S. C. § 4321 et seq.*, and guidelines for agency action have been provided by the

Council on Environmental Quality of which Russell E. Train is Chairman. See *36 Fed. Reg. 7724*.

Yet the pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency **[*746]** which in time develops between the regulator and the regulated. [6] **[**1372]** As early as 1894, Attorney **[***650]** General Olney predicted that regulatory agencies might become "industry-minded," **[*747]** as illustrated by his forecast concerning the Interstate Commerce Commission:

"The Commission . . . is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things." M. Josephson, The Politicos 526 (1938).

6 The federal budget annually includes about $ 75 million for underwriting about 1,500 advisory committees attached to various regulatory agencies. These groups are almost exclusively composed of industry representatives appointed by the President or by Cabinet members. Although public members may be on these committees, they are rarely asked to serve. Senator Lee Metcalf warns: "Industry advisory committees exist inside most important federal agencies, and even have offices in some. Legally, their function is purely as kibitzer, but in practice many have become internal lobbies -- printing industry handouts in the Government Printing Office with taxpayers' money, and even influencing policies. Industry committees perform the dual function of stopping government from finding out about corporations while at the same time helping corporations get inside information about what government is doing. Sometimes, the same company that sits on an advisory council that obstructs or turns down a government questionnaire is precisely the company which is withholding information the government needs in order to enforce a law." Metcalf, The Vested Oracles: How Industry Regulates Government, 3 The Washington Monthly, July 1971, p. 45. For proceedings conducted by Senator Metcalf exposing these relationships, see Hearings on S. 3067 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 91st Cong., 2d Sess. (1970); Hearings on S. 1637, S. 1964, and S. 2064 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 92d Cong., 1st Sess. (1971).

The web spun about administrative agencies by industry representatives does not depend, of course, solely upon advisory committees for effectiveness. See Elman, Administrative Reform of the Federal Trade Commission, 59 Geo. L. J. 777, 788 (1971); Johnson, A New Fidelity to the Regulatory Ideal, 59 Geo. L. J. 869, 874, 906 (1971); R. Berkman & K. Viscusi, Damming The West, The Ralph Nader Study Group Report on The Bureau of Reclamation 155 (1971); R. Fellmeth, The Interstate Commerce Omission, The Ralph Nader Study Group Report on the Interstate Commerce Commission and Transportation 15-39 and *passim* (1970); J. Turner, The Chemical Feast, The Ralph Nader Study Group Report on Food Protection and the Food and Drug Administration *passim* (1970); Massel, The Regulatory Process, 26 Law & Contemp. Prob. 181, 189 (1961); J. Landis, Report on Regulatory Agencies to the President-Elect 13, 69 (1960).

Years later a court of appeals observed, "the recurring question which has plagued public regulation of industry [is] whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect." *Moss v. CAB, 139 U. S. App. D. C. 150, 152, 430 F.2d 891, 893*. See also *Office of Communication of the United Church of Christ v. FCC, 123 U. S. App. D. C. 328, 337-338, 359 F.2d 994, 1003-1004*; *Udall v. FPC, 387 U.S. 428*; *Calvert Cliffs' Coordinating Committee, Inc*. v. *AEC, 146 U. S. App. D. C. 33, 449 F.2d 1109*; *Environmental Defense Fund, Inc*. v. *Ruckelshaus, 142*

U. S. App. D. C. 74, 439 F.2d 584; *Environmental Defense Fund, Inc.* v. *HEW, 138 U. S. App. D. C. 381, 428 F.2d 1083*; *Scenic Hudson Preservation Conf.* v. *FPC, 354 F.2d 608, 620*. But see Jaffe, The Federal Regulatory Agencies In Perspective: Administrative Limitations In A Political Setting, 11 B. C. Ind. & Com. L. Rev. 565 (1970) (labels "industry-mindedness" as "devil" theory).

[*748] The Forest Service -- one of the federal agencies behind the scheme to despoil Mineral King -- has been notorious for its alignment with lumber companies, although its mandate from Congress directs it to consider the various aspects of multiple use in its supervision of the national forests. [7]

7 The Forest Reserve Act of 1897, 30 Stat. 35, *16 U. S. C. § 551*, imposed upon the Secretary of the Interior the duty to "preserve the [national] forests . . . from destruction" by regulating their "occupancy and use." In 1905 these duties and powers were transferred to the Forest Service created within the Department of Agriculture by the Act of Feb. 1, 1905, 33 Stat. 628, *16 U. S. C. § 472*. The phrase "occupancy and use" has been the cornerstone for the concept of "multiple use" of national forests, that is, the policy that uses other than logging were also to be taken into consideration in managing our 154 national forests. This policy was made more explicit by the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, *16 U. S. C. §§ 528-531*, which provides that competing considerations should include outdoor recreation, range, timber, watershed, wildlife, and fish purposes. The Forest Service, influenced by powerful logging interests, has, however, paid only lip service to its multiple-use mandate and has auctioned away millions of timberland acres without considering environmental or conservational interests. The importance of national forests to the construction and logging industries results from the type of lumber grown therein which is well suited to builders' needs. For example, Western acreage produces Douglas fir (structural support) and ponderosa pine (plywood lamination). In order to preserve the total acreage and so-called "maturity" of timber, the annual size of a Forest Service harvest is supposedly equated with expected yearly reforestation. Nonetheless, yearly cuts have increased from 5.6 billion board feet in 1950 to 13.74 billion in 1971. Forestry professionals challenge the Service's explanation that this harvest increase to 240% is not really overcutting but instead has resulted from its improved management of timberlands. "Improved management," answer the critics, is only a euphemism for exaggerated regrowth forecasts by the Service. N. Y. Times, Nov. 15, 1971, p. 48, col. 1. Recent rises in lumber prices have caused a new round of industry pressure to auction more federally owned timber. See Wagner, Resources Report/Lumbermen, conservationists head for new battle over government timber, 3 National J. 657 (1971).

Aside from the issue of how much timber should be cut annually, another crucial question is *how* lumber should be harvested. Despite much criticism, the Forest Service had adhered to a policy of permitting logging companies to "clearcut" tracts of auctioned acreage. "Clearcutting," somewhat analogous to strip mining, is the indiscriminate and complete shaving from the earth of all trees -- regardless of size or age -- often across hundreds of contiguous acres.

Of clearcutting, Senator Gale McGee, a leading antagonist of Forest Service policy, complains: "The Forest Service's management policies are wreaking havoc with the environment. Soil is eroding, reforestation is neglected if not ignored, streams are silting, and clearcutting remains a basic practice." N. Y. Times, Nov. 14, 1971, p. 60, col. 2. He adds: "In Wyoming . . . the Forest Service is very much . . . nursemaid . . . to the lumber industry . . . ." Hearings on Management Practices on the Public Lands before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, pt. 1, p. 7 (1971).

Senator Jennings Randolph offers a similar criticism of the leveling by lumber companies of large portions of the Monongahela National Forest in West Virginia. *Id.*, at 9. See also 116 Cong. Rec. 36971 (reprinted speech of Sen. Jennings Randolph concerning Forest Service policy in Monongahela National Forest). To

investigate similar controversy surrounding the Service's management of the Bitterroot National Forest in Montana, Senator Lee Metcalf recently asked forestry professionals at the University of Montana to study local harvesting practices. The faculty group concluded that public dissatisfaction had arisen from the Forest Service's "overriding concern for sawtimber production" and its "insensitivity to the related forest uses and to the . . . public's interest in environmental values." S. Doc. No. 91-115, p. 14 (1970). See also Behan, Timber Mining: Accusation or Prospect?, American Forests, Nov. 1971, p. 4 (additional comments of faculty participant); Reich, The Public and the Nation's Forests, 50 Calif. L. Rev. 381-400 (1962).

Former Secretary of the Interior Walter Hickel similarly faulted clearcutting as excusable only as a money-saving harvesting practice for large lumber corporations. W. Hickel, Who Owns America? 130 (1971). See also Risser, The U.S. Forest Service: Smokey's Strip Miners, 3 The Washington Monthly, Dec. 1971, p. 16. And at least one Forest Service study team shares some of these criticisms of clearcutting. U.S. Dept. of Agriculture, Forest Management in Wyoming 12 (1971). See also Public Land Law Review Comm'n, Report to the President and to the Congress 44 (1970); Chapman, Effects of Logging upon Fish Resources of the West Coast, 60 J. of Forestry 533 (1962).

A third category of criticism results from the Service's huge backlog of delayed reforestation projects. It is true that Congress has underfunded replanting programs of the Service but it is also true that the Service and lumber companies have regularly ensured that Congress fully funds budgets requested for the Forest Service's "timber sales and management." M. Frome, The Environment and Timber Resources, in What's Ahead for Our Public Lands? 23, 24 (H. Pyles ed. 1970).

[*749] [*651] [**1374]** The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal **[*750]** agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard. [8]

8 Permitting a court to appoint a representative of an inanimate object would not be significantly different from customary judicial appointments of guardians *ad litem*, executors, conservators, receivers, or counsel for indigents.

The values that ride on decisions such as the present one are often not appreciated even by the so-called experts.

"A teaspoon of living earth contains 5 million bacteria, 20 million fungi, one million protozoa, and 200,000 algae. No living human can predict what vital miracles may be locked in this dab of life, this stupendous reservoir of genetic materials that have evolved continuously since the dawn of the earth. For example, molds have existed on earth for about 2 billion years. But only in this century did we unlock the secret of the penicillins, tetracyclines, and other antibiotics from the lowly molds, and thus fashion the most powerful and effective medicines ever discovered by man. Medical scientists still wince at the thought that we might have inadvertently wiped out the rhesus monkey, medically, the most important research animal on earth. And who knows what revelations might lie in the cells of the blackback gorilla nesting in his eyrie this moment in the Virunga Mountains of Rwanda? And what might we have learned from the European lion, the first species formally noted (in 80 A. D.) as extinct by the Romans?

"When a species is gone, it is gone forever. Nature's genetic chain, billions of years in the making, is broken for all time." Conserve -- Water, Land and Life, Nov. 1971, p. 4.

Aldo Leopold wrote in Round River 147 (1953):

"In Germany there is a mountain called the Spessart. Its south slope bears the most magnificent oaks in the world. American cabinetmakers, when they want the last word in

quality, use Spessart oak. The north slope, which should be the better, bears an indifferent stand of Scotch pine. Why? Both slopes are part of the same state forest; both have been managed with equally scrupulous care for two centuries. Why the difference?

"Kick up the litter under the oaks and you will see that the leaves rot almost as fast as they fall. Under the pines, though, the needles pile up as a thick duff; decay is much slower. Why? Because in the Middle Ages the south slope was preserved as a deer forest by a hunting bishop; the north slope was pastured, plowed, and cut by settlers, just as we do with our woodlots in Wisconsin and Iowa today. Only after this period of abuse was the north slope replanted to pines. During this period of abuse something happened to the microscopic flora and fauna of the soil. The number of species was greatly reduced, *i. e*., the digestive apparatus of the soil lost some of its parts. Two centuries of conservation have not sufficed to restore these losses. It required the modern microscope, and a century of research in soil science, to discover the existence of these 'small cogs and wheels' which determine harmony or disharmony between men and land in the Spessart."

[*751] Perhaps **[***652]** they will not win. Perhaps the bulldozers of "progress" will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has standing to be heard?

Those who hike the Appalachian Trail into Sunfish Pond, New Jersey, and camp or sleep there, or run the **[*752]** Allagash in Maine, or climb the Guadalupes in West Texas, or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away. Those who merely are caught up in environmental news or propaganda and flock to defend these waters or areas may be treated differently. That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life [9] which it represents **[***653]** will stand before the court -- the pileated woodpecker as well as the coyote and **[**1375]** bear, the lemmings as well as the trout in the streams. Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.

9 Senator Cranston has introduced a bill to establish a 35,000-acre Pupfish National Monument to honor the pupfish which are one inch long and are useless to man. S. 2141, 92d Cong., 1st Sess. They are too small to eat and unfit for a home aquarium. But as Michael Frome has said:

"Still, I agree with Senator Cranston that saving the pupfish would symbolize our appreciation of diversity in God's tired old biosphere, the qualities which hold it together and the interaction of life forms. When fishermen rise up united to save the pupfish they can save the world as well." Field & Stream, Dec. 1971, p. 74.

Ecology reflects the land ethic; and Aldo Leopold wrote in A Sand County Almanac 204 (1949), "The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land."

That, as I see it, is the issue of "standing" in the present case and controversy.

[*753] APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

Extract From Oral Argument of the Solicitor General *

* Tr. of Oral Arg. 31-35.

. . . .

"As far as I know, no case has yet been decided which holds that a plaintiff which merely asserts that, to quote from the complaint here, its interest would be widely affected and that 'it would be aggrieved' by the acts of the defendant, has standing to raise legal questions in court.

"But why not? Do not the courts exist to decide legal questions? And are they not the most impartial and learned agencies that we have in our governmental system? Are there not many questions which must be decided by the courts? Why should not the courts decide

any question which any citizen wants to raise?

"As the tenor of my argument indicates, this raises, I think, a true question, perhaps a somewhat novel question, in the separation of powers. . . .

"Ours is not a government by the Judiciary. It is a government of three branches, each of which was intended to have broad and effective powers subject to checks and balances. In litigable cases, the courts have great authority. But the Founders also intended that the Congress should have wide powers, and that the Executive Branch should have wide powers.

"All these officers have great responsibilities. They are not less sworn than are the members of this Court to uphold the Constitution of the United States.

"This, I submit, is what really lies behind the standing doctrine, embodied in those cryptic words 'case' and 'controversy' in Article III of the Constitution.

[*754] "Analytically one could have a system of government in which every legal question arising in the core of government would be decided by the courts. It would not be, I submit, a good system.

"More important, it is not the system which was ordained and established in our Constitution, as it has been understood for nearly 200 years.

"Over the past 20 or 25 years, there has been a great shift in the decision of legal questions in our governmental operations into the courts. This has been the result of continuous whittling away of the numerous doctrines which have been established over the years, designed to minimize the number of governmental questions which it was the responsibility of the courts to consider.

"I've already mentioned the most ancient of all: case or controversy, **[***654]** which was early relied on to prevent the presentation of feigned issues to the court.

"But there are many other doctrines, which I cannot go into in detail: reviewability, justiciability, sovereign immunity, mootness in various aspects, statutes of limitations and laches, jurisdictional amount, real party in interest, and various questions in relation to joinder.

" **[**1376]** Under all of these headings, limitations which previously existed to minimize the number of questions decided in courts, have broken down in varying degrees.

"I might also mention the explosive development of class actions, which has thrown more and more issues into the courts.

. . . .

"If there is standing in this case, I find it very difficult to think of any legal issue arising in government which will not have to await one or more decisions of the Court before the administrator, sworn to uphold the law, can take any action. I'm not sure that this is good for the government. I'm not sure that it's good for the **[*755]** courts. I do find myself more and more sure that it is not the kind of allocation of governmental power in our tripartite constitutional system that was contemplated by the Founders.

. . . .

"I do not suggest that the administrators can act at their whim and without any check at all. On the contrary, in this area they are subject to continuous check by the Congress. Congress can stop this development any time it wants to."

MR. JUSTICE BRENNAN, dissenting.

I agree that the Sierra Club has standing for the reasons stated by my Brother BLACKMUN in Alternative No. 2 of his dissent. I therefore would reach the merits. Since the Court does not do so, however, I simply note agreement with my Brother BLACKMUN that the merits are substantial.

MR. JUSTICE BLACKMUN, dissenting.

The Court's opinion is a practical one espousing and adhering to traditional notions of standing as somewhat modernized by *Data Processing Service v. Camp, 397 U.S. 150 (1970)*; *Barlow v. Collins, 397 U.S. 159 (1970)*; and *Flast v. Cohen, 392 U.S. 83 (1968)*. If this were an ordinary case, I would join the opinion and the Court's judgment and be quite content.

But this is not ordinary, run-of-the-mill litigation. The case poses -- if only we choose to acknowledge and reach them -- significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological

disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional **[*756]** concepts do not quite fit and do not prove to be entirely adequate for new issues?

The ultimate result of the Court's decision today, I fear, and sadly so, is that the 35.3-million-dollar complex, over 10 times greater than the Forest Service's suggested minimum, will now hastily proceed to completion; that serious opposition to it will recede in discouragement; and that Mineral King, the "area of great natural beauty nestled in the Sierra Nevada Mountains," to use the Court's words, will become defaced, at least in part, and, like **[***655]** so many other areas, will cease to be "uncluttered by the products of civilization."

I believe this will come about because: (1) The District Court, although it accepted standing for the Sierra Club and granted preliminary injunctive relief, was reversed by the Court of Appeals, and this Court now upholds that reversal. (2) With the reversal, interim relief by the District Court is now out of the question and a permanent injunction becomes most unlikely. (3) The Sierra Club may not choose to amend its complaint or, if it does desire to do so, may not, at this late date, be granted permission. (4) The ever-present pressure to get the project under way will mount. (5) Once under way, any prospect of bringing it to a halt will grow dim. Reasons, most of them economic, for not stopping the project will have a tendency to multiply. And the irreparable harm will be largely inflicted in the earlier stages of construction and development.

[1377]** Rather than pursue the course the Court has chosen to take by its affirmance of the judgment of the Court of Appeals, I would adopt one of two alternatives:

1. I would reverse that judgment and, instead, approve the judgment of the District Court which recognized standing in the Sierra Club and granted preliminary relief. I would be willing to do this on condition that the Sierra Club forthwith amend its complaint to meet the **[*757]** specifications the Court prescribes for standing. If Sierra Club fails or refuses to take that step, so be it; the case will then collapse. But if it does amend, the merits will be before the trial court once again. As the Court, *ante*, at 730 n. 2, so clearly reveals, the issues on the merits are substantial and deserve resolution. They assay new ground. They are crucial to the future of Mineral King. They raise important ramifications for the quality of the country's public land management. They pose the propriety of the "dual permit" device as a means of avoiding the 80-acre "recreation and resort" limitation imposed by Congress in *16 U. S. C. § 497*, an issue that apparently has never been litigated, and is clearly substantial in light of the congressional expansion of the limitation in 1956 arguably to put teeth into the old, unrealistic five-acre limitation. In fact, they concern the propriety of the 80-acre permit itself and the consistency of the entire, enormous development with the statutory purposes of the Sequoia Game Refuge, of which the Valley is a part. In the context of this particular development, substantial questions are raised about the use of a national park area for Disney purposes for a new high speed road and a 66,000-volt power line to serve the complex. Lack of compliance with existing administrative regulations is also charged. These issues are not shallow or perfunctory.

2. Alternatively, I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues. This incursion upon tradition need not be very extensive. Certainly, it should be no cause for alarm. It is no more progressive than was the decision in *Data Processing* itself. It need only recognize the interest of one who has a provable, **[*758]** sincere, dedicated, and established status. We need not fear that Pandora's box will be **[***656]** opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past. Who would have suspected 20 years ago that the concepts of standing enunciated in *Data Processing* and *Barlow* would be the measure for today? And MR. JUSTICE DOUGLAS, in his eloquent opinion, has imaginatively suggested another means and one, in its own way, with obvious, appropriate, and self-imposed limitations as to standing. As I read what he has written, he makes only one addition to the customary criteria (the existence of a genuine dispute; the assurance of adversariness; and a conviction that the party whose standing is challenged will adequately represent the interests he asserts), that is, that the litigant be one who speaks knowingly for the environmental values he

asserts.

I make two passing references:

1. The first relates to the Disney figures presented to us. The complex, the Court notes, will accommodate 14,000 visitors *a day* (3,100 overnight; some 800 employees; 10 restaurants; 20 ski lifts). The State of California has proposed to build a new road from Hammond to Mineral King. That road, to the extent of 9.2 miles, is to traverse Sequoia National Park. It will have only two lanes, with occasional passing areas, but it will be capable, it is said, of accommodating 700-800 vehicles per hour and a peak of 1,200 per hour. We are **[**1378]** told that the State has agreed not to seek any further improvement in road access through the park.

If we assume that the 14,000 daily visitors come by automobile (rather than by helicopter or bus or other known or unknown means) and that each visiting automobile carries four passengers (an assumption, I am **[*759]** sure, that is far too optimistic), those 14,000 visitors will move in 3,500 vehicles. If we confine their movement (as I think we properly may for this mountain area) to 12 hours out of the daily 24, the 3,500 automobiles will pass any given point on the two-lane road at the rate of about 300 per hour. This amounts to five vehicles per minute, or an average of one every 12 seconds. This frequency is further increased to one every six seconds when the necessary return traffic along that same two-lane road is considered. And this does not include service vehicles and employees' cars. Is this the way we perpetuate the wilderness and its beauty, solitude, and quiet?

2. The second relates to the fairly obvious fact that any resident of the Mineral King area -- the real "user" -- is an unlikely adversary for this Disney-governmental project. He naturally will be inclined to regard the situation as one that should benefit him economically. His fishing or camping or guiding or handyman or general outdoor prowess perhaps will find an early and ready market among the visitors. But that glow of anticipation will be short-lived at best. If he is a true lover of the wilderness -- as is likely, or he would not be near Mineral King in the first place -- it will not be long before he yearns for the good old days when masses of people -- that 14,000 influx per day -- and their thus far uncontrollable waste were unknown to Mineral King.

Do we need any further indication and proof that all this means that the area will no longer be one "of great natural beauty" and one "uncluttered by the products of civilization?" Are we to be rendered helpless to consider and evaluate allegations and challenges of this **[***657]** kind because of procedural limitations rooted in traditional concepts of standing? I suspect that this may be the result of today's holding. As the Court points out, *ante*, at 738-739, other federal tribunals have **[*760]** not felt themselves so confined. [1] I would join those progressive holdings.

1 *Environmental Defense Fund, Inc*. v. *Hardin, 138 U. S. App. D. C. 391, 394-395, 428 F.2d 1093, 1096-1097 (1970)*; *Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97, 101-105 (CA2 1970)*, cert. denied, *400 U.S. 949*; *Scenic Hudson Preservation Conf*. v. *FPC, 354 F.2d 608, 615-617 (CA2 1965)*; *Izaak Walton League v. St. Clair, 313 F.Supp. 1312, 1316-1317 (Minn. 1970)*; *Environmental Defense Fund, Inc*. v. *Corps of Engineers, 324 F.Supp. 878, 879-880 (DC 1971)*; *Environmental Defense Fund, Inc*. v. *Corps of Engineers, 325 F.Supp. 728, 734-736* (ED Ark. 1970-1971); *Sierra Club v. Hardin, 325 F.Supp. 99, 107-112 (Alaska 1971)*; *Upper Pecos Assn*. v. *Stans, 328 F.Supp. 332, 333-334 (N. Mex. 1971)*; *Cape May County Chapter, Inc., Izaak Walton League v. Macchia, 329 F.Supp. 504, 510-514 (N. J. 1971)*. See *National Automatic Laundry & Cleaning Council v. Shultz, 143 U. S. App. D. C. 274, 278-279, 443 F.2d 689, 693-694 (1971)*; *West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 234-235 (CA4 1971)*; *Environmental Defense Fund, Inc*. v. *HEW, 138 U. S. App. D. C. 381, 383 n. 2, 428 F.2d 1083, 1085 n. 2 (1970)*; *Honchok v. Hardin, 326 F.Supp. 988, 991 (Md. 1971)*.

The Court chooses to conclude its opinion with a footnote reference to De Tocqueville. In this environmental context I personally prefer the older and particularly pertinent observation and warning of John Donne. [2]

2 "No man is an Iland, intire of itselfe; every man is a peece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any man's death diminishes me,

because I am involved in Mankinde; And therefore never send to know for whom the bell tolls; it tolls for thee." Devotions XVII.

REFERENCES

2 Am Jur 2d, Administrative Law 575; *61 Am Jur 2d, Pollution Control 127*

US L Ed Digest, Administrative Law 223; Public Lands 270

ALR Digests, Administrative Law 170

L Ed Index to Anno, Administrative Law

ALR Quick Index, Administrative Law; Pollution

Federal Quick Index, Administrative Law; Pollution

Annotation References:

Propriety, under *Rules 23(a)* and *23(b) of Federal Rules of Civil Procedure*, as amended in 1966, of class action seeking relief against pollution of environment. *7 ALR Fed 907*.

Standing of private citizen, association or organization to maintain action in federal court for injunctive relief against commercial development or activities, or construction of highways, or other governmental projects, alleged to be harmful to environment in public parks, other similar recreational areas, or wildlife refuges. *11 ALR Fed 556*.

APPEAL OF ROBERT C. RICHARDS, EDWARD KAUFMAN AND MARTIN ROCHMAN; APPEAL OF CAMPAIGN FOR RATEPAYERS RIGHTS AND JOHN V. HILBERG (New Hampshire Public Utilities Commission)

No. 90-406

SUPREME COURT OF NEW HAMPSHIRE

134 N.H. 148*; *590 A.2d 586*; *1991 N.H. LEXIS 39

April 24, 1991

NOTICE: [*1]** Released for Publication June 10, 1991.

SUBSEQUENT HISTORY: Rehearing Denied June 5, 1991.

PRIOR HISTORY: Appeal from Public Utilities Commission.

DISPOSITION: *Affirmed; appeals dismissed.*

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee Public Utilities Commission (PUC) approved a rate plan contained in a plan of reorganization by appellee utility company. The bankruptcy court confirmed the reorganization in federal district court. The PUC denied appellant stockholders and appellant ratepayer's motion for a rehearing and the stockholders and ratepayers challenged the PUC's decision.

OVERVIEW: On appeal the court found that the stockholders did not have standing to bring an action. The court reasoned that the stockholders had not alleged a direct injury as a result of the Public Utilities Commission's decision approving the rate plan and they did not allege a constitutional violation of their rights that was distinguishable from a violation of the rights of the utility company or its other stockholders. However, the court did find that the ratepayers had standing to maintain an action. The court reasoned that the ratepayers would suffer a direct economic injury as a result of the rate plan. Finally, the court found that the ratepayers had failed to sustain their burden and establish that the decision by the PUC was unlawful or unreasonable. The ratepayers argued that the PUC was constitutionally required to apply the traditional ratemaking analysis and failed to do so. The court rejected this argument based on precedent and held that the methodology used in setting the rate was irrelevant. Instead, the court found that it was the result that was important. The court found that the rate set by the PUC was not unjust or unreasonable.

OUTCOME: The court affirmed the decision that denied the stockholders' motion for a rehearing and dismissed their appeal.

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Reviewability > Standing
Civil Procedure > Justiciability > Standing > Injury in Fact
Civil Procedure > Judgments > Relief From Judgment > Motions to Reargue
[HN1] For a court to hear a party's complaint, the party must have standing to assert the claim. After an

administrative agency has denied an individual's motion for rehearing, in order to have standing to appeal the agency's decision to the New Hampshire Supreme Court the party must demonstrate that his rights may be directly affected by the decision or that he has suffered or will suffer an injury in fact. Similarly, a party has standing to raise a constitutional issue only when his own personal rights have been or will be directly and specifically affected.

Civil Procedure > Judgments > Relief From Judgment > Motions to Reargue
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
Energy & Utilities Law > Administrative Proceedings > Rehearings
[HN2] To appeal a decision or order of the Public Utilities Commission (PUC), one must first file a motion for rehearing with the PUC stating fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. *N.H. Rev. Stat. Ann. § 541:4*.

Administrative Law > Judicial Review > Reviewability > General Overview
Civil Procedure > Judgments > Relief From Judgment > Motions to Reargue
[HN3] Issues not raised in the motion for rehearing may not be raised on appeal. *N.H. Rev. Stat. Ann. § 541:4*.

Business & Corporate Law > Corporations > Directors & Officers > Compensation > General Overview
Business & Corporate Law > Corporations > Shareholders > Shareholder Duties & Liabilities > General Overview
[HN4] In general, a corporation's board of directors, rather than its stockholders, has the authority to bring an action to redress an injury to the corporation. Nevertheless, a stockholder's rights may be directly affected, entitling him to sue in his individual capacity; (1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder; or (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders.

Administrative Law > Judicial Review > Reviewability > Standing
Civil Procedure > Justiciability > Standing > General Overview
[HN5] No individual or group of individuals has standing to appeal when the alleged injury caused by an administrative agency's action affects the public in general, particularly when the affected public interest is represented by an authorized official or agent of the state. Similarly, an association has no standing to challenge an administrative agency's action based upon a mere interest in a problem. It does, however, have standing to represent its members if they have been injured.

Administrative Law > Judicial Review > Standards of Review > General Overview
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
[HN6] A party seeking to set aside a decision of the Public Utilities Commission (PUC) has the burden of demonstrating that the decision is unlawful, or, by a clear preponderance of the evidence, that it is unjust or unreasonable. Additionally, findings of fact made by the PUC are presumed to be prima facie lawful and reasonable. *N.H. Rev. Stat. Ann. § 541:13*.

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
[HN7] See *N.H. Rev. Stat. Ann. § 362-C:3* (1990).

Energy & Utilities Law > Utility Companies > Rates > General Overview
[HN8] A just and reasonable rate is one that, after consideration of the relevant competing interests, falls within the zone of reasonableness between confiscation of utility property or investment interests and ratepayer exploitation.

Governments > Legislation > Interpretation
[HN9] The courts will construe statutes so as to effectuate their evident purpose.

HEADNOTES

1. Parties--Standing--Generally

For a court to hear a party's complaint, the party must have standing to assert the claim.

2. Administrative Law--Standing--Injury in Fact

In order to have standing to appeal an administrative agency's denial of a motion for rehearing, movant must demonstrate that his rights may be directly affected, *i.e.* that he has suffered or will suffer an injury in fact. *RSA 541:3*, :6.

3. Constitutional Law--Standing--Generally

A party has standing to raise a constitutional issue only when his own personal rights have been or will be directly and specifically affected.

4. Corporations--Stockholders--Actions in Individual Capacity

In general, a corporation's board of directors, rather than its stockholders, has authority to bring an action to redress injury to the corporation; nevertheless, a stockholder is entitled to sue in an individual capacity when: (1) there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder, or (2) the shareholder suffered an injury separate and distinct from that suffered by other shareholders or by the corporation itself.

5. Corporations--Stockholders--Actions in Individual Capacity

A diminution in stock value is an injury which does not give a stockholder standing to sue a wrongdoer on his own behalf.

6. Administrative Law--Standing--Standing Not Found

Stockholders of bankrupt public utility had no standing to appeal, in their individual capacities, from denial of rehearing of public utilities commission's order approving rate plan of reorganized utility, where sole asserted injury was diminution of the value of their stock.

7. Administrative Law--Standing--Generally

No individual or group of individuals has standing to appeal a decision or order of an administrative agency, when the alleged injury caused by agency's action affects the public in general, particularly when the affected public interest is represented by an authorized official or agent of the State.

8. Administrative Law--Standing--Generally

An association has no standing to challenge an administrative agency's action based upon a "mere interest in a problem"; however, it does have standing to represent its members if they have been injured.

9. Public Utilities--Hearings--Right To

Ratepayers and association representing ratepayers had standing to appeal from public utility commission's denial of motion for rehearing of order approving rate plan which allegedly caused direct economic injury to ratepayers.

10. Appeal and Error--Preservation of Questions--Timeliness

Issue discussed in public utilities commission (PUC) decision approving rate plan and first raised by appellants in motion for rehearing of PUC order was properly preserved for review on appeal from motion's denial; appellants could not, prior to issuance of commission's order, have discovered alleged error in using incorrect analysis to approve rate plan.

11. Public Utilities--Regulatory Agencies--Appeals From

Party seeking to set aside decision of public utilities commission (PUC) has the burden of demonstrating that decision is unlawful or, by a clear preponderance of the evidence, unjust or unreasonable, and findings of fact made by PUC are presumed to be *prima facie* lawful and reasonable. *RSA 541:13*.

12. Public Utilities--Regulatory Agencies--Sources of Authority

Subject to constitutional limitations, the regulation of utilities and the setting of appropriate rates to be charged for public utility products and services is the unique province of the legislature.

13. Statutes--Construction and Application--Legislative Intent

In order to determine whether statute required public utilities commission to apply traditional ratemaking principles in its analysis of rates under rate plan in reorganization agreement for bankrupt utility, under statutory mandate to determine whether rates stipulated in agreement were "just and proper," principles of statutory interpretation required looking first to statutory language

as the best indication of legislative intent. *RSA 362-C:1*, :3.

14. Statutes--Construction and Application--Construction as a Whole

In interpreting a statute, it will be examined in relation to statutory scheme.

15. Statutes--Construction and Application--Plain Meaning

When possible, a statute will be interpreted in a manner consistent with its plain meaning.

16. Public Utilities--Rates--Just and Reasonable

Two "just and reasonable" standards applicable to ratemaking are recognized: a statutory standard applying traditional ratemaking analysis, as described in *Appeal of Conservation Law Foundation, 127 N.H. 606 (1986)*; and, a broader, constitutional standard requiring that rate fall within a zone of reasonableness between confiscation of utility property or investment interests and ratepayer exploitation. *RSA 378:7*.

17. Public Utilities--Rates--Just and Reasonable

Public utilities commission (PUC) was not required to apply traditional ratemaking principles to its analysis of rates under rate plan in reorganization agreement for bankrupt utility, under commission's statutory mandate to determine whether rates were "just and reasonable"; in using phrase "just and reasonable," legislature referred to constitutional standard rather than standard found in traditional ratemaking statutes. *RSA 362-C:1*, :3; 378:7.

18. Public Utilities--Statutes--Construction

Public utilities commission was not constitutionally required to apply traditional ratemaking principles to its analysis of rates under rate plan in reorganization agreement for bankrupt utility; holding that use of traditional ratemaking formula is constitutionally required would be contrary to well established federal constitutional case law, which establishes that the use of any particular formula in determining rates is not required, and that the methodology used is irrelevant. *RSA 362-C:1*, :3; 378:7.

19. Public Utilities--Regulatory Agencies--Rates

Where statute directed public utilities commission (PUC) to establish rates in rate plan in reorganization agreement for bankrupt public utility, if found to be "just and reasonable," and if implementation of the agreement is found to be "consistent with the public good," appellants challenging the PUC's approval failed to meet their burden to prove that PUC's decision approving rate plan was unlawful or unreasonable, and PUC's decision was upheld. *RSA 362-C:1*, :3; 541:13.

COUNSEL: *Robert C. Richards*, of New York, New York, by brief and orally, *pro se*.

Edward Kaufman, of Scarsdale, New York, by brief and orally, *pro se*.

Martin Rochman, of Palm Beach, Florida, by brief, *pro se*.

Backus, Meyer & Solomon, of Manchester (*Robert A. Backus* on the brief and orally), for Campaign for Ratepayers Rights and John Hilberg.

Rath, Young, Pignatelli and Oyer P.A., of Concord, and *Day, Berry and Howard*, of Hartford, Connecticut, for Northeast Utilities Service Company, and *Sulloway Hollis and Soden*, of Concord, for Public Service Company of New Hampshire (*Thomas D. Rath* and *Martin L. Gross* on the brief, and *Mr. Rath* orally).

John P. Arnold, attorney general (*Harold T. Judd*, assistant attorney general, on the brief and orally), for the State.

John J. Lahey for Business & Industry Association of New Hampshire, and *Michael W. Holmes* for Office of Consumer Advocate, by brief, as *amici curiae*.

JUDGES: Brock, C.J., and Batchelder, **[***2]** J., dissented.

OPINION BY: PER CURIAM

OPINION

[*151] [588]** In these consolidated appeals, the appellants challenge a decision of the New Hampshire Public Utilities Commission (the PUC) approving a rate plan contained in an agreement relating to the reorganization of Public Service Company of New Hampshire (PSNH) that was negotiated by Northeast

Utilities Service Company (NU) and the State. This decision was issued in the PUC's docket DR 89-244 and reported in *Re Northeast Utilities/Public Service Company of New Hampshire, 114 PUR4th 385 (N.H.P.U.C. 1990)*. The appellants are as follows: Robert C. Richards, Edward Kaufman, and Martin Rochman, who are PSNH stockholders (hereinafter referred to as "the appealing stockholders"); John Hilberg, who is a PSNH ratepayer; and Campaign for Ratepayers Rights (CRR), which is a ratepayer group. The rate plan provides for average base retail rate increases of 5.5% per year for seven years, beginning January 1, 1990, and is an integral part of the agreement whereby NU would acquire PSNH, the State's largest electric utility, for $ 2.3 billion. Although the appealing stockholders argue that the average base retail rate increases are too low, **[***3]** and Hilberg and CRR argue that they are too high, both sets of appellants contend that the PUC improperly approved the rate plan without a finding that the rates that would be produced by the rate plan are "just and reasonable" in accordance with traditional ratemaking principles. For the reasons that follow, we affirm the PUC's decision and dismiss the appeals.

I. *Facts and Procedural History*

This is an unusual case, in that it involves a public utility that has declared bankruptcy. *See* Darr, *Federal-State Comity in Utility Bankruptcies*, 27 Am. Bus. L.J. 63, 64 (1989). PSNH filed for bankruptcy under chapter 11 of the federal Bankruptcy Code on January 28, 1988, citing as the reasons therefor: the magnitude of its investment in Seabrook Nuclear Generating Station Unit 1 (Seabrook); the delay in obtaining licensing approval from the federal Nuclear Regulatory Commission; and its inability to realize any return on its investment until Seabrook went on line, due to the New Hampshire **[*152]** Legislature's enactment of *RSA 378:30-a*, the so-called "anti-CWIP" law, which prohibits utilities from charging rates that would enable them to recover the cost of "construction **[***4]** work in progress." *Re Northeast Utilities, supra at 391-92*.

The bankruptcy court authorized the State to intervene in the proceedings, whereupon the State entered into negotiations with PSNH management and NU, among others, regarding the possible level of rates that could be charged by the reorganized company. *Re Northeast Utilities, supra at 392*. On November 22, 1989, the State and NU signed an agreement which provided for a merger of PSNH with NU, at an acquisition cost of $ 2.3 billion, and which included the 5.5% rate plan. *Re Northeast Utilities, supra at 392-93*.

In a one-day special session held on December 14, 1989, the legislature adopted a statute which authorized the PUC to review and implement the agreement. This legislation, RSA chapter 362-C (Supp. 1990), became effective on December 18, 1989. The legislature stated that the purpose of the statute was to authorize the PUC

> "to determine whether a proposed agreement relating to the reorganization of Public Service Company of New Hampshire and, upon receipt of required regulatory approvals, the acquisition of Public Service Company of New Hampshire by Northeast Utilities, would be consistent with **[***5]** *the public good* and whether the rates for electric service to be established in connection with the reorganization are *just and reasonable* and should be approved."

RSA 362-C:1, IV (Supp. 1990) (emphasis supplied). To effectuate this purpose, *RSA 362-C:3* (Supp. 1990) authorized the PUC,

> "after hearing, in one or more proceedings to be initiated and completed during the pendency of the Public Service Company of New Hampshire bankruptcy, to determine whether the implementation of the agreement would be consistent with *the public good*. If the commission so **[**589]** finds, it shall, notwithstanding any other provision of law, establish and place into effect the levels of rates . . . in accordance with, and during the time periods set forth in, the agreement."

(Emphasis supplied.)

Pursuant to this statute, the PUC held hearings on the merits between April 9 and May 5, 1990, and hearings on rebuttal and supplemental testimony from May 22 to 25, 1990. *Re Northeast Utilities,* **[*153]** *114 PUR4th at 395*. Hilberg is the only appellant who was a party to the proceedings before the PUC. In the meantime, the bankruptcy court confirmed NU's reorganization **[***6]** plan on April 20, 1990, *id. at 393*, subject to the PUC's

approval of the rate plan. *See 11 U.S.C. § 1129(a)(6) (1988)* (the bankruptcy court's confirmation of a reorganization plan is subject to the approval of any rate change provided for in the plan by any governmental regulatory commission with jurisdiction over the rates of the debtor).

Appellants Richards, Kaufman, and Rochman moved separately to intervene in the proceedings before the PUC, but their motions were denied as untimely. *Re Northeast Utilities, 114 PUR4th at 395*. Appellant Richards thereafter filed a petition in this court, on behalf of himself and appellants Kaufman and Rochman, for a writ of prohibition to the PUC. We denied this petition without prejudice on June 18, 1990. The appealing stockholders are presently appealing the bankruptcy court's confirmation order in federal district court.

The PUC approved the rate plan in an order issued on July 20, 1990. *See id. at 469-70*. The order was accompanied by an extensive written decision, in which the PUC explained its analysis of the average base retail rate increases contained in the rate plan and summarized the evidence supporting its findings. **[***7]** It concluded that "the implementation of the Rate Plan as set forth herein is consistent with the public good . . . and will result in just and reasonable rates that equitably balance the interests of ratepayers and investors." *Id. at 460*.

The PUC reached its decision after comparing the rate of return to the cost of capital under the rate plan. *Id. at 405-08*. It also compared the rates under the rate plan with rates forecast for other New England utilities, *id. at 411-12*, and the rates estimated, insofar as foreseeable, under traditional ratemaking principles, *id. at 410-11*. The PUC stated that the rates resulting from the use of traditional ratemaking methodology would probably be higher than those provided for by the rate plan, but that it was not required to calculate the precise level of rates under traditional ratemaking principles "to determine whether the Rate Plan serves the public good with just and reasonable rates over the fixed rate period." *Id. at 410*. Moreover, it asserted that "[d]etermination of just and reasonable rates by traditional ratemaking methodology, is precluded by the Rate [Plan's] prescribing the level of retail rates over the **[***8]** seven year fixed rate period." *Id. at 408*. The PUC nonetheless estimated the rates that would be achieved under traditional ratemaking principles, insofar as foreseeability permitted. *See id. at 410*.

[*154] The appealing stockholders, and Hilberg and CRR, subsequently filed motions for rehearing. The PUC denied their motions on August 17, 1990, and these appeals followed.

II. *Standing and Preservation of the Issues*

Before reaching the appellants' arguments, we must first address the contention shared by the State, and NU and PSNH, that the appellants lack standing. [HN1] For a court to hear a party's complaint, the party must have standing to assert the claim. *59 Am. Jur. 2d Parties § 30* (1987); *see also State ex rel. Thomson v. State Bd. of Parole, 115 N.H. 414, 419, 342 A.2d 634, 637 (1975)* (noting that the purpose of the law of standing is to protect against improper plaintiffs). After an administrative agency has denied an individual's motion for rehearing filed pursuant to *RSA 541:3*, in order to have standing to appeal the agency's decision to this court, he must demonstrate that his rights "may be directly affected" by the decision, *see RSA* **[***9]** *541:3* and :6, or in other words, that he has suffered or will suffer an "injury **[**590]** in fact." *See New Hampshire Bankers' Ass'n v. Nelson, 113 N.H. 127, 129, 302 A.2d 810, 811 (1973)*; *see also Blanchard v. Railroad, 86 N.H. 263, 264-66, 167 A. 158, 159-60 (1933)* (holding that a party to an administrative proceeding does not have standing to appeal an administrative agency's decision absent a showing of direct injury). Similarly, a party has standing to raise a constitutional issue only when his own personal rights have been or will be directly and specifically affected. *59 Am. Jur. 2d Parties § 33* (1987). Thus, to have standing to appeal the PUC's decision, the appealing stockholders, and Hilberg and CRR, must demonstrate that they have been "directly affected" by it.

In addition, the appellants must show that the issues raised have been properly preserved for appeal. [HN2] To appeal a decision or order of the PUC, one must first file a motion for rehearing with the PUC stating "fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." *RSA 541:4*. A party or any person directly affected by the PUC's decision **[***10]** or order may apply for a rehearing with respect to "any matter determined in the action or proceeding, *or covered or included in the order*." *RSA 541:3* (emphasis supplied). If the motion for rehearing is denied, the party may then appeal by petition to this court. *RSA 541:6*. [HN3] Issues not raised in the motion for rehearing may not be raised on appeal. *See*

RSA 541:4.

[*155] A. *The Appealing Stockholders*

Appellants Richards and Kaufman are holders of PSNH common stock. Appellant Rochman is a beneficial owner of PSNH common stock recorded in his wife's name. Collectively they own 195,000 shares, which is less than one percent of PSNH's outstanding stock. The appealing stockholders assert that the PUC's decision approving the rate plan resulted in a violation of their, and PSNH's, constitutional and statutory rights to recover their "prudent" investment in PSNH plant "used and useful" in the generation of electricity, and that they have been injured, in that the value of their PSNH stock has decreased. They argue that they should be permitted to bring the present appeal in their capacities as individual stockholders or, alternatively, on behalf of PSNH. Because **[***11]** the appealing stockholders have not named PSNH as a party to their appeal, we do not address the issue of whether they have standing to appeal in a derivative capacity. *See Kidd v. Traction Co., 72 N.H. 273, 286-88, 56 A. 465, 469 (1903)* (stating that a corporation is a necessary party to a derivative action); 13 W. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 5997, at 277 (rev. perm. ed. 1984).

[HN4] In general, a corporation's board of directors, rather than its stockholders, has the authority to bring an action to redress an injury to the corporation. *See* 13 W. Fletcher, *supra* § 5963, at 111. Nevertheless, a stockholder's rights may be directly affected, entitling him to sue in his individual capacity, "(1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder, [or] (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders," 12B W. Fletcher, *supra* § 5911, at 421, or by the corporation itself, *Gaff v. Federal Deposit Ins. Corp., 814 F.2d 311, 315 (6th Cir. 1987)*. A diminution in stock value is an injury that does not fall within either of these **[***12]** two categories and, thus, does not give a stockholder standing to sue on his own behalf. *See Dowling v. Narragansett Capital Corp., 735 F. Supp. 1105, 1113 (D.R.I. 1990)*.

The appealing stockholders have not alleged a direct injury as a result of the PUC's decision approving the rate plan. Nor have they alleged a constitutional violation of their rights that is distinguishable from a violation of the rights of PSNH or other PSNH stockholders. Accordingly, we hold that they have no standing under RSA chapter 541 to prosecute the present appeal, and, therefore, their appeal is dismissed.

[*156] B. *Appellants Hilberg and CRR*

NU and PSNH contend that appellants Hilberg and CRR also lack standing. Specifically, **[**591]** they argue that Hilberg's status as a ratepayer and the ratepayer status of CRR's members is insufficient to confer standing, absent a showing by Hilberg that he, and by CRR, that its ratepayer members, have been directly affected by the PUC's decision. Hilberg and CRR, on behalf of its ratepayer members, allege that the rate increases that will be imposed upon them as a result of the PUC's approval of the rate plan constitute an "injury in fact" that **[***13]** gives them standing to bring this appeal. In rejoinder, NU and PSNH, citing *Blanchard v. Railroad, 86 N.H. 263, 167 A. 158 (1933)*, maintain that the injury alleged by Hilberg and CRR is no different than an injury to the public in general, and that only the Attorney General and the Office of Consumer Advocate are authorized to represent the public in this instance.

[HN5] No individual or group of individuals has standing to appeal when the alleged injury caused by an administrative agency's action affects the public in general, particularly when the affected public interest is represented by an authorized official or agent of the State. *See Blanchard v. Railroad, supra at 264-65, 167 A. at 159*. This is simply another way of formulating the "injury in fact" or "direct effect" requirement. Similarly, an association has no standing to challenge an administrative agency's action based upon a "mere 'interest in a problem.'" *Sierra Club v. Morton, 405 U.S. 727, 739 (1972)*. It does, however, have standing to represent its members if they have been injured. *Id.*

Unlike the plaintiff in *Blanchard v. Railroad*, in which "[t]he only interest alleged to have been infringed **[***14]** by the order is that of the public," *supra at 264, 167 A. at 158*, Hilberg alleges that he, and CRR alleges that its ratepayer members, will suffer a direct economic injury. Courts in other jurisdictions have held that ratepayers are directly affected by rate decisions and, thus, have standing to challenge them. *See Iowa-Ill. Gas & Elec. v. Iowa S. Com. Com'n, 347 N.W.2d 423, 426-27 (Iowa 1984)* (citing cases); *see also City of Houston v. Public Utility Com'n, 618 S.W.2d 428, 431 (Tex. Civ. App. 1981)* (stating that cities, as ratepayers, were "aggrieved" by the public utility commission's order, in that the increase in electric rates imposed upon them an

added financial obligation or burden); *Tripps Park v. Pa. Public Utility Com'n, 415 A.2d 967, 970 (Pa. Commw. Ct. 1980)* (holding that Tripps Park, an association whose members included **[*157]** utility customers, had standing to appeal a public utility commission rate order). We therefore hold that Hilberg, as a PSNH ratepayer, and CRR, as the representative of its PSNH ratepayer members, have standing to bring this appeal under RSA chapter 541.

NU and PSNH maintain that Hilberg and CRR, even if they have standing **[***15]** to appeal the PUC's decision, have failed to properly preserve their claims for appeal by raising them in a timely manner. In this appeal, Hilberg and CRR argue first that the PUC erred in approving the rate plan, because it failed to employ the proper analysis to determine whether the average base retail rate increases contained in the rate plan will produce rates that are "just and reasonable"; namely, "traditional ratemaking analysis." Second, they assert that the PUC was required to consider whether the placement of PSNH's Seabrook assets into a separate corporation, as provided for by the agreement, would be in the "public good." Finally, they appear to raise a due process issue in their brief, but this argument is merely a restatement of their first argument that the PUC did not properly analyze the rates under the rate plan in accordance with traditional ratemaking principles. Hilberg and CRR included the first issue, and arguably the third, but not the second, as grounds for their joint motion for rehearing filed with the PUC. NU and PSNH argue that these claims were not properly preserved for appeal, because Hilberg and CRR did not raise them during the PUC proceedings **[***16]** or offer any evidence during the proceedings to support them.

Since Hilberg and CRR did not include the second issue as one of the grounds for their motion for rehearing, **[**592]** they are precluded from raising it on appeal. *See RSA 541:4*. Additionally, because they made only passing reference to "due process" in their brief, did not cite any constitutional provisions, and did not address this issue during oral argument, we hold that they have not properly preserved the third issue for appeal. *See State v. Isaacson, 129 N.H. 438, 439-40, 529 A.2d 923, 924 (1987)*. However, as to the first issue, we reject NU and PSNH's argument that Hilberg and CRR are barred from raising it on appeal because they did not raise it during the PUC proceedings or offer any evidence during the proceedings to support it. Hilberg and CRR would have been unable to discover the alleged error made by the PUC, *i.e.*, that it used the incorrect analysis to approve the rate plan, prior to the issuance of the PUC's decision. *Cf. Appeal of Cheney, 130 N.H. 589, 594, 551 A.2d 164, 167 (1988)* (stating that parties "are not entitled to take later advantage of error they could have discovered **[***17]** or chose to ignore at the very moment **[*158]** when it could have been corrected"). Moreover, this issue is a legal, rather than a factual, one in support of which it was not necessary to introduce additional evidence during the PUC proceedings. Because this issue was discussed by the PUC in its decision and raised in Hilberg and CRR's motion for rehearing, we hold that it is properly raised on appeal.

To summarize, we hold that the appealing stockholders have no standing to bring the present appeal, and that although Hilberg and CRR have standing, they have failed to preserve for appeal the second and third issues raised in their brief.

The sole remaining issue is whether the PUC erred in approving the rate plan, because it failed to employ traditional ratemaking analysis to determine whether the average base retail rate increases contained in the rate plan will produce rates that are "just and reasonable."

III. *Standard of Review*

In addressing this issue on appeal, we apply the standard of review set forth in *RSA 541:13*. [HN6] A party seeking to set aside a decision of the PUC has the burden of demonstrating that the decision is unlawful, or, by a clear preponderance **[***18]** of the evidence, that it is unjust or unreasonable. Additionally, findings of fact made by the PUC are presumed to be *prima facie* lawful and reasonable. *RSA 541:13*; *see Appeal of Cheney, 130 N.H. at 592, 551 A.2d at 166*.

IV. *The Analysis Required of the PUC*

In this case, we are dealing with an issue of the delegation of legislative power. Subject to acknowledged constitutional limitations, considered below, the regulation of utilities and the setting of appropriate rates to be charged for public utility products and services is the unique province of the legislature. *Duquesne Light Co. v. Barasch, 488 U.S. 299, 313 (1989)*; *The Minnesota Rate Cases, 230 U.S. 352, 433 (1913)*; *see LUCC v. Public Serv. Co. of N.H., 119 N.H. 332, 340, 402 A.2d 626, 631 (1979)*. For substantially all of such regulation,

the legislature has recognized the need for expertise not readily available as part of legislative resources, and has therefore delegated its power to a standing regulatory commission of the legislature's creation. RSA ch. 363. The delegated power is exercised in the area of ratemaking, RSA ch. 378, which is conducted through ongoing supervision of rate **[***19]** schedules filed with the PUC. In the traditional ratemaking proceeding, when the utility files for a change in rates under RSA chapter 378, a course of action, well defined by that **[*159]** chapter, the PUC's regulations and the decisions of this court, is undertaken. In the reorganization of PSNH under the State's agreement with NU, the traditional approach could have been employed, initiated by a PSNH filing for standard and appropriate changes to its existing rates. The rate element of the reorganization could have come to the PUC, in the normal course, under the existing statutory delegation and with all of the judicial requirements attached. However, the rate element of the reorganization was far from traditional, since it envisioned contractual protections for NU, through a contractual **[**593]** guarantee of rates designed to cover the cost of acquisition required to be paid by NU. The contractual rates were intended to be in effect far beyond the period normally and historically appropriate for this utility.

The legislature, citing special needs and circumstances in the situation, *RSA 362-C:1* (Supp. 1990), saw fit to provide in this statute a special delegation to **[***20]** the PUC of power to review this agreement. RSA ch. 362-C (Supp. 1990). Its delegating charge was for the PUC to "determine whether the implementation of the agreement would be consistent with the public good." *RSA 362-C:3* (Supp. 1990). It charged that, if such a determination is made, "notwithstanding any other provision of law," the contracted rates shall be established and placed in effect for the contracted period. *Id.* In exercise of this authority to determine the public good, the legislature authorized the PUC to inquire into "whether the rates for electric service to be established in connection with the reorganization are just and reasonable and should be approved." *RSA 362-C:1, IV* (Supp. 1990). The parties disagree as to whether, in such consideration of the rates stipulated by the agreement, by using the phrase "just and reasonable," the legislature intended the PUC to apply traditional ratemaking principles. Hilberg and CRR assert that the statute's reference to the "just and reasonable" standard, which is also found in existing "traditional" ratemaking statutes, *e.g., RSA 378:7* and :28, indicates that the legislature wanted the PUC to undertake a traditional **[***21]** ratemaking procedure, and judge the rates under the rate plan according to established "just and reasonable" standards, or, in other words, to conduct a "traditional ratemaking analysis." By "traditional ratemaking analysis," Hilberg and CRR refer to the ratemaking process described in *Appeal of Conservation Law Foundation, 127 N.H. 606, 507 A.2d 652 (1986)*.

According to this process, rates are determined using the following formula: R = O + (B X r), where R = required revenue, O = allowed operating expenses, B = rate base and r = rate of return. *Id.* **[*160]** *at 633, 507 A.2d at 671*; *Petition of Public Serv. Co. of N.H., 130 N.H. 265, 270-71, 539 A.2d 263, 266 (1988), appeal dismissed, 488 U.S. 1035 (1989)*. The PUC first determines the appropriate values of the three variables in the formula: rate base, rate of return, and the utility's allowed operating expenses. *Appeal of Conservation Law Foundation, 127 N.H. at 633-40, 507 A.2d at 671-75*. Rate base is defined as "'the amount of money that the utility has invested in capital assets (like generating plant and transmission lines) that it uses to provide services to its customers.'" *Id. at 634, 507 A.2d* **[***22]** *at 671* (quoting Glicksman, *Allocating the Cost of Construction Excess Capacity: "Who Will Have To Pay For It All?*," 33 Kan. L. Rev. 429, 432 (1985)). It may only include property that is "used and useful" in the generation of electricity, in which the utility's investment was "prudent" at the time made. *Id. at 637-38, 507 A.2d at 673-74*. The rate of return, "a percentage applied to the rate base expressed as a dollar amount in order to produce 'interest on long-term debt, dividends on preferred stock, and earnings on common stock (including surplus or retained earnings),'" *id. at 635, 507 A.2d at 672* (quoting C. Phillips, Jr., The Regulation of Public Utilities 332 (1985)), should "yield a return comparable 'to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties[.]'" *Id.* (quoting *Bluefield Co. v. Pub. Serv. Comm., 262 U.S. 679, 692 (1923)*). Once it has determined the values of the three variables, the PUC then calculates the utility's allowed revenue requirement, from which rates are derived. *Id. at 633-40, 507 A.2d* **[***23]** *at 671-75*.

Hilberg and CRR note, quoting *Appeal of Conservation Law Foundation*, that "any attempt to judge

reasonableness [of rates] apart from [the traditional ratemaking] process would . . . risk . . . unconstitutionality." *See id. at 639, 507 A.2d at 674.* NU and PSNH, on the other hand, maintain **[**594]** that to interpret *RSA 362-C:3* (Supp. 1990) as requiring the PUC to apply these statutory ratemaking requirements in its analysis of the rate plan would nullify the statute's purpose, because it would then "be impossible to approve the Rate Agreement." The State, and NU and PSNH, also argue that traditional ratemaking analysis is not constitutionally required. They contend that even if it were required, the PUC satisfied this requirement by finding that the rate plan would be consistent with traditional ratemaking principles.

We note at the outset that the PUC did estimate, insofar as reasonably foreseeable, what rates would be produced using traditional **[*161]** ratemaking methodology, and that it compared these rates to the rates under the rate plan. *See Re Northeast Utilities, 114 PUR4th at 410*. Hilberg and CRR apparently claim that this comparison was **[***24]** invalid, because the PUC was required to, but did not, conduct a full-blown ratemaking proceeding, as part of which a determination of the "prudent" and "used and useful" value of Seabrook would be made. We base our discussion on this characterization of their argument.

A. *Under RSA 362-C:3*

To resolve Hilberg and CRR's argument that *RSA 362-C:3* (Supp. 1990) obligated the PUC to apply traditional ratemaking principles in its analysis of the rates under the rate plan, "principles of statutory interpretation require us to look first to the statutory language itself," *Petition of Jane Doe, 132 N.H. 270, 276, 564 A.2d 433, 438 (1989)*, for the words used in the statute are the best indication of legislative intent. *See Chambers v. Geiger, 133 N.H. 149, 152, 573 A.2d 1356, 1357 (1990)*. When possible, a statute will be interpreted in a manner consistent with its plain meaning. *Petition of Jane Doe, 132 N.H. at 276-77, 564 A.2d at 438*. "We also examine a statute in relation to the statutory scheme." *State v. Taylor, 132 N.H. 314, 318, 566 A.2d 172, 174 (1989)*.

The operative section of [HN7] RSA chapter 362-C, section 3, provides:

> "The commission is authorized . . **[***25]** . to determine whether the implementation of the agreement would be consistent with *the public good*. If the commission so finds, it shall, *notwithstanding any other provision of law*, establish and place into effect the levels of rates . . . in accordance with, and during the time periods set forth in, the agreement."

(Emphasis supplied.) In making this determination of consistency with the public good, *RSA 362-C:3* (Supp. 1990) authorizes the PUC to determine whether the rate plan contained in the agreement will produce rates that are "just and reasonable and should be approved." Since this consideration is specifically mentioned in *RSA 362-C:1, IV* (Supp. 1990), it is essential to the operative determination of public good. *State v. Perra, 127 N.H. 533, 537, 503 A.2d 814, 816-17 (1985)* (stating that statutes shall be interpreted to effectuate the legislature's expressed intent). *RSA 362-C:3* (Supp. 1990) does not, however, expressly require the PUC to undertake any particular analysis of the rate plan.

Hilberg and CRR argue that, because the legislature in its declaration of purpose and findings specifically used the phrase "just and **[*162]** reasonable," a **[***26]** term of art found in traditional ratemaking statutes, it intended the PUC to use traditional ratemaking analysis to assess the rates under the rate plan.

It does not follow from the fact that the phrase "just and reasonable" is used in traditional ratemaking statutes that these statutes apply in the present case. In *Petition of Public Service Co. of New Hampshire*, a case decided subsequent to our decision in *Appeal of Conservation Law Foundation*, we stated that in the constitutional sense of the phrase,

> [HN8] "[a] just and reasonable rate is one that, after consideration of the relevant competing interests, falls within the zone of reasonableness between confiscation of utility property or investment interests and ratepayer exploitation."

130 N.H. at 274, 539 A.2d at 268. Thus, we have recognized two "just and reasonable" standards: a statutory standard and a **[**595]** broader, constitutional

standard. The question that remains is whether the legislature intended the statutory "just and reasonable" standard to apply in addition to the constitutional "just and reasonable" standard.

It is significant that the only place the phrase "just and reasonable" appears **[***27]** in RSA chapter 362-C (Supp. 1990) is in its "Declaration of Purpose and Findings," *RSA 362-C:1* (Supp. 1990), and not in *RSA 362-C:3* (Supp. 1990), the operative section. That the legislature used the phrase only in the declaration of purpose and findings section is consistent with a determination that it was using the phrase in the broader, constitutional sense, rather than in the more specific, statutory sense. The legislature's omission of the phrase "just and reasonable" from *RSA 362-C:3* (Supp. 1990), entitled "Action by the Commission," indicates that the legislature did not intend to require the PUC to undertake traditional ratemaking analysis. Had the legislature intended the PUC to do so, it could easily have made this an express requirement. It is not the function of this court to add provisions to the statute that the legislature did not see fit to include. *Sigel v. Boston & Maine R.R., 107 N.H. 8, 23, 216 A.2d 794, 805 (1966)*. Furthermore, the legislature's mandate that, having determined public good, the contracted rates are to be implemented as agreed, "notwithstanding any other provision of law," calls more for contract review and ratification than for creative **[***28]** ratemaking.

Interpreting *RSA 362-C:3* (Supp. 1990) so as to require the PUC to use traditional ratemaking analysis would also directly contravene the express intent of the legislature in enacting RSA chapter 362-C **[*163]** (Supp. 1990). *Cf. Quality Carpets, Inc. v. Carter, 133 N.H. 887, 889, 587 A.2d 254, 255 (1991)* (stating that [HN9] "[w]e will construe statutes 'so as to effectuate their evident purpose'" (quoting *State v. Sweeney, 90 N.H. 127, 128, 5 A.2d 41, 41 (1939))*. The legislature stated the following as reasons for its enactment of RSA chapter 362-C (Supp. 1990):

> "I. The health, safety and welfare of the people of the state of New Hampshire and orderly growth of the state's economy require that there be a sound system for the furnishing of electric service.
>
> II. The bankruptcy of the state's largest electric utility, Public Service Company of New Hampshire, has threatened the adequacy, reliability and cost of electric service.
>
> III. The present and predicted growth in electric service demands in the state of New Hampshire requires a prompt resolution of the bankruptcy and reorganization of Public Service Company of New Hampshire."

The predominant **[***29]** purpose of RSA chapter 362-C (Supp. 1990) was to expedite the resolution of the PSNH bankruptcy by authorizing the PUC, upon a finding of public good, to approve and implement the agreement, which would resolve the PSNH bankruptcy by providing for a reorganization of the utility.

An effort at traditional ratemaking would involve a complex process which, as we noted above, consists of a number of steps. *See Appeal of Conservation Law Foundation, 127 N.H. at 633-40, 507 A.2d at 671-75*. If *RSA 362-C:3* (Supp. 1990) were interpreted as Hilberg and CRR suggest, the PUC essentially would be required to hold a ratemaking proceeding which could take as long as one or two years. *See* C. Phillips, Jr., The Regulation of Public Utilities 732 (1985) (stating that "'[f]rom start to finish, the proceedings averaged more than . . . 21 months for ratemaking.'" (quoting 4 Senate Comm. on Governmental Affairs, Study on Federal Regulation, 95th Cong., 1st Sess. 7 (1977))). As a consequence of this interpretation of *RSA 362-C:3* (Supp. 1990), the resolution of the PSNH bankruptcy would be delayed rather than expedited, a result that was clearly not intended by the legislature. Further, the **[***30]** agreement was not an appropriate subject for traditional ratemaking. Its contractual nature, its stipulated rate base and its extended term would have made traditional ratemaking a sham or exercise in futility.

[*164] **[**596]** Based upon the foregoing analysis, we hold that *RSA 362-C:3* (Supp. 1990) did not require the PUC to analyze the rate plan in accordance with traditional ratemaking principles. By using the phrase "just and reasonable," the legislature referred to the constitutional "just and reasonable" standard, rather than the "just and reasonable" standard found in traditional ratemaking statutes, applicable to traditional ratemaking procedures, and discussed in *Appeal of Conservation Law Foundation*.

B. *Under Constitutional Law*

Hilberg and CRR also appear to argue that the PUC was constitutionally required to apply traditional ratemaking analysis. Again, they cite *Appeal of Conservation Law Foundation* as authority. In *Appeal of Conservation Law Foundation*, we noted that "any attempt to judge reasonableness [of rates] apart from [the traditional ratemaking] process would . . . risk . . . unconstitutionality." *127 N.H. at 639, 507 A.2d at 674.* **[***31]** We did not, however, foreclose the possibility that there existed other constitutionally permissible means of determining "just and reasonable" rates, nor should our holding in that case be construed as unconditionally requiring the use of that traditional ratemaking methodology.

A holding that the use of that traditional ratemaking formula is constitutionally required would be contrary to well-established federal constitutional case law. In *Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944)*, the seminal case in this area, the United States Supreme Court held that the Federal Natural Gas Act, *15 U.S.C. § 717 (1988)*, does not require the use of any particular formula in determining rates. *Id. at 602*. The Court stated that the methodology used to set rates is irrelevant. *See id.* Instead, it is the result reached that is important: "[i]f the total effect of the rate order cannot be said to be unjust or unreasonable, judicial inquiry . . . is at an end." *Id.* Although the Court decided the case under the Federal Natural Gas Act, it noted that "there are no constitutional requirements more exacting than the standards of the Act." *Id. at 607.* **[***32]**

The holding in *Hope* has been followed in numerous subsequent Supreme Court cases. In *Wisconsin v. Federal Power Commission, 373 U.S. 294 (1963)*, the Court stated:

> "[T]o declare that a particular method of rate regulation is so sanctified as to make it highly unlikely that any other method could be sustained would be wholly out of keeping **[*165]** with this Court's consistent and clearly articulated approach to the question of the [Federal Power] Commission's power to regulate rates. *It has repeatedly been stated that no single method need be followed by the Commission in considering the justness and reasonableness of rates*."

Id. at 309 (emphasis supplied). Most recently, in *Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989)*, the Court reaffirmed the principle that "'[i]t is not the theory, but the impact of the rate order which counts.'" *Id. at 314* (quoting *Hope, 320 U.S. at 602*); *see also Petition of Public Serv. Co. of N.H., 130 N.H. at 275, 539 A.2d at 268* (stating that the Federal Constitution is concerned with only the end result of a rate order). Accordingly, the PUC was not constitutionally required to apply traditional **[***33]** ratemaking principles in its analysis of the rates under the rate plan.

V. *Conclusion*

In conclusion, we hold that *RSA 362-C:3* (Supp. 1990) did not obligate the PUC to analyze the rate plan in accordance with traditional ratemaking principles, nor would such methodology be practical or consistent with the legislative delegation. Further, we hold that traditional ratemaking analysis was not constitutionally required in this case. Since Hilberg and CRR neither argue nor demonstrate that the total effect of the rate plan is unjust or unreasonable, we hold that they have failed to sustain their burden of proof to show that the PUC's decision approving the rate plan was unlawful or unreasonable. **[**597]** Therefore, the PUC's decision must be affirmed. *See Appeal of Cheney, 130 N.H. at 592, 551 A.2d at 166.*

Affirmed; appeals dismissed.

DISSENT BY: BROCK; BATCHELDER

DISSENT

Brock, C.J., and Batchelder, J., dissenting:

In this appeal we are asked to determine the legislative intent behind *RSA 362-C:3* (Supp. 1990), specifically, whether the legislature intended to require the PUC to analyze the rates under the rate plan negotiated by NU and the State in accordance with existing **[***34]** statutory ratemaking standards. Our decision today will affect electric ratepayers all over New Hampshire for the period remaining under the rate plan and perhaps longer. For the reasons hereinafter set forth, we believe that the majority has incorrectly interpreted *RSA 362-C:3* (Supp. 1990) to reach a result that was not

intended by the legislature, and, in **[*166]** addition, that they have misapprehended federal constitutional ratemaking requirements discussed both in federal cases and in the decisions of this court.

I. *The Statutory "Just and Reasonable" Standard is Presumed to Apply*

Reading *RSA 362-C:3* (Supp. 1990) to effectuate one of the legislature's express purposes in enacting RSA chapter 362-C (Supp. 1990), *see* 2A N. Singer, Sutherland Statutory Construction § 58.06, at 723 (Sands 4th ed. 1984), it is clear that the PUC was required to determine whether the rates under the rate plan are "just and reasonable." Although not defined in RSA chapter 362-C (Supp. 1990), "just and reasonable" is a term of art used in *RSA 378:7*. *RSA 378:7*, entitled "Fixing of Rates by Commission," requires the PUC to set "just and reasonable" rates, or rates that are "sufficient **[***35]** to yield not less that a reasonable return on the cost of the property of the utility used and useful in the public service less accrued depreciation." *See RSA 378:27* and :28. According to well established canons of statutory construction, it is assumed not only that the legislature was aware of this statutory "just and reasonable" standard, *see Wyatt v. Board of Equalization, 74 N.H. 552, 557, 70 A. 387, 390 (1908)* (stating that a statute "must be read in the light of the circumstances then existing," including "the law as it was then declared"), but that, by using the term "just and reasonable" when it enacted RSA chapter 362-C (Supp. 1990), the legislature intended this standard to apply.

> "'It is assumed that whenever the legislature enacts a provision, it has in mind previous statutes relating to the same subject matter. . . .
>
> . . . .
>
> Unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter *will* be construed in the same sense.'"

Appeal of Town of Hampton Falls, 126 N.H. 805, 809-10, 498 A.2d 304, 307 (1985) (emphasis added) (quoting 2A N. Singer, Sutherland Statutory **[***36]** Construction § 51.02, at 453-54 (Sands 4th ed. 1984) (footnotes omitted)).

This court further defined the term "just and reasonable" in *Appeal of Conservation Law Foundation, 127 N.H. 606, 507 A.2d 652 (1986)*. In that case, we stated that, given the above-cited statutes, the term "reasonable" or "just and reasonable" rate

> **[*167]** "*must be understood as referring to the result of the ratemaking process*. The ratemaking process fixes rates that will satisfy a utility's revenue requirement. Reduced to its essentials, this revenue requirement *may* be expressed as a formula: R = O + (B X r), where R is the utility's allowed revenue requirement; O is its allowed operating expense; B is its rate base, defined as cost less depreciation of the utility's property that is used and useful in the public service, *see RSA 378:27*; and r is the rate of return allowed on the rate base."

Id. at 633-34, 507 A.2d at 671 (emphasis added). The court went on to discuss at some length "both the standard of reasonable rates and the commission's responsibility **[**598]** in light of that standard." *Id. at 633, 507 A.2d at 671*.

There is nothing in either the language **[***37]** or the legislative history of RSA chapter 362-C (Supp. 1990) to rebut the presumption that the legislature intended the phrase "just and reasonable" to refer to the statutory "just and reasonable" standard. The legislature's use of the phrase "notwithstanding any other provision of law" does not, contrary to what NU and PSNH argue, indicate that it did not intend the statutory "just and reasonable" standard to apply, because this language neither limits nor describes the analysis the PUC was required to undertake in order to assess the reasonableness of the rates under the rate plan. Nor does the fact that the phrase "just and reasonable" appears only in *RSA 362-C:1* (Supp. 1990), entitled "Declaration of Purpose and Findings," mean that the legislature was using it in its broader, constitutional sense. It is only logical that this phrase, provided that it is used in the same context, has the same meaning regardless of its location in the statutory scheme. Additionally, the legislative history of RSA chapter 362-C (Supp. 1990) provides no indication that the legislature intended any standard other than the statutory "just and reasonable" standard to apply. Therefore, *RSA 362-C:3* **[***38]**

(Supp. 1990) required the PUC to determine whether the rates under the rate plan met the statutory "just and reasonable" standard discussed in *Appeal of Conservation Law Foundation*.

Such an interpretation of the statute does not, as the majority suggests, contravene the legislature's apparent intent to expedite the resolution of the PSNH bankruptcy. The assumption underlying the majority's decision is that the legislature wanted to expedite the resolution of the PSNH bankruptcy by ensuring that the PUC would be **[*168]** able to approve and implement the agreement, including the rate plan, as quickly as possible. A close look at the plain language of RSA chapter 362-C (Supp. 1990) and its legislative history, however, reveal this assumption to be unfounded.

When it enacted RSA chapter 362-C (Supp. 1990), the legislature stated that the PUC "should be authorized to determine . . . whether the rates for electric service to be established [under the rate plan contained in the agreement] . . . *should be approved*." *RSA 362-C:1, IV* (Supp. 1990) (emphasis added). The legislature clearly did not intend the PUC to rubberstamp the rate plan. If the legislature had wanted the **[***39]** rate plan to be approved, it simply could have enacted legislation approving the rate plan. It is well established that the legislature has the authority to set utility rates. *See Duquesne Light Co. v. Barasch, 488 U.S. 299, 313 (1989)*; *The Minnesota Rate Cases, 230 U.S. 352, 433 (1913)* (stating that "[t]he rate-making power is a legislative power and necessarily implies a range of legislative discretion"). Thus, there was no reason for the legislature to delegate this authority to the PUC, unless it wanted the PUC to use its expertise to analyze the rate plan. The PUC has expertise in determining whether rates are "just and reasonable," which it has obtained as a result of holding numerous ratemaking proceedings in accordance with the applicable ratemaking statutes. By delegating the authority to approve the rate plan to the PUC without any further instructions, it follows that the legislature intended the PUC to conduct its customary analysis of the rates under the rate plan, whereby it would determine whether the rates met the statutory "just and reasonable" standard. This reading of the statute is consistent with the legislative history of RSA chapter 362-C (Supp. **[***40]** 1990): "This bill authorizes the PUC to conduct a *full and complete review* of the rate agreement . . . . In other words, it delegates to the PUC the authority to perform an *expert review* of the technical terms of the Agreement." N.H.H.R. Jour. 8 (Special Session, December 14, 1989) (emphasis added).

The legislature desired a prompt resolution of the PSNH bankruptcy, but it desired more. It also wanted to ensure that the rate plan would not unduly burden its ratepayer constituents. A prompt resolution **[**599]** of the PSNH bankruptcy and a careful review of the rate plan in accordance with traditional ratemaking principles were not, however, mutually exclusive goals. Moreover, the enormity of the undertaking involved in this case, namely, the decision whether or not to implement a rate plan calling for seven years of rate increases, warranted a conservative approach in determining the fairness of **[*169]** the rate plan, rather than the conclusory treatment engaged in by the PUC. The legislature had sound reason to expect the former; otherwise, it could have adopted the rate plan by statute and shunted the PUC from any participation in this process.

II. *The* **[***41]** *Reasonableness of Rates Must Be Assessed in the Context of the Ratemaking Process*

Principles of federal constitutional law also required the PUC to assess the reasonableness of the rates under the rate plan in the context of the ratemaking process. The establishment of "just and reasonable" rates involves a balancing of investor and ratepayer interests, *Power Comm'n v. Hope Gas Co., 320 U.S. 591, 603 (1944)*, which occurs when rates are determined in accordance with traditional ratemaking principles, *see Appeal of Conservation Law Foundation, 127 N.H. at 633, 507 A.2d at 671* (stating that the traditional ratemaking process "appropriately balances the competing interests of ratepayers who desire the lowest possible rates and investors who desire rates that are higher"). By determining a proper rate base value and by allowing a reasonable rate of return on that rate base, the PUC ensures that ratepayers do not pay excessive rates and, in addition, guarantees investors an adequate return on their investment. "[W]hether a particular rate is 'unjust' or 'unreasonable' will depend to some extent on what is a fair rate of return given the risks under a particular ratesetting **[***42]** system, and on the amount of capital upon which the investors are entitled to earn that return." *Duquesne, 488 U.S. at 310*.

Although the United States Supreme Court has often stated that there is no constitutionally required ratemaking methodology or formula, *Duquesne, 488 U.S. at 316*; *Colorado Interstate Co. v. Comm'n, 324 U.S. 581,*

605 (1945); *Hope, 320 U.S. at 602*, it must be remembered that in these cases the applicability of the traditional ratemaking process itself was not at issue, but rather some specific aspect of the ratemaking process, for example, rate base. *See Duquesne, 488 U.S. at 301-02*; *Colorado Interstate Co. v. Comm'n, 324 U.S. at 604-05*; *Hope, 320 U.S. at 603*; *see also Wisconsin v. Fed. Power Comm'n, 373 U.S. 294, 308-10 (1963)* (holding that establishing rates on an area-wide, as opposed to an individual company basis is not unconstitutional); *Power Comm'n v. Pipeline Co., 315 U.S. 575 (1942)* (upholding the Federal Power Commission's findings as to rate base, amortization period, amortization interest rate, and rate of return). By stating that there is no single ratemaking formula, the Court apparently meant that there was **[***43]** no required formula for determining **[*170]** any of the three variables used in the traditional ratemaking process, such as rate base. *Accord Appeal of Conservation Law Foundation, 127 N.H. at 637, 507 A.2d at 673* (citing cases). Its holdings should not be read as broadly as the majority suggests, to stand for the proposition that rates may be found to be "just and reasonable," in the constitutional sense of the phrase, without reference to the traditional ratemaking process. In this instance, "traditional ratemaking process" refers to the general ratemaking process, whereby rates are determined in relation to the proper rate base and rate of return. This process *may* be expressed as the following formula: R = O + (B X r); but use of this specific formula is not necessarily required. *See id. at 633, 507 A.2d at 671*. What *is* required is that, in determining whether rates are "just and reasonable," a utilities commission consider the proper rate base **[**600]** and rate of return, which in this case the PUC failed to do.

In *Appeal of Conservation Law Foundation*, this court noted that any attempt to determine the reasonableness of rates apart from the general **[***44]** ratemaking process described in that case would entail the risk of unconstitutionality. *127 N.H. at 639, 507 A.2d at 675*.

> "This is so, not because the State or Federal Constitution guarantees a particular rate, but because existing concepts of the constitutional limits of ratemaking have been developed in the context of a process that does not determine how far to recognize one competing interest in isolation from the other. That process has been described metaphorically as a "constitutional calculus" in which the interests of investors, like the interests of customers, are variables. Consequently, any criterion of reasonableness that might be applied independently from the balancing process that does reflect such interests would run the risk of unconstitutionality by inviting the fixing of rates without regard to the balancing of interests."

Id. (citations omitted). Similarly, in *Company v. State, 95 N.H. 353, 64 A.2d 9 (1949)*, we stated that

> "in the *Hope* case, as in subsequent decisions called to our attention, the findings of the regulatory body whose orders were sustained disclosed a rational process by which a rate base and a rate of return **[***45]** were determined and applied, to produce the return translated into rates, or in default thereof, the case was remanded for further findings."

[*171] *Id. at 357, 64 A.2d at 14*. Reading the above-cited cases in a consistent manner, they teach us that, although there is no constitutionally required formula for determining rate base, or the other variables used in traditional ratemaking methodology, rates cannot pass constitutional muster unless they have been determined in relation to the proper rate base and rate of return, or in other words, in accordance with the traditional ratemaking process.

III. *The PUC's Analysis of the Rate Plan*

In the present case, the comparison made by the PUC between the rates under the rate plan and the estimated traditional rates for the same period was invalid, because the PUC did not properly determine the rates likely under traditional ratemaking methodology. Instead of determining the applicable rate base by calculating the value of PSNH's *prudent* investment in property used and useful in the generation of electricity, the PUC *assumed* the applicable rate base to be $ 2.3 billion, NU's acquisition cost of PSNH contained **[***46]** in the agreement. *Re Northeast Utilities/Public Service Company of New Hampshire, 114 PUR4th 385, 410 (N.H.P.U.C. 1990)*. It did so in spite of its previous decision in *Re Public Service Co. of New Hampshire, 66*

PUR4th 349 (N.H.P.U.C. 1985), in which it stated that

> "[r]easonable rates on a just and reasonable rate base cannot be finally prescribed without a prudency determination of the capital investment in rate base.
>
> . . . .
>
> We cannot prejudge the reasonableness of rates or make a definitive finding that rates resulting from the capital investment in Seabrook are unduly burdensome without first finding the prudent investment to which they relate. . . . We are bound by the New Hampshire and federal Constitutions to assure that ultimately PSNH will receive just compensation through rates on prudent investment. While there are constitutional guarantees of the opportunity to earn a fair return, rates may not be 'prohibitive, exorbitant, or unduly burdensome to the public.' The essential reconciliation of prudent investment and reasonable, not unduly burdensome rates may be accomplished in a rate proceeding when PSNH seeks rate support for the addition of Seabrook **[***47]** to its rate base. *A prudency investigation should be initiated by the commission on a timely basis to assure an in-depth analysis* **[*172]** *of prudent investment and the reasonable rate level for a fair return to investors without unduly burdening ratepayers*."

[601]** *Id. at 424* (emphasis added) (citations omitted) (quoting *S.W. Tel. Co. v. Pub. Serv. Comm., 262 U.S. 276, 290 n.2 (1923)* (Brandeis, J., dissenting)).

The PUC arrived at this $ 2.3 billion figure by finding the value of Seabrook to be $ 700 million and the value of PSNH's non-Seabrook assets to be $ 800 million. The remaining $ 800 million was labeled as an "acquisition premium." It does not appear, however, that the $ 800 million "acquisition premium" represents the value of any particular utility property, so as to be properly included in rate base. *See Re Northeast Utilities, 114 PUR4th at 467-68* (the PUC's rulings on Hydro Intervenors' requested findings numbers 3 and 7). The $ 800 million acquisition premium does not legitimately bridge the gap between the value of PSNH's assets and the price to be paid for PSNH by NU, and is of little solace to a ratepayer who is forced to contribute **[***48]** to a return on that asset which presumably does not generate electricity but merely helps to indemnify junk bondholders. *See Appeal of Conservation Law Foundation, 127 N.H. at 650-51, 507 A.2d at 682-83* (King, C.J., and Batchelder, J., dissenting).

Since the PUC did not calculate the applicable rate base value, it was unable to properly determine the rates likely under traditional ratemaking methodology and compare them to the rates that will be produced by the rate plan. Therefore, the PUC erred in approving the rate plan, because it did not properly determine whether the rates that would be established by the rate plan are "just and reasonable."

IV. *Conclusion*

In this case, the legislature contemplated, and ratepayers and investors alike were entitled to, a careful and thorough review of the rate plan by the PUC in accordance with traditional ratemaking principles. Yet the PUC, instead of determining whether the rates that New Hampshire ratepayers will be charged under the rate plan are "just and reasonable," focused its inquiry upon whether the "rate plan yields the minimum rates necessary to finance the payment of the $ 2.3 billion bankruptcy compromise to PSNH **[***49]** creditors and equity holders without unduly burdening ratepayers or the N.H. economy." *Re Northeast Utilities, 114 PUR4th at 405*. Although the PUC cited *Appeal of Conservation Law Foundation* in its decision, **[*173]** apparently it did not fully comprehend the requirements this case imposes. As a result of its cursory analysis of the rate plan, ratepayers may now be unjustly locked into a rate plan which not only provides for seven consecutive years of rate increases totaling, on a cumulative basis, approximately forty-five percent, *Re Northeast Utilities, 114 PUR4th at 410*, but which contains a return on equity "collar" and "ceiling" which allow for further increases, *id. at 418*.

The PUC, which five short years ago refused to consider the potential effect of a PSNH bankruptcy, *see Appeal of Conservation Law Foundation, 127 N.H. at 670, 507 A.2d at 695-96* (King, C.J., and Batchelder, J.,

dissenting), in authorizing the further borrowing of hundreds of millions of dollars for the completion of Seabrook Unit I at its then-projected completion cost of $ 4.7 billion dollars, *id. at 648-49, 507 A.2d at 681*, has once again fallen short of the mark which the New **[***50]** Hampshire Legislature and ratepayers should reasonably expect of it in the performance of its high constitutional duty. It has found a schedule of rate increases to be in the public good without determining in the first instance whether they are "just and reasonable" as that term has been used by this court, the United States Supreme Court, the New Hampshire Legislature, and its own decisions.

The decision of the court today jeopardizes New Hampshire ratepayers' interest in receiving adequate utility service at a fair cost, because it results in the establishment of a schedule of electric rates that must be borne by ratepayers over a period of years without an oft-promised prudency hearing concerning PSNH's investment in Seabrook, *see Re Public Service Co. of New Hampshire, 66 PUR4th at 424*, which now exceeds $ 6.5 billion, *Re Northeast Utilities, 114 PUR4th at 392* (as of January 1, **[**602]** 1990, the total cost of Seabrook, including all direct costs and interest charges, was approximately $ 6.5 billion). For the reasons set forth herein, we would remand this matter to the PUC for its appropriate inquiry, and accordingly, we respectfully dissent from today's per curiam **[***51]** opinion of the court.

BLAGBROUGH FAMILY REALTY TRUST v. A & T FOREST PRODUCTS, INC. & a.

No. 2005-669

SUPREME COURT OF NEW HAMPSHIRE

155 N.H. 29*; *917 A.2d 1221*; *2007 N.H. LEXIS 25

November 8, 2006, Argued
February 28, 2007, Opinion Issued

SUBSEQUENT HISTORY: Rehearing denied by *Blagbrough Family Realty Trust v. A & T Forest Prods., Inc., 2007 N.H. LEXIS 82 (N.H., Apr. 17, 2007)*

PRIOR HISTORY: [*1]**

Hillsborough-southern judicial district.

Blagbrough v. Town of Wilton, 145 N.H. 118, 755 A.2d 1141, 2000 N.H. LEXIS 28 (2000)

Blagbrough v. Town of Wilton, 153 N.H. 234, 893 A.2d 679, 2006 N.H. LEXIS 12 (2006)

DISPOSITION: Affirmed in part; reversed in part; and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff, a family realty trust, and defendant, a forest products corporation, cross-appealed an opinion and order of the Hillsborough-southern judicial district (New Hampshire) on two consolidated cases: (1) an appeal from a decision of the Zoning Board of Adjustment (ZBA) of a town granting a building permit to defendant and (2) a petition to quiet title.

OVERVIEW: The parties owned adjoining parcels of real property. The trial court determined that: plaintiff had acquired a portion of a lot by adverse possession; that plaintiff had certain rights in a canal easement; that plaintiff had not acquired any portion of an old road through adverse possession; that the ZBA decision was not unlawful nor unreasonable; defendant was required to replace a portion of a pipe running from a well; and that defendant was required to repair some damage to the canal. The court held that the trial court's conclusion that plaintiff acquired a portion of the lot by adverse possession contrary to the law since plaintiff's occasional use of the property was insufficient to support title by adverse possession. The court upheld the trial court's ruling that the old road was a public highway since the evidence supported that the public had used the road since the early 1800s. Further, contrary to plaintiff's contention, there was no evidence that use of the old road was ever discontinued. The court found that the trial court's ruling that the ZBA properly upheld the grant of a building permit to defendant was lawful.

OUTCOME: The court reversed, in part, the trial court's decision that granted title to plaintiffs of a portion of a lot by adverse possession. The court otherwise affirmed the opinion and order and remanded the case to the trial court for the entry of an order consistent with the reversal.

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review
Civil Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence

[HN1] An appellate court reviews a trial court's

application of law to facts de novo. An appellate court accords deference to a trial court's findings of historical fact, where those findings are supported by evidence in the record.

Evidence > Procedural Considerations > Burdens of Proof > Allocation
Real Property Law > Adverse Possession > Elements of Adverse Claims
Real Property Law > Adverse Possession > Procedure
[HN2] In order to obtain title by adverse possession, the adverse possessor must prove, by a balance of probabilities, 20 years of adverse, continuous, and uninterrupted use of the land claimed so as to give notice to the owner that an adverse claim is being made. Adverse use is trespassory in nature, and the adverse possessor's use of the land must be exclusive. The success or failure of a party claiming adverse possession is not determined by the subjective intent or the motives of the adverse possessor. The acts of the adverse possessor's entry onto and possession of the land should, regardless of the basis of the occupancy, alert the true owner of the cause of action. In evaluating the merits of an adverse possession claim, courts are to construe evidence of adverse possession of land strictly.

Real Property Law > Adverse Possession > Elements of Adverse Claims
[HN3] The law requires more than occasional, trespassory maintenance in order to perfect adverse title; the use must be sufficiently notorious to justify a presumption that the owner was notified of it.

Real Property Law > Deeds > Construction & Interpretation
[HN4] A plain error in a deed will be rejected and the deed construed reasonably to conform to the intent of the parties.

Civil Procedure > Appeals > Reviewability > Preservation for Review
[HN5] The moving party must affirmatively demonstrate where each question presented on appeal was raised below. N.H. Sup. Ct. R. 16(3)(b). A moving party's brief shall contain statement of facts material to consideration of questions presented with appropriate references to the appendix or to the record. N.H. Sup. Ct. R. 13(2). Where a party fails to demonstrate that it raised an issue before the trial court, the issue is not preserved for an appellate court's review.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury
Real Property Law > Adverse Possession > Elements of Adverse Claims
Real Property Law > Limited Use Rights > Easements > Creation > Easement by Prescription
[HN6] Pursuant to *RSA 229:1* (1993), a public road could be created by prescription if it had been used for public travel for 20 years prior to January 1, 1968. Whether a highway is created by prescription is a finding of fact.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
Civil Procedure > Appeals > Standards of Review > Fact & Law Issues
Civil Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence
[HN7] Findings of fact by a trial court are binding upon us unless they are not supported by the evidence or are erroneous as a matter of law.

Real Property Law > Adverse Possession > Elements of Adverse Claims
Real Property Law > Limited Use Rights > Easements > Creation > Easement by Prescription
[HN8] The inclusion of a road on a map is competent evidence to support the inference of use of the road.

Real Property Law > Limited Use Rights > Easements > Public Easements
Real Property Law > Limited Use Rights > Easements > Termination of Easements
[HN9] Once it is shown that a road is a public highway, the highway is presumed to exist until it is discontinued, and discontinuance is not favored in the law. Discontinuance is a fact that must be proved and the burden is upon the party who asserts discontinuance to prove it by clear and satisfactory evidence. Because public roads are discontinued by town vote, and such actions are recorded, the best evidence of discontinuance is the official record.

Civil Procedure > Appeals > Standards of Review >

Clearly Erroneous Review
Civil Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence
[HN10] The resolution of conflicts in the evidence and determination of issues of fact are functions of the trier of fact. Because the proper standard of review with respect to the weight of evidence is not whether the appellate court would have found differently but whether a reasonable person could find as did the trial court, an appellate court will not disturb the decision of the finder of fact unless it is clearly erroneous. The trial court, acting as the finder of fact, is not required to explain away all inconsistencies in the evidence presented at trial.

Real Property Law > Adverse Possession > General Overview
[HN11] One cannot acquire rights in a public highway by adverse possession. *RSA 236:30* (1993).

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Review
Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Real Property Law > Zoning & Land Use > Judicial Review
[HN12] An appellate court's review of zoning board of appeal (ZBA) decisions is limited. A court will uphold the trial court's decision unless the evidence does not support it or it is legally erroneous. For its part, the trial court must treat all factual findings of the ZBA as prima facie lawful and reasonable. *RSA 677:6* (1996). It may set aside a ZBA decision if it finds by the balance of probabilities, based upon the evidence before it, that the ZBA's decision was unreasonable.

Civil Procedure > Discovery > General Overview
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN13] The trial court has broad discretion in managing and supervising pretrial discovery and in ruling on the conduct of a trial. An appellate court reviews a trial court's rulings on the management of discovery and the scope of cross-examination under an unsustainable exercise of discretion standard. To establish that the trial court erred under that standard, the plaintiff must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of its case.

Civil Procedure > Judicial Officers > Judges > Discretion
Evidence > Procedural Considerations > Rule Application & Interpretation
Real Property Law > Zoning & Land Use > Judicial Review
[HN14] It is within a trial court's discretion to allow further evidence in a zoning board appeal.

Civil Procedure > Appeals > Standards of Review > De Novo Review
Real Property Law > Zoning & Land Use > Judicial Review
Real Property Law > Zoning & Land Use > Ordinances
[HN15] The interpretation of a zoning ordinance is a question of law, which an appellate court reviews de novo.

Governments > Legislation > Interpretation
[HN16] Because the traditional rules of statutory construction generally govern an appellate court's review, an appellate court construes the words and phrases of an ordinance according to the common and approved usage of the language. When the language of an ordinance is plain and unambiguous, an appellate court need not look beyond the ordinance itself for further indications of legislative intent. An appellate court will not guess what the drafters of the ordinance might have intended, or add words that they did not see fit to include.

Real Property Law > Zoning & Land Use > Building & Housing Codes
Real Property Law > Zoning & Land Use > Special Permits & Variances
[HN17] See *RSA 674:41(I)(c)*.

Governments > Legislation > Interpretation
[HN18] In matters of statutory interpretation, a court is the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole. When examining the language of a statute, a court ascribes the plain and ordinary meaning to the words used. A court interprets legislative intent from the statute as written and will not consider what the legislature might have said or add words that the legislature did not include.

Real Property Law > Zoning & Land Use >

Administrative Procedure
Real Property Law > Zoning & Land Use > Building & Housing Codes
[HN19] See *RSA 674:41(II)*.

Governments > Legislation > Interpretation
[HN20] A court does not construe statutes in isolation; instead, a court attempts to do so in harmony with the overall statutory scheme. When interpreting two statutes that deal with a similar subject matter, an appellate court construes them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes.

Real Property Law > Zoning & Land Use > Administrative Procedure
Real Property Law > Zoning & Land Use > Building & Housing Codes
Real Property Law > Zoning & Land Use > Special Permits & Variances
[HN21] *RSA 674:41(II)* provides a method for an applicant suffering from practical difficulty or unnecessary hardship, the conditions needed to trigger that provision, to appeal a decision of a local administrative officer. *RSA 674:41(I)(c)* does not conflict with *RSA 674:41(II)*. Rather, it simply sets forth the procedure to be followed by those applicants who cannot, choose not, or need not, demonstrate a practical difficulty or unnecessary hardship.

Real Property Law > Limited Use Rights > Easements > Creation > Easement by Necessity
Real Property Law > Zoning & Land Use > Special Permits & Variances
[HN22] See *RSA 231:40*.

Civil Procedure > Remedies > General Overview
Real Property Law > Limited Use Rights > Easements > Creation > Easement by Necessity
Real Property Law > Zoning & Land Use > Special Permits & Variances
[HN23] *RSA 231:41* sets forth the conditions under which such a right-of-way may be used and discontinued. *RSA 231:42* then sets forth the notice and hearing requirements that must be followed before the selectmen may lay out such a right-of-way, discontinue it, or award damages arising out of its use.

Governments > Legislation > Interpretation
[HN24] Where there is no explicit or implicit private right of action to seek a declaration of the statute's violation, a court will conclude that the statute does not do so.

Civil Procedure > Equity > Relief
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN25] The propriety of affording equitable relief rests in the sound discretion of the trial court to be exercised according to the circumstances and exigencies of the case. Because the separation between law and equity is not sharp, courts in the State of New Hampshire have broad discretion in exercising equity jurisdiction. An appellate court will uphold a trial court's equitable order unless its decision constitutes an unsustainable exercise of discretion.

COUNSEL: Cleveland, Waters and Bass, P.A., of Concord (William B. Pribis on the brief and orally), for the plaintiff.

Wiggin & Nourie, P.A., of Manchester (Patricia M. Panciocco and Gregory E. Michael on the brief, and Mr. Michael orally), for defendant A & T Forest Products, Inc.

Fernald, Taft, Falby & Little, P.A., of Peterborough (Silas Little on the brief and orally), for defendant Town of Wilton.

JUDGES: DUGGAN, J. BRODERICK, C.J., and DALIANIS and GALWAY, JJ., concurred.

OPINION BY: DUGGAN

OPINION

[*31] [1225]** DUGGAN, J. The plaintiff, Blagbrough Family Realty Trust (Blagbrough), and defendant A & T Forest Products (A & T) cross-appeal an opinion and order of the Trial Court (*Lynn*, C.J.), on two consolidated cases: (1) an appeal from a decision of the Zoning Board of Adjustment (ZBA) of the Town of Wilton (Town) granting a building permit to A & T; and (2) a petition to quiet title. We affirm in part, reverse in part, and remand.

[*2]** *I. Background*

Litigation involving the parties and the land here at issue was the subject of two previous opinions of this court. *See Blagbrough Family Realty Trust v. Town of Wilton, 153 N.H. 234, 893 A.2d 679 (2006)*; *Blagbrough v. Town of Wilton, 145 N.H. 118, 755 A.2d 1141 (2000)*. Here we recite the facts pertinent to this appeal as found by the trial court.

Blagbrough owns real property located at 293 Burton Highway in Wilton, which is identified on the Town's tax map as Lot A-22. A & T owns an adjoining parcel, identified on the Town's tax map as Lot A-21, and had obtained approval to subdivide it into two lots: Lots A-21-1 and A-21-2. Both Lot A-22 and Lot A-21 are bounded to the north by Old Peterborough Road and were at one time under the common ownership of John and Anne Dimeling. A & T also owns another parcel identified as Lot A-30, which is situated north of Old Peterborough Road.

A & T acquired Lots A-21 and A-30 on February 20, 2001, by warranty deed from heirs of the Dimelings. Blagbrough acquired Lot A-22 from the Dimelings by warranty deed dated September 16, 1963. The deed for the Blagbrough parcel contains a typed paragraph indicating that **[***3]** the conveyance included a canal easement with certain flowage rights therein. However, **[**1226]** a line was drawn through the canal easement paragraph and a handwritten notation was inserted. It reads, "Above paragraph deleted -- pertinent to land retained by Dimelings. " The deed also grants Blagbrough an easement to use and access a well located on land which was, at the time, retained by the Dimelings (now Lot A-21-1). The well provided water for the house on the Blagbrough's parcel, but the trial **[*32]** court found that the well has not been used as a source of drinking water since 1985.

On September 29, 2003, the Town's board of selectmen (the selectmen) voted to authorize a building permit for A & T to construct a single family home on Lot A-30. Blagbrough appealed the selectmen's decision to the ZBA. The ZBA upheld the selectmen's decision and later denied Blagbrough's motion for rehearing. Blagbrough then appealed to the superior court.

Blagbrough also brought a petition to quiet title in superior court, seeking a declaration that it: (1) had acquired a portion of Lot A-21-1 through adverse possession; (2) had certain rights to the canal easement (described above); (3) had acquired a portion **[***4]** of Old Peterborough Road through adverse possession; and (4) was entitled to damages for interference with the well and canal easements that allegedly occurred when A & T removed timber and hauled it across Lot A-21-1. In response to a motion filed by Blagbrough, the ZBA appeal was consolidated with the quiet title petition, and both matters became the subject of a two-day bench trial and a subsequent hearing on damages.

When all was said and done, the trial court ruled that: (1) Blagbrough had acquired a portion of Lot A-21-1 by adverse possession; (2) Blagbrough had certain rights in the canal easement; (3) Blagbrough had not acquired any portion of Old Peterborough Road through adverse possession; (4) the decision of the ZBA was neither unlawful nor unreasonable; (5) A & T was required to replace a portion of the pipe running from the well on Lot A-21 to the Blagbrough property; and (6) A & T was required to repair some damage to the canal. Blagbrough then appealed and A & T cross-appealed, placing these rulings in dispute.

II. Adverse Possession: Lot A-21-1

The trial court found that, according to the pertinent deeds, the boundary between Lots A-22 and A-21-1 is "a straight **[***5]** course running between two granite bounds, one located on the northern side of the Burton Highway and the other located on the southern side of the so-called 'Old Peterborough Road. '" Neither side challenges this finding. Accordingly, we assume its correctness and use it as a reference point for our consideration of Blagbrough's adverse possession claim.

The foundation of a small boathouse is slightly to the west of the boundary line. Crediting the testimony of Corinne Blagbrough, Kenton Blagbrough (Corinne Blagbrough's son), and Howard Preston, the trial court found that the Blagbrough family engaged in activities in an area immediately around the boathouse and that these activities were sufficient to satisfy the criteria for adverse possession. However, the trial court also **[*33]** ruled that the extent to which the Blagbroughs engaged in activity on land to the west of the boathouse was unclear and could not satisfy the criteria for adverse possession. It therefore concluded **[**1227]** that Blagbrough had acquired title by adverse possession to a portion of Lot A-21-1 which was east (*i.e.*, in the direction of Lot A-22) of the western-most point of the boathouse.

On appeal, Blagbrough argues **[***6]** that the trial

court's ruling is inconsistent with the evidence because the evidence demonstrated that Blagbrough acquired title by adverse possession to a significantly broader swath of Lot A-21-1, extending all the way to a stone wall located approximately 150 feet west of the boathouse. A & T cross-appeals, arguing that the evidence does not support a conclusion that Blagbrough acquired title by adverse possession to any portion of Lot A-21-1.

[HN1] We review a trial court's application of law to facts *de novo*. *Tech-Built 153 v. Va. Surety Co., 153 N.H. 371, 373, 898 A.2d 1007 (2006)*. We accord deference to a trial court's findings of historical fact, where those findings are supported by evidence in the record. *Elwood v. Bolte, 119 N.H. 508, 510, 403 A.2d 869 (1979)*.

[HN2] In order to obtain title by adverse possession, the adverse possessor must prove, by a balance of probabilities, twenty years of adverse, continuous, and uninterrupted use of the land claimed so as to give notice to the owner that an adverse claim is being made. *Flanagan v. Prudhomme, 138 N.H. 561, 571-72, 644 A.2d 51 (1994)*. In addition, adverse use is trespassory in nature, and **[***7]** the adverse possessor's use of the land must be exclusive. *See Kellison v. McIsaac, 131 N.H. 675, 679, 559 A.2d 834 (1989)*; *Seward v. Loranger, 130 N.H. 570, 576-77, 547 A.2d 207 (1988)*. The success or failure of a party claiming adverse possession is not determined by the subjective intent or the motives of the adverse possessor. *Kellison, 131 N.H. at 680*. Rather the acts of the adverse possessor's entry onto and possession of the land should, regardless of the basis of the occupancy, alert the true owner of the cause of action. *Id.* In evaluating the merits of an adverse possession claim, courts are to construe "[e]vidence of adverse possession of land . . . strictly. " *Bellows v. Jewell, 60 N.H. 420, 422 (1880)* (citations omitted).

The trial court found that members of the Blagbrough family: (1) tore down the boathouse in approximately 1964 or 1965 because it was dilapidated; (2) routinely entered the parcel for walks and other recreational activities; (3) permitted their children to play on the parcel; (4) used the parcel as a source of Christmas trees; and (5) cut grass, removed trees, and planted some flowers **[***8]** on the parcel. Accordingly, the question here is whether these activities are sufficient to support a conclusion that Blagbrough obtained title by adverse possession to a portion of Lot A-21-1. We hold that they are not.

[*34] [HN3] The law requires more than occasional, trespassory maintenance in order to perfect adverse title; the use must be sufficiently notorious to justify a presumption that the owner was notified of it. *Pease v. Whitney, 78 N.H. 201, 204, 98 A. 62 (1916)*. The act of tearing down the boathouse, although not insignificant, was a one-time occurrence that the trial court found took place one or two years after the Blagbroughs acquired the parcel. That act, alone, therefore cannot be considered more than an occasional trespass. *See id.* Apparently recognizing this point, both the trial court and the parties properly focused more upon the Blagbroughs' other activities on the subject parcel in considering the adverse possession claim. With respect to these activities, although testimony did indicate that the Blagbrough family engaged in some of them "routinely," those activities are not sufficiently notorious or exclusive to satisfy the criteria for adverse **[***9]** possession. *Compare Alukonis v. Kashulines, 97 N.H. 298, 299, 86 A.2d 327 (1952)* (stating that forty years of continuous *and* uninterrupted use of disputed strip to cut hay, garden, and grow crops, combined with fact that strip visually blended in with possessor's lot due to rudimentary boundary monuments in his favor, constituted **[**1228]** adverse possession), *with Flanagan, 138 N.H. at 572* (noting occasional playing of children on tract constituted minimal use not exclusive or sufficiently adverse); *Hemon v. Rowe Chevrolet Co., 108 N.H. 11, 16-17, 226 A.2d 792 (1967)* (stating that plaintiff's setting off disputed boundary strip with row of spruce trees, which grew from small to large over the twenty-year prescriptive period, was not open and notorious use giving notice of adverse claim); *Cushing v. Miller, 62 N.H. 517, 525 (1883)* (stating that occasional cutting of timber on wild lot not sufficiently adverse), *overruled on other grounds by Dame v. Fernald, 86 N.H. 468, 471, 171 A. 369 (1934)*. Accordingly, even accepting the facts as found by the trial court, we conclude that Blagbrough has not met its burden **[***10]** of establishing that it acquired title to any portion of Lot A-21-1 by adverse possession. The trial court's conclusion to the contrary is therefore reversed.

III. The Canal Easement

As described above, a portion of the deed from the Dimelings to Blagbrough conveyed a canal easement, granting rights in a canal that traversed Lots A-21 and A-22. Some of the language concerning the canal easement -- particularly the flowage rights therein -- had

been crossed out. The trial court ruled that this "removal of the so-called canal easement language [from the deed conveying Lot A-22 from the Dimelings to Blagbrough] was a mistake and does not have the effect of extinguishing Blagbrough's right to flow, use and maintain the portion of the canal located on the Blagbrough property." On appeal, A & T argues that: (1) **[*35]** removal of the canal easement language from the deed was not a mistake; and (2) easement rights in the old canal merged under the common ownership of the Dimelings, and cannot spring back.

With respect to the first argument, we have held that "[[HN4] a] plain error in a deed will be rejected and the deed construed reasonably to conform to the intent of the parties." *Reney v. Hebert, 109 N.H. 74, 75, 242 A.2d 72 (1968).* **[***11]** The trial court found that "there is no dispute that a portion of the canal lays within the Blagbrough property." The trial court then held that since "the Dimelings actually did include a portion of the canal in their grant to Blagbrough, the crossed-out and penned-in language contained in the deed cannot be construed as reflective of an intent not to convey a portion of the canal easement to Blagbrough." We agree.

As the trial court reasoned, the most "sensible construction [of the deed] is that the deletion of the easement was based on the grantors' erroneous belief that the property conveyed to Blagbrough did not include any portion of the canal." After all, the crossed-out language of the deed pertains to flowage rights in the canal and the handwritten portion evinces a belief that no portion of the canal had been transferred. It follows that if the Dimelings had realized that they were still conveying a portion of the canal to Blagbrough, they would have retained specific language in the deed pertaining to the use of, or flowage rights related to, the portion of the canal that was conveyed. No such language appears in the deed. Accordingly, we reject A & T's first argument.

[*12]** As its fallback position, A & T contends that the canal easement was extinguished by operation of the doctrine of merger. Our rules affirmatively require [HN5] the moving party to demonstrate where each question presented on appeal was raised below. *See Sup. Ct. R.* 16(3)(b); *Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250, 855 A.2d 564 (2004)*. A & T has pointed to no part of the record indicating that it raised its merger argument before **[**1229]** the trial court and we find no specific reference to merger in the transcript. *See Sup. Ct. R.* 16(3)(d) (moving party's brief shall contain statement of facts material to consideration of questions presented "with appropriate references to the appendix or to the record"); *Sup. Ct. R.* 13(2) ("The moving party shall be responsible for ensuring that all or such portions of the record relevant and necessary for the court to decide the questions of law presented by the case are in fact provided to the supreme court."). Nor did the trial court discuss the merger argument in its decision. Where a party fails to demonstrate that it raised an issue before the trial court, the issue is not preserved for our review. *Bean, 151 N.H. at 250*; **[***13]** *see also Broughton v. Proulx, 152 N.H. 549, 555, 880 A.2d 388 (2005)*. Accordingly, we will not address the merger issue for the first time on appeal.

[*36] *IV. Adverse Possession: Old Peterborough Road*

Blagbrough asserts that it has acquired title by adverse possession to a portion of Old Peterborough Road which abuts the northern boundary of Lot A-22. The trial court rejected this argument, concluding that: (1) Old Peterborough Road was a public highway; (2) Blagbrough had failed to establish that Old Peterborough Road had been discontinued; and (3) therefore Blagbrough could not acquire any rights in it by adverse possession. We agree with the trial court.

A. Establishment of Public Highway

[HN6] Pursuant to *RSA 229:1* (1993), a public road could be created by prescription if it had "been used . . . for public travel . . . for 20 years prior to January 1, 1968 . . . ." *See Mahoney v. Town of Canterbury, 150 N.H. 148, 150, 834 A.2d 227 (2003)*. Whether a highway is created by prescription is a finding of fact. *Id*. [HN7] Findings of fact by a trial court are binding upon us unless they are not supported by the evidence or are **[***14]** erroneous as a matter of law. *Id*.

Here, the trial court found that Old Peterborough Road, sometimes called Old County Road or Stiles Road, had been used for public travel since at least the early 1800s. In support of this finding, the trial court noted that Old Peterborough Road was: (1) referenced on the Wilton Town Plan of 1805; (2) included in the Carrigain Map of 1816; and (3) referenced in the layout petition for the Burton Highway filed with the Court of Common Pleas in 1840. We have held, based upon a different road's inclusion in the same Carrigain map, that "[HN8] the inclusion of a road on a map is competent evidence to

support the inference of use of the road . . . ." *Williams v. Babcock, 116 N.H. 819, 822, 368 A.2d 1166 (1976).* Moreover, during a view, the trial court observed stone walls lining both sides of Old Peterborough Road. Where a wall has been erected on either or both sides of a road, its "evidentiary value is important. " *Hoban v. Bucklin, 88 N.H. 73, 80, 184 A. 362 (1936).* Further, the trial court expressly found that Blagbrough had not come forward with any evidence that use of the road was permissive. *See Mahoney, 150 N.H. at 151.* **[***15]** In *Mahoney*, we held that similar evidence supported a finding that a public highway by prescription had been established under *RSA 229:1*. *Id. at 151-52*. Similarly, here we uphold the trial court's determination that Old Peterborough Road was a public highway.

B. Discontinuance

Blagbrough argues that even if Old Peterborough Road was established as a public highway, it was discontinued. [HN9] Once it is shown that a road is a public highway, the highway is presumed to exist **[**1230]** until it is discontinued, **[*37]** and discontinuance is not favored in the law. *Davenhall v. Cameron, 116 N.H. 695, 696-97, 366 A.2d 499 (1976).* "Discontinuance is a fact that must be proved and the burden is upon the party who asserts discontinuance to prove it by clear and satisfactory evidence. Because public roads are discontinued by town vote, and such actions are recorded . . ., the best evidence of discontinuance is the official record. " *Id*. (citations omitted); *see also RSA 231:43* (Supp. 2006) (discussing discontinuance).

Blagbrough advances several arguments for discontinuance in its brief. First, citing *State v. Canterbury, 40 N.H. 307, 312-13 (1860),* **[***16]** Blagbrough argues:

> The Burton Highway Petition did reference the Old Peterborough Road. However, the Petition spoke of laying out a road (the Burton Highway) to "the Old Road" *but then in an entirely different direction*. Thus, although it references Old Peterborough Road, the Burton Highway Petition did not have the effect of confirming its existence. Instead, it had the effect of discontinuing Old Peterborough Road.

(Citations omitted.) The trial court rejected Blagbrough's argument "that the road depicted or referenced in the various maps and other documents introduced by A & T and the Town is some road or roads other than the same Old Peterborough Road described in the Blagbrough deed and the drawing recorded with that deed in the registry. "

We find Blagbrough's argument unavailing. The Burton Highway Petition describes the layout of the Burton Highway as running past markers such as sticks, stones, stakes, birch trees, unidentified types of trees, and beech trees, among many other types of markers. Blagbrough has not directed us to any exhibit admitted by the trial court that clearly delineates all of these markers and supports its position. Indeed, in the **[***17]** exhibits admitted by the trial court and provided to us in connection with this appeal, we find no maps that identify these particular trees, stones, and stakes. While a Burton Highway layout plan is contained in A & T's appendix, Blagbrough does not rely upon it in its brief as a point of reference for its argument. Without such maps, which Blagbrough (as the party appealing this issue) was responsible for providing us, *see Sup. Ct. R.* 13(2), 16(3)(d), we have no way of evaluating the precise trajectory of the Burton Highway or the implications of that trajectory on Old Peterborough Road. Furthermore, the Burton Highway Petition describes a layout of the Burton Highway -- it does not describe a layout of the Old Peterborough Road. Therefore, and given the strong presumption against discontinuance, we find the Burton Highway Petition's vague references to **[*38]** Old Peterborough Road, without more, do not compel a finding that Old Peterborough Road was discontinued.

Blagbrough also argues that the trial court erred in concluding that discontinuance had not been established because it did not give enough weight to: (1) the testimony of Kenton Blagbrough; (2) the testimony of the Town's **[***18]** former road agent; and (3) certain maps offered into evidence which supported its position.

> [HN10] The resolution of conflicts in the evidence and determination of issues of fact are functions of the trier of fact. Because the proper standard of review with respect to the weight of evidence is not whether this court would have found differently but whether a reasonable person could find as did the trial court, we

> will not disturb the decision of the finder of fact unless it is clearly erroneous. The trial court, acting as the finder of fact, is not required to explain away **[**1231]** all inconsistencies in the evidence presented at trial.

Barrows v. Boles, 141 N.H. 382, 396-97, 687 A.2d 979 (1996) (brackets, citations, and quotations omitted); *see also Rancourt v. Town of Barnstead, 129 N.H. 45, 50, 523 A.2d 55 (1986)* ("The credibility and weight to be given to a witness' testimony is a question of fact for the trial court. If the findings can reasonably be made on all the evidence, they must stand."). Our review of the record reflects that the trial court's factual determinations are adequately supported by the testimony and other evidence presented **[***19]** at trial. Further, in light of the strong presumption against discontinuance, the fact that some maps may have been inconsistent with others in their labeling of Old Peterborough Road is not dispositive.

C. Adverse Possession vis-a-vis a Public Highway

[HN11] One cannot acquire rights in a public highway by adverse possession. *RSA 236:30* (1993). We have upheld the trial court's determinations that: (1) Old Peterborough Road is a public highway, within the meaning of *RSA 229:1*; and (2) it was not established that Old Peterborough Road had been discontinued. Accordingly, even assuming *arguendo* that Blagbrough had successfully established the elements of adverse possession, its claim vis-a-vis Old Peterborough Road fails.

V.The ZBA Ruling

The ZBA ruling at issue relates to Lot A-30, a 12.8-acre parcel located north of the Blagbrough property and bounded on the south by Old Peterborough Road. On September 29, 2003, the Town's selectmen, after **[*39]** review and comment by the planning board and town counsel, voted to authorize a building permit pursuant to *RSA 674:41, I(c)* (Supp. 2002) (amended 2004) for A **[***20]** & T to engage in construction on Lot A-30. Blagbrough appealed the selectmen's decision to the ZBA, which agreed with the selectmen. Blagbrough then appealed the ZBA's decision to the superior court, which affirmed the ZBA.

Here, Blagbrough argues that the trial court erred by: (1) making certain pretrial rulings relating to a protective order sought by the Town; (2) concluding that Old Peterborough Road is a public highway; (3) ruling that Lot A-30 was grandfathered within the meaning of the zoning ordinance; and (4) misinterpreting *RSA 674:41, I(c)*. We consider each argument in turn.

[HN12] Our review of zoning board decisions is limited. *Harrington v. Town of Warner, 152 N.H. 74, 77, 872 A.2d 990 (2005)*. We will uphold the trial court's decision unless the evidence does not support it or it is legally erroneous. *Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 580, 883 A.2d 1034 (2005)*. For its part, the trial court must treat all factual findings of the ZBA as *prima facie* lawful and reasonable. *RSA 677:6* (1996). It may set aside a ZBA decision if it finds by the balance of probabilities, based **[***21]** upon the evidence before it, that the ZBA's decision was unreasonable. *Town of Chester, 152 N.H. at 580*.

A. The Protective Order and Related Issues

We begin by placing Blagbrough's challenge to the trial court's pretrial rulings in context. On June 2, 2004, Blagbrough moved to consolidate the petition to quiet title and the ZBA appeal, arguing, among other things, that "the issues and evidence presented [in both cases] . . . are likely to be duplicative . . . ." On July 8, 2004, the Trial Court (*Hicks*, J.) granted the motion to consolidate. Later, on or about September 15, 2004, Blagbrough propounded interrogatories to the Town, **[**1232]** seeking discoverable information related to the ZBA appeal. In response, the Town moved for a protective order, arguing that the superior court should rule on issues connected to the ZBA appeal based only upon information contained in the certified record of the ZBA proceedings, and therefore further discovery on the ZBA matter was not necessary. The Trial Court (*Lynn*, C.J.) granted the Town's motion. At trial, the court permitted counsel for the Town to cross-examine witnesses and to introduce or rely upon evidence not found **[***22]** in the certified record of the ZBA proceedings. On appeal, Blagbrough argues that "once the Trial Court disallowed any discovery on the plaintiff's *RSA 677:4* appeal, it was bound to prohibit the Town from participating substantively in the evidentiary aspects of the December 21 and 22, 2004 hearing in this matter. "

[*40] [HN13] The trial court has broad discretion in managing and supervising pretrial discovery and in ruling on the conduct of a trial. *Murray v. Developmental Servs.*

of Sullivan County, 149 N.H. 264, 268, 818 A.2d 302 (2003). We review a trial court's rulings on the management of discovery and the scope of cross-examination under an unsustainable exercise of discretion standard. *See State v. Barnes, 150 N.H. 715, 719, 849 A.2d 152 (2004)* (discovery); *State v. Wellington, 150 N.H. 782, 788, 846 A.2d 1171 (2004)* (cross-examination). To establish that the trial court erred under this standard, the plaintiff must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of its case. *See id.*

Especially since it was Blagbrough that sought to consolidate these two cases, **[***23]** we do not find that the trial court's rulings were untenable or unreasonable to the prejudice of Blagbrough's case. [HN14] It is within the trial court's discretion to allow further evidence in a ZBA appeal. *Peter Christian's v. Town of Hanover, 132 N.H. 677, 683, 569 A.2d 758 (1990)*. In granting the Town's motion for a protective order, the trial court apparently concluded that it understood the materials upon which the ZBA relied and that further evidence would not aid in its decision or be necessary to complete the record; therefore, additional discovery on issues pertaining to the ZBA appeal would not be necessary. *See Estabrooks v. Town of Jefferson, 134 N.H. 367, 369, 592 A.2d 1154 (1991)* (explaining the admission of additional evidence by the superior court in a ZBA appeal). Later, at trial, when Blagbrough elicited testimony from witnesses concerning issues germane to the ZBA appeal, the Town was entitled to cross-examine those witnesses through questioning and the use of exhibits. *Appeal of Sutton, 141 N.H. 348, 351, 684 A.2d 1346 (1996)* ("In any proceeding, cross-examination, almost by definition, is a review of direct examination **[***24]** in order to determine the veracity, accuracy and depth of knowledge of the witness." (quotation omitted)). To hold otherwise would result in one litigant being able to embark on a wide-ranging evidentiary inquiry, while the other (who opposed consolidation presumably to avoid precisely the type of predicament at issue here) is forced to stand by silently. Accordingly, we reject Blagbrough's first assignment of error on the ZBA appeal.

B. Old Peterborough Road

Blagbrough's second argument is that the trial court erred in concluding that Old Peterborough Road is a public highway. For the reasons articulated earlier in this opinion, we reject this argument.

[*41] *C. Grandfathering of Lot A-30*

Lot A-30 is located in an area of the Town zoned as a watershed district. Section 14.3.2 of the Wilton Zoning Ordinance requires each lot in the Watershed **[**1233]** District to have a minimum of 300 feet of frontage on a class V or better road. It is undisputed that Lot A-30 does not have 300 feet of frontage. In affirming the selectmen's decision to grant the building permit, the ZBA concluded, and the trial court agreed, that section 17.2 of the ordinance excused A & T from having to comply with section **[***25]** 14.3.2. Blagbrough contends that both the ZBA and the trial court misinterpreted section 17.2 and that therefore, absent a variance, A & T could not obtain a building permit on a lot that did not satisfy the ordinance's frontage requirements.

[HN15] The interpretation of a zoning ordinance is a question of law, which we review *de novo. Town of Warner, 152 N.H. at 79*. [HN16] Because the traditional rules of statutory construction generally govern our review, we construe the words and phrases of an ordinance according to the common and approved usage of the 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*. Moreover, we will not guess what the drafters of the ordinance might have intended, or add words that they did not see fit to include. *Id.*

Section 17.2 of the ordinance provides in pertinent part:

> [A] lot of record at the time of the effective date of this Ordinance [which] has less area and/or frontage than herein required in the District in which it is located . . . may be used for a single family dwelling if permitted in that district **[***26]** subject to New Hampshire water supply and pollution control division approval and subject to all district regulations applicable to lots within the district wherein the lot is located with the exception of lot size and/or frontage.

In order for section 17.2 to apply, the subject lot must be a "lot of record" at the time of the effective date of the ordinance. Section 3.1.19 of the ordinance defines

a "lot of record" as "[l]and designated as a separate and distinct parcel in a legally-recorded deed filed in the record of Hillsborough County, New Hampshire. " While acknowledging that Lot A-30 and Lot A-21 had been in common ownership under the Dimelings, the trial court ruled that Lot A-30 was a "lot of record" within the meaning of section 17.2 because Lot A-30 was located on the opposite side of Old Peterborough Road from Lot A-21 and had been described separately from Lot A-21 in the deeds in the Dimeling chain.

[*42] Blagbrough contends that Lot A-30 does not satisfy the definition of "lot of record" both because there was no separate deed for Lot A-30 at the time of the Dimelings' ownership and because a requirement that the lot be "buildable" should be read into the definition **[***27]** of "lot of record. " Blagbrough also argues that the "Ordinance should not be interpreted to allow development in the Watershed District with *no* frontage whatsoever and the Trial Court erred when it allowed such interpretation. " We find these arguments unavailing.

First, the plain language of section 3.1.19 does not require a "lot of record" to be described in a separate deed. Rather, it simply requires that within any deed conveying the lot, the lot must be described separately. The trial court found that such a separate description was contained in the deeds in the Dimeling chain, and Blagbrough has pointed to no persuasive evidence which would undermine this finding.

Second, the word "buildable" does not appear anywhere in the definition of "lot of record. " We will not guess what the drafters of the ordinance might have intended, or add words that they did not see **[**1234]** fit to include. *Town of Warner, 152 N.H. at 79*.

Third, we decline Blagbrough's invitation to hold that a lot with no frontage somehow materially differs from a lot with little frontage for purposes of section 17.2. The plain language of the ordinance applies anytime a lot has "less" frontage. **[***28]** Lot A-30 has less frontage than is required (it has none). Accordingly, section 17.2 applies and we reject Blagbrough's arguments concerning the trial court's interpretation of the ordinance. If the Town wishes to change the words or terms of its ordinance, it is of course free to do so.

D. RSA 674:41, I(c)

Blagbrough's final assignment of error pertaining to the ZBA appeal is that both the ZBA and the trial court misinterpreted *RSA 674:41, I(c)*. Blagbrough contends that *RSA 674:41, I(c)* does not authorize selectmen to issue building permits to individual landowners.

RSA 674:41, I(c) provides, in pertinent part:

> [[HN17] N]o building shall be erected on any lot within any part of the municipality nor shall a building permit be issued for the erection of a building unless the street giving access to the lot upon which such building is proposed to be placed:
>
> . . .
>
> (c) Is a class VI highway, provided that:
>
> **[*43]** (1) The local governing body after review and comment by the planning board has voted to authorize the issuance of building permits for the erection of buildings on said class **[***29]** VI highway or a portion thereof; and
>
> (2) The municipality neither assumes responsibility for maintenance of said class VI highway nor liability for any damages resulting from the use thereof; and
>
> (3) Prior to the issuance of a building permit, the applicant shall produce evidence that notice of the limits of municipal responsibility and liability has been recorded in the county registry of deeds . . . .

[HN18] In matters of statutory interpretation, we are the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole. *Appeal of Town of Bethlehem, 154 N.H. , , 154 N.H. 314, 911 A.2d 1* (decided Nov. 2, 2006). When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used. *Id*. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add words that the

legislature did not include. *Id.*

We agree with the trial court's reasoning that there is

> no merit in Blagbrough's suggestion that *RSA 674:41, I(c)* does not permit the local governing body to grant building permits on an individual, case **[***30]** by case basis, for properties that fall within the purview of the statute. The mere fact that the statute uses the plural terms "permits" and "buildings" does not compel the conclusion that the selectmen must grant such approval en gross, i.e., either on a road-wide or municipality-wide basis. On the contrary, the statute specifically indicates that approvals can be granted "for *said* class VI highway or *a* portion thereof. " (Emphasis added.) These terms support the view that the statute contemplates a case by case determination by the selectmen as to whether to grant approval for building on a particular lot or lots.

Blagbrough disputes the trial court's reasoning by citing *RSA 674:41, II*, which provides:

> [HN19] Whenever the enforcement of the provisions of this section would entail practical **[**1235]** difficulty or unnecessary hardship, and when the circumstances of the case do not require the building, structure or part thereof to be related to existing or proposed streets, the applicant for such permit may appeal from the decision of the **[*44]** administrative officer having charge of the issuance of permits to the zoning board of adjustment in any municipality **[***31]** which has adopted zoning regulations . . . .

Blagbrough argues that *RSA 674:41, II* requires individual lot owners to seek building permits from the local zoning board of adjustment.

[HN20] We do not construe statutes in isolation; instead, we attempt to do so in harmony with the overall statutory scheme. *Soraghan v. Mt. Cranmore Ski Resort, 152 N.H. 399, 405, 881 A.2d 693 (2005)*. When interpreting two statutes that deal with a similar subject matter, we construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes. *Id.*

RSA 674:41, II [HN21] provides a method for an applicant suffering from practical difficulty or unnecessary hardship -- the conditions needed to trigger that provision -- to appeal a decision of a local administrative officer. *RSA 674:41, I(c)* does not conflict with *RSA 674:41, II*. Rather, it simply sets forth the procedure to be followed by those applicants who cannot, choose not, or need not, demonstrate a practical difficulty or unnecessary hardship. Accordingly, discerning **[***32]** no error, we uphold the trial court's interpretation of the statutory scheme.

VI. Damages

Blagbrough's final two arguments are that the trial court erred in: (1) ruling that A & T was not required to comply with *RSA 231:40-:42* when it placed a timber road over Lot A-21-1; and (2) fashioning the remedy for damage caused to its well easement. We first provide some factual background, and then analyze Blagbrough's contentions.

The well easement is described earlier in this opinion. It contains an approximately 900-foot water line that runs from the well head on A & T's property to the residence on Blagbrough's property. The trial court credited the testimony of Alan Stevens, the principal of A & T, that this water line was broken accidentally because it was entangled in the roots of a tree that was removed during the construction of a road across Lot A-21. The road across Lot A-21 was constructed to facilitate tree removal and to provide access to Lots A-21-1, A-21-2 and A-30.

A. RSA 231:40-:42

Blagbrough argues that *RSA 231:40-:42* (1993) required A & T to petition the selectmen before it created **[***33]** a right-of-way to remove timber via the road. In short, Blagbrough's position seems to be that the well easement operated to give it standing to privately enforce the provisions of *RSA 231:40-:42*. The trial court ruled that the requirements of *RSA 231:40-:42* **[*45]** were not triggered because those statutes "cannot be read to require defendant to obtain a right-of-way from the

selectmen to remove timber from his own land merely because plaintiff may have an easement to obtain well water from defendant's property. "

RSA 231:40 provides:

> [HN22] Upon petition, when it becomes necessary for the convenient removal of lumber, wood or other material, to pass through the lands of a person other than the owner of the land from which such lumber, wood or other material is to be removed, the selectmen of the town within which said lands are situated, in their discretion, may lay out a right-of-way **[**1236]** through the land of any person for the purposes aforesaid, and, upon notice to and hearing of the owner of the lands, shall determine the necessity for and assess the damages occasioned by the laying out of such right-of-way, and such **[***34]** damages shall be paid by the person applying for such right-of-way before the same shall be open for use. Any person aggrieved by the action hereunder of the selectmen shall have the same right of appeal as provided by this chapter.

RSA 231:41, in turn, [HN23] sets forth the conditions under which such a right-of-way may be used and discontinued. *RSA 231:42* then sets forth the notice and hearing requirements that must be followed before the selectmen may lay out such a right-of-way, discontinue it, or award damages arising out of its use.

We hold that *RSA 231:40-:42* do not provide a basis upon which Blagbrough may prevail here. Although *RSA 231:40* provides an appeal mechanism for a "person aggrieved" by a decision of a board of selectmen laying out such a right-of-way, we have been provided with no such decision by the selectmen in this case. To the extent that Blagbrough seeks damages based upon an asserted violation of *RSA 231:40-:42*, it has not directed us to any statutory or other legal authority establishing a private right of action to seek both a declaration **[***35]** that *RSA 231:40-:42* have been violated and damages. Nor does Blagbrough make any argument as to why we should find an implicit, private right to seek such a declaration and damages. [HN24] Where there is no explicit or implicit private right of action to seek a declaration of the statute's violation, we will conclude that the statute does not do so. *Cross v. Brown, 148 N.H. 485, 487, 809 A.2d 785 (2002)*.

B. Nature of Relief Granted

Blagbrough's final argument is that the trial court erred in requiring A & T to repair the portion of the well line that traverses A & T's property **[*46]** rather than ordering A & T to pay $ 3,260 in damages, an amount representing the cost of repairing the entire well line. Blagbrough contends that the trial court's decision constituted an improper award of equitable relief where an adequate legal remedy existed.

[HN25] The propriety of affording equitable relief rests in the sound discretion of the trial court to be exercised according to the circumstances and exigencies of the case. *Gutbier v. Hannaford Bros. Co., 150 N.H. 540, 541, 842 A.2d 64 (2004)*. Because the separation between law and equity is not sharp, **[***36]** courts in New Hampshire have broad discretion in exercising equity jurisdiction. *Thurston Enters., Inc. v. Baldi, 128 N.H. 760, 764, 519 A.2d 297 (1986)*. We will uphold a trial court's equitable order unless its decision constitutes an unsustainable exercise of discretion. *Gutbier, 150 N.H. at 541-42*.

Several circumstances undermine Blagbrough's challenge to the trial court's exercise of discretion. For example, the damaged portion of the well line was located on A & T's property and the well line had not been used as a source of drinking water for the residence on Blagbrough's property since 1985. Further, the trial court found that the "water line was very old and was not in particularly good condition at the time it was accidentally broken by defendant. " The trial court also found that "[t]he line consisted of lead piping, which is no longer in use, and was not buried deep enough under ground to conform with modern practice. " It also bears noting that during trial and at the hearing on damages, Blagbrough took the position that this was an equity case -- not a law **[**1237]** suit for damages. Under these circumstances, we cannot conclude that the trial **[***37]** court unsustainably exercised its discretion in ordering A & T to replace the portion of the line lying on its property rather than paying the amount it would cost to replace the entire 900-foot line.

VII. A & T's Cross-Appeal

Finally, we observe that A & T raised four issues in the notice of its cross-appeal but essentially argued only two in its brief. In its brief, A & T argued that the trial court erred in awarding a portion of Lot A-21-1 to Blagbrough by operation of the doctrine of adverse possession and in ruling that the Dimelings made a mistake in striking the canal easement paragraph from the deed to the Blagbroughs, arguments we already have addressed. To the extent that A & T's notice of appeal raises issues not addressed in this opinion, we deem those issues waived. *See Colla v. Town of Hanover, 153 N.H. 206, 210, 890 A.2d 916 (2006)* ("We . . . deem an issue waived when it is raised in a notice of appeal, but is not briefed. ").

[*47] *VIII. Conclusion*

Because we hold that Blagbrough did not satisfy the criteria to acquire a portion of Lot A-21-1 by adverse possession, we remand to the trial court for the entry of an order consistent with that determination. **[***38]** In all other respects, we affirm.

Affirmed in part; reversed in part; and remanded.

BRODERICK, C.J., and DALIANIS and GALWAY, JJ., concurred.

YVONNE MARQUAY & a. v. MICHAEL ENO & a.

No. 93-198

SUPREME COURT OF NEW HAMPSHIRE

139 N.H. 708*; *662 A.2d 272*; *1995 N.H. LEXIS 80

July 11, 1995, Decided

SUBSEQUENT HISTORY: **[***1]** As Corrected July 12, 1995. Released for Publication August 2, 1995.

PRIOR HISTORY: U.S. District Court.

DISPOSITION: Remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: The United States District Court for the District of New Hampshire certified state law questions in a suit by plaintiff female students against defendants, school district, officials, teachers, coaches, and employees, arising out of allegations of exploitation, harassment, assault, and sexual abuse.

OVERVIEW: The court held that *N.H. Rev. Stat. Ann. § 169-C:29* (1990), which required the reporting of child abuse, did not create a private right of action in favor of an abused child against those who violated the statute. Further, a violation of the reporting statute did not constitute negligence per se in an action based on inadequate supervision of a student. The court held that those in a supervisory position over students had a duty to reasonably supervise their students. There was also a duty not to hire or retain employees that the school district or officials knew or have should known had a propensity for sexually abusing students. In a negligent hiring or retention action, failure to report abuse in accordance with the statute could give rise to liability, provided the plaintiff showed that reporting would have prevented the subsequent abuse. Liability might exist for abuse after school hours or after graduation where, but for the hiring and retention of the abusing employee, there would have been no relationship between abuser and victim. The court declined to recognize any new constitutional torts because the female students had an adequate remedy at law.

OUTCOME: The court answered the certified questions and remanded the case to the federal district court.

LexisNexis(R) Headnotes

Family Law > Family Protection & Welfare > Children > General Overview
Governments > Legislation > Interpretation
[HN1] *N.H. Rev. Stat. Ann. § 169-C:29* (1990), the reporting statute, does not support a private right of action for its violation because there is no express or implied legislative intent to create such civil liability.

Torts > Negligence > Proof > Violations of Law > Standards of Care
Torts > Negligence > Proof > Violations of Law > Statutes
[HN2] Use of a statute to establish the standard of care is limited to situations where a common law cause of action exists, and then, only if the statute is applicable. Whether a statutory standard is applicable depends, in part, on whether the type of duty to which the statute speaks is

similar to the type of duty on which the cause of action is based.

Family Law > Family Protection & Welfare > Children > General Overview
Torts > Negligence > Proof > Violations of Law > Statutes
[HN3] Because the duty to which *N.H. Rev. Stat. Ann. § 169-C:29* (1990) speaks -- reporting of abuse -- is considerably different from the duty on which the cause of action is based -- supervision of students -- a violation of the reporting statute does not constitute negligence per se in an action based on inadequate supervision of a student.

Torts > Negligence > Duty > Affirmative Duty to Act > Special Relationships > General Overview
[HN4] The relation of the parties determines whether any duty to use due care is imposed by law upon one party for the benefit of another. If there is no relationship, there is no duty.

Torts > Negligence > Duty > Affirmative Duty to Act > Special Relationships > Children & Parents
Torts > Negligence > Duty > Affirmative Duty to Act > Special Relationships > Schools
[HN5] Schools share a special relationship with students entrusted to their care, which imposes upon them certain duties of reasonable supervision. The scope of the duty imposed is limited by what risks are reasonably foreseeable.

Education Law > Civil Liability > General Overview
Torts > Negligence > Causation > General Overview
Torts > Negligence > Duty > Affirmative Duty to Act > Special Relationships > General Overview
[HN6] The duty falls upon those school employees who have supervisory responsibility over students and who thus have stepped into the role of parental proxy. Those employees who share such a relationship with a student and who acquire actual knowledge of abuse or who learn of facts which would lead a reasonable person to conclude a student is being abused are subject to liability if their level of supervision is unreasonable and is a proximate cause of a student's injury.

Torts > Negligence > Duty > General Overview
[HN7] The principal or superintendent rarely has primary supervisory authority over a student. Because, however, it is the school to which parents turn over custody of their children and from which they expect safety and because the superintendent and principal are charged with overseeing all aspects of the school's operation, a duty of supervision is owed to each student. Where the principal or superintendent knows or should know that a particular school employee poses a threat to a student, entrustment of the student to the care of that employee will not satisfy the duty of reasonable supervision.

Education Law > Civil Liability > Negligence
Torts > Business Torts > Negligent Hiring & Supervision > General Overview
Torts > Negligence > Causation > General Overview
[HN8] A school district or school administrative unit (school) has a duty not to hire or retain employees that it knows or should know have a propensity for sexually abusing students. Where the plaintiff can establish that the school knew or reasonably should have known of such a propensity, the school will generally be liable for the foreseeable sexual abuse of students by that employee. Liability based on negligent hiring or retention is not limited to abuse that occurs during the school day. A school may be liable for abuse of a student by a school employee outside of school hours where there is a causal connection between the particular injury and the fact of employment. Also, a school can only be liable for injuries suffered after it knew or should have known of the employee's propensity. In any event, liability will only lie if the employee's conduct was tortious.

Torts > Business Torts > Negligent Hiring & Supervision > General Overview
[HN9] Some school officials may also be subject to personal liability under negligent hiring or retention theories. Those officials who have hiring and firing authority with respect to subordinates must exercise that authority reasonably, and, once such an official becomes aware or should have become aware that a subordinate was sexually abusing a student, retention could be unreasonable.

Family Law > Family Protection & Welfare > Children > General Overview
Torts > Business Torts > Negligent Hiring & Supervision > General Overview

[HN10] While the reporting statute, *N.H. Rev. Stat. Ann. § 169-C:29* (1990), is not applicable in an action based on negligent supervision, it is applicable in a negligent hiring or retention action. Accordingly, failure to report abuse in accordance with the statute could give rise to liability, provided the plaintiff can show that reporting would have prevented the subsequent abuse.

Torts > Business Torts > Negligent Hiring & Supervision > General Overview

[HN11] Liability might exist for abuse after school hours or after graduation where, but for the hiring and retention of the abusing employee, there would have been no relationship between abuser and victim.

Governments > Courts > Common Law
Governments > Federal Government > Claims By & Against
Governments > Federal Government > Employees & Officials

[HN12] While the supreme court ultimately has the authority to fashion a common law remedy for the violation of a particular constitutional right, it will avoid such an extraordinary exercise where established remedies -- be they statutory, common law, or administrative -- are adequate.

HEADNOTES

1. Statutes--Maxims and Rules of Construction--Violation as Actionable Wrong

Whether or not the common law recognizes a cause of action, plaintiff may maintain an action under an applicable statute where the legislature intended violation of that statute to give rise to civil liability.

2. Negligence--Standard of Care--Statutory or Regulatory Standards

The doctrine of negligence *per se*provides that where a cause of action exists at common law, the standard of conduct to which a defendant will be held may be defined as that required by statute, rather than as the usual reasonable person standard.

3. Negligence--Standard of Care--Statutory or Regulatory Standards

If a common law duty exists and there is an applicable statute, defendant, in a negligence action, will be held to the statutory standard of conduct if plaintiff is in a class the legislature intended to protect, and the harm is of a type the legislature intended to prevent; however, whether or not a common law duty exists plaintiff may maintain an action directly under the statute if a statutory cause of action is either expressed or implied by the legislature.

4. Minors--Child Abuse--Statutes

RSA 169-C:29, which, under penalty as a misdemeanor, requires any person suspecting that a child has been abused or neglected to report same to the State, does not support a private right of action for its violation because there is no express or implied legislative intent to create such civil liability. *RSA 169-C:29*.

5. Statutes--Maxims and Rules of Construction--Violation as Actionable Wrong

Where the legislature has intended that civil liability flow from the violation of a statute, it has often so provided.

6. Minors--Child Abuse--Statutes

A violation of *RSA 169-C:29*, which requires the reporting of child abuse, does not constitute negligence *per se*in an action based on inadequate supervision of children because the duty to which the statute speaks (reporting of abuse) is considerably different from the duty on which the cause of action is based (supervision of students). *RSA 169-C:29*.

7. Schools--Administrative Rights and Duties--Generally

Schools share a special relationship with students entrusted to their care, which imposes upon them certain duties of reasonable supervision.

8. Schools--Pupils--Authority of Schools

Duty of supervision falls upon those school employees who have supervisory responsibility over students and who have stepped into the rule of parental proxy.

9. Schools--Pupils--Liability of Schools

School employees who share parental proxy

relationship with a student and who learn of facts which would lead a reasonable person to conclude a student is being abused are subject to liability if their level of supervision is unreasonable and is a proximate cause of a student's injury.

10. Schools--Pupils--Liability of Schools

Where a principal or superintendent knows or should know that a particular school employee poses a threat to a student, entrustment of the student to the care of that employee will not satisfy the duty of reasonable supervision.

11. Schools--Pupils--Liability of Schools

Where plaintiff can establish that the school knew or reasonably should have known of an employee's propensity for sexually abusing students, the school will generally be liable for the foreseeable sexual abuse of students by that employee.

12. Schools--Pupils--Liability of Schools

A school may be liable for abuse of a student by a school employee outside of school hours where there is a causal connection between the particular injury and the fact of employment.

13. Schools--Pupils--Liability of Schools

Once a school official who has hiring and firing authority becomes aware that a subordinate was sexually abusing a student, retention of that subordinate could be unreasonable.

14. Minors--Child Abuse--Statutes

RSA 169-C:29, requiring reporting of child abuse, is applicable in a negligent hiring or retention action and failure to report child abuse in accordance with *RSA 169-C:29* could give rise to liability if plaintiff can show that reporting would have prevented the subsequent abuse. *RSA 169-C:29*.

15. Schools--Pupils--Liability of Schools

A school or its employees might be liable for the abuse of a student after school hours or after graduation where, but for the hiring and retention of the abusing employee, there would have been no relationship between the abuser and student.

16. Schools--Pupils--Liability of Schools

Supreme court declined to recognize a new "constitutional tort" for alleged sexual abuse of students by school employees where established common law remedies available to students provided adequate remedy for harms alleged. N.H. CONST. pt. I, art, 2.

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Brian Adams, pro se, filed no brief.

James F. Allmendinger, of Concord, by brief for NEA-New Hampshire, as amicus curiae.

JUDGES: HORTON, J.; JOHNSON, J., did not sit; BOIS, J., retired, sat by special assignment under RSA 490:3; all concurred.

OPINION BY: HORTON

OPINION

[275]** **[*711]** HORTON, J. This case comes to us by way of certified State law questions from the United States District Court for the District of New Hampshire (McAuliffe, J.). See Sup. Ct. R. 34.

The plaintiffs are three women who were students in the Mascoma Valley Regional School District. In separate complaints filed in the district court, each plaintiff alleges that she was exploited, harassed, assaulted, and sexually abused by one or more employees of the school district. According to the complaints, Lisa Burns was sexually abused by Brian Erskine, a high school teacher, beginning in her sophomore **[***3]** year and continuing beyond graduation; Jennifer Snyder was sexually abused by Michael Eno, a sports coach and teacher, beginning in the seventh grade and continuing beyond graduation; and Yvonne Marquay was sexually abused by Eno beginning in the seventh grade and by Brian Adams, also a teacher, beginning in high school. Each plaintiff also alleges that a host of school employees, including other teachers, coaches, superintendents, principals and secretaries either were aware or should have been aware of the sexual abuse. None of the complaints alleges where any of the sexual abuse occurred, or whether it occurred during school hours.

The plaintiffs seek damages against the "abusing employees," the "non-abusing employees," the school district and the school administrative units on a variety of State and federal theories. State law claims against the abusing employees are based on negligence, assault and battery, and due process and equal protection violations of the State Constitution. State claims against the non-abusing employees, who knew or should have known of the abuse, and against the school district and school administrative units are based on negligence; violation of *RSA* **[***4]** *169-C:29* (1990), the child abuse reporting statute; violation of *RSA 354-A:8* (1984) (recodified at *RSA 354-A:17* (Supp. 1994)), the State anti-discrimination statute; violation of due process and equal protection guarantees of the State Constitution; and respondeat superior. After the defendants moved to dismiss various State law claims, the district court certified to us the following questions:

> **[*712]** (1) Does *N.H. REV. STAT. ANN § 169-C:29* create a private right of action such that plaintiff students may recover against defendant teachers, coaches, superintendents, principals, secretaries, school districts and school administrative units based on their failure to report alleged **[**276]** incidents of sexual abuse and misconduct by defendant teachers/coaches Eno, Adams, and Erskine, if they knew, or if they had reason to know of such abuse and misconduct?
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> (2) Does New Hampshire common law impose a duty upon defendant teachers, coaches, superintendents, principals, secretaries, school districts and school administrative units to protect plaintiff students by reporting alleged sexual misconduct to the proper authorities or taking other protective measures, if they knew, or render them **[***5]** liable if they should have known, that plaintiffs were being sexually harassed, assaulted or abused by defendants in positions such as those occupied by defendants Eno, Adams and Erskine?
>
> (3) If the Court finds that the identified defendants owed a duty to report the alleged conduct of Eno, Adams and Erskine under *N.H. REV. STAT. ANN. § 169-C:29* and/or New Hampshire common law, does that duty also apply to known conduct occurring after plaintiffs' graduation from high school?
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> (4) Does the alleged failure of defendant teachers, coaches, superintendents, principals, secretaries, school districts and school administrative units to report the alleged sexual misconduct of Eno, Adams and Erskine, or, does the alleged conduct of Eno, Adams and Erskine, if proved, constitute a

violation of plaintiffs' right to enjoy life and liberty and to seek and obtain happiness as guaranteed by Part 1, Art. 2 of the New Hampshire Constitution so as to give rise to a private right of action and right of recovery in favor of plaintiff students?

(5) Does the alleged failure of defendant teachers, coaches, superintendents, principals, secretaries, school districts and school administrative **[***6]** units to report the alleged sexual misconduct of Eno, Adams, and Erskine, constitute a violation of the plaintiff students' rights to equal protection under the law as guaranteed by Part 1, Art. 2 of the New Hampshire Constitution so as to give rise to a private right of action and right of recovery in favor of plaintiff students?

[*713] I. Relationship of Statutory Violation to Civil Liability

The first certified question asks whether *RSA 169-C:29*, which, under penalty as a misdemeanor, requires that any person "having reason to suspect that a child has been abused or neglected shall report the same [to the State]," creates a private right of action in favor of abused children against those who have violated the statute's reporting requirement. In light of the discussion in the parties' briefs, answering this question requires consideration of a broader issue that this court has yet to address comprehensively; namely, the relationship between statutory duties and civil liability.

At first glance, our cases appear to be inconsistent on this issue. *Everett v. Little Construction Co., 94 N.H. 43, 46 A.2d 317 (1946)*, instructs that "the violation of a penal statute is an **[***7]** actionable wrong only when the Legislature expressly so provides . . ., or when the purpose and language of the statute compel such inference . . . ." *Id. at 46, 46 A.2d at 319* (quotation omitted). We have also held, however, that "a causal violation of a statutory standard of conduct constitutes legal fault in the same manner as does the causal violation of a common-law standard of due care," *Moulton v. Groveton Papers Co., 112 N.H. 50, 52, 289 A.2d 68, 71 (1972)*, and that "the breach of a statutory duty results in liability . . . when the plaintiff is in a class the statute is designed to protect and the injury is of the type that the statute is intended to prevent," *Island Shores Estates Condo. Assoc. v. City of Concord, 136 N.H. 300, 307, 615 A.2d 629, 633 (1992)*. The plaintiffs assert that Everett effectively has been overruled and that because the legislature intended to protect schoolchildren from the type of abuse alleged, civil liability may be based on violation of the statute. The defendants argue that Everett remains controlling, but acknowledge that several of our subsequent opinions have predicated civil liability on the violation of a statute; they **[***8]** suggest that we have yet to delineate clearly when civil liability can be based on the violation of a statute.

[277]** The apparent inconsistency in our jurisprudence arises from a failure to distinguish two distinct bases of civil liability: (1) statutorily expressed or implied causes of action; and (2) negligence per se. The former, recognized in Everett, is the principle that whether or not the common law recognizes a cause of action, the plaintiff may maintain an action under an applicable statute where the legislature intended violation of that statute to give rise to civil liability. The doctrine of negligence per se, on the other hand, provides that where a cause of action does exist at common law, the standard of conduct to which a defendant will be held may be defined as that required by statute, rather than as the usual reasonable person standard. See *Broderick v. Watts, 136 N.H. 153, 160, 614 A.2d 600, 604 (1992)*. The doctrine of negligence **[*714]** per se, however, plays no role in the creation of common law causes of action. Thus, in many cases, the common law may fail to recognize liability for failure to perform affirmative duties that are imposed by statute. **[***9]** But cf. *Weldy v. Town of Kingston, 128 N.H. 325, 330-31, 514 A.2d 1257, 1260 (1986)*.

Recognizing this distinction, we first inquire whether the plaintiff could maintain an action at common law. See Morris, The Role of Criminal Statutes in Negligence Actions, 49 Colum. L. Rev. 21, 21-22 (1949); Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317, 329-31 (1914); see also Linden, Tort Liability for Criminal Nonfeasance, 44 Canadian B. Rev. 25, 27, 41 (1966); Fricke, The Juridical Nature of the Action Upon the Statute, 76 Law Q. Rev. 240, 265 (1960). Put another way, did the defendant owe a common law duty of due care to the plaintiff? If no common law duty exists, the

plaintiff cannot maintain a negligence action, even though the defendant has violated a statutory duty. If a common law duty does exist and there is an applicable statute, the defendant, in a negligence action, will be held to the statutory standard of conduct if the plaintiff is in a class the legislature intended to protect, and the harm is of a type the legislature intended to prevent. This is the negligence per se test we articulated in Groveton Papers, Island Shores, and **[***10]** many other cases. Whether or not a common law duty exists, however, a plaintiff may maintain an action directly under the statute if a statutory cause of action is either expressed or implied by the legislature. This is the principle we recognized in Everett.

Although the legal commentators have seized on the distinction discussed above -- i.e., whether a common law cause of action exists -- it is one that few courts from other jurisdictions have appreciated. One of those few, the Oregon Supreme Court, articulated the distinction and its significance in language that we need not improve upon:

> An initial distinction must be made between (1) cases in which liability would be based upon violation of a statutory duty when there is also an underlying common law cause of action, and (2) cases in which liability would be based upon a violation of a statute when there is no underlying common law cause of action.
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> A common example of a case of the first type is an action for damages for negligence in which it is contended that violation of a duty imposed by statute is negligence per se in that the statutory duty is the standard of conduct of a reasonably prudent person, although **[***11]** other elements of a cause of action must still be shown. The test for determining **[*715]** whether violation of the statute constitutes negligence per se in such a case . . . is (1) whether the injured person is a member of the class intended by the legislature to be protected, and (2) whether the harm is of the kind which the statute was intended to prevent.
>
> The approach to be taken by this court is somewhat different in cases in which there is no underlying common law cause of action and when the court is called upon to, in effect, "create" or "recognize" a new tort. In such a case it must still be determined whether the plaintiff is a member of the class protected by the statute and whether the harm inflicted is the type intended to be protected against. The court must undertake further analysis, however, by an examination of the statute to determine whether there exists any explicit or implicit legislative intent that a **[**278]** violation of a statute should give rise to a tort cause of action.

Bob Godfrey Pontiac, Inc. v. Roloff, 291 Ore. 318, 630 P.2d 840, 844-45 (Or. 1981) (citations omitted).

Turning to the present case and keeping in mind the distinction between negligence **[***12]** per se and statutory causes of action under a statute, we ask two questions: (1) whether the legislature intended civil liability to flow from violation of the reporting statute; and (2) whether the doctrine of negligence per se should play any role in this case.

We hold that [HN1] the reporting statute does not support a private right of action for its violation because we find no express or implied legislative intent to create such civil liability. First, we note that where the legislature has intended that civil liability flow from the violation of a statute, it has often so provided. See, e.g., *RSA 358-A:10* (1984) (deceptive trade practices). Where, as here, civil liability for a statutory violation would represent an abrupt and sweeping departure from a general common law rule of nonliability, we would expect that if the legislature, which is presumed to recognize the common law, see *Niemi v. Railroad, 87 N.H. 1, 9-10, 173 A. 361, 366 (1934)*, intended to impose civil liability it would expressly so provide. Here there was no expressed intent. Nor can we divine any implied intent. The reporting statute was originally enacted in 1965, applying only to physicians. Laws **[***13]** 1965, 193:1. It was amended in 1971 to extend the reporting requirement to all persons and to provide a $ 200 fine for its violation. Laws 1971, 531:2. In 1973, the penalty section was amended to provide that a violation would constitute a misdemeanor. Laws 1973, 532:8. Despite specific amendment of the penalty section, nothing in the legislative history suggests that civil liability was

contemplated, let alone intended. In sum, considering that imposition of civil liability for all reporting violations would represent a **[*716]** sharp break from the common law and neither the statute nor the legislative history directly reveal any such intent, we are unwilling to say that violation of the child abuse reporting statute supports a private right of action. Accord *Fischer v. Metcalf, 543 So. 2d 785 (Fla. Dist. Ct. App. 1989)* (finding no cause of action under similar Florida reporting statute); *Kansas State Bank & Tr. Co. v. Specialized Transportation Services, Inc., 249 Kan. 348, 819 P.2d 587 (Kan. 1991)* (no cause of action under Kansas reporting statute).

We now turn to the negligence per se question, considering the relevance of the reporting statute in cases where a common law **[***14]** cause of action exists based on an alleged failure to exercise a recognized duty of reasonable supervision. As discussed previously, [HN2] use of a statute to establish the standard of care is limited to situations where a common law cause of action exists, and then, only if the statute is "applicable." Whether a statutory standard is applicable depends, in part, on whether the type of duty to which the statute speaks is similar to the type of duty on which the cause of action is based. See *Island Shores, 136 N.H. at 307, 615 A.2d at 633*; *Bob Godfrey Pontiac, 630 P.2d at 844-45*. [HN3] Because the duty to which the statute speaks -- reporting of abuse -- is considerably different from the duty on which the cause of action is based -- supervision of students -- we hold that a violation of the reporting statute does not constitute negligence per se in an action based on inadequate supervision of a student.

II. Common Law Causes of Action

The plaintiffs argue that all school district employees have a common law duty to protect students whom they know or should know are being sexually abused by another school employee. We hold that some employees owe such a duty while others do **[***15]** not. The duty owed by some defendants is based on their relationship to the students; for other defendants the duty derives from their relationship to the alleged abusers.

A. Duties Based on a Relationship to the Students

As a general rule, a person has no affirmative duty to aid or protect another. See *Walls v. Oxford Management Co., 137 N.H. 653, 656, 633 A.2d 103, 104 (1993)*. Such a duty may arise, however, if a special relationship exists. See, e.g., *Murdock v.* **[**279]** *City of Keene, 137 N.H. 70, 72, 623 A.2d 755, 756 (1993)*. [HN4] "The relation of the parties determines whether any duty to use due care is imposed by law upon one party for the benefit of another. If there is no relationship, there is no duty." *Guitarini v. Company, 98 N.H. 118, 119, 95 A.2d 784, 785 (1953)* (quotation omitted). The plaintiffs argue that a special relationship exists between educators and school children, imposing a duty upon **[*717]** educators to protect students whom they know or should know are being sexually abused by another school employee.

"One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities **[***16]** for protection is under a . . . . duty to the other." *Restatement (Second) of Torts § 314A* at 118 (1965). "[A] child while in school is deprived of the protection of his parents or guardian. Therefore, the actor who takes custody . . . of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him." Id. § 320 comment b at 131. We agree with the majority of courts from other jurisdictions that [HN5] schools share a special relationship with students entrusted to their care, which imposes upon them certain duties of reasonable superdvision. See, e.g., Wagenblast v. Odessa Sch. No. 105-157-166 J, 110 Wash. 2d 845, *758 P.2d 968, 973 (Wash. 1988)*; *District of Columbia v. Doe, 524 A.2d 30, 32 (D.C. 1987)*; Fazzolari v. Portland School Dist. No. 1J, *303 Ore. 1, 734 P.2d 1326, 1337 (Or. 1987)*; *Chavez v. Tolleson Elementary School Dist., 122 Ariz. 472, 595 P.2d 1017, 1020 (Ariz. Ct. App. 1979)*; *Hoyem v. Manhattan Beach City School Dist., 22 Cal. 3d 508, 585 P.2d 851, 853, 150 Cal. Rptr. 1 (Cal. 1978)*; *Pratt v. Robinson, 39 N.Y.2d 554, 349 N.E.2d 849, 852, 384 N.Y.S.2d 749 (N.Y. 1976)*; *McLeod v. Grant County School Dist. No.* **[***17]** *128, 42 Wash. 2d 316, 255 P.2d 360, 362 (Wash. 1953)*. The scope of the duty imposed is limited by what risks are reasonably foreseeable. "As a general rule, a defendant will not be held liable for negligence if he could not reasonably foresee that his conduct would result in an injury or if his conduct was reasonable in light of what he could anticipate." *Walls, 137 N.H. at 656, 633 A.2d at 105* (quotation omitted).

Major factors influencing our conclusion that a special relationship exists between schools and students include the compulsory character of school attendance, see *RSA 193:1, I* (Supp. 1994), the expectation of parents

and students for and their reliance on a safe school environment, and the importance to society of the learning activity which is to take place in public schools, see *Claremont School Dist. v. Governor, 138 N.H. 183, 187, 635 A.2d 1375, 1378 (1993)*. For these reasons, we conclude that "the social importance of protecting the plaintiffs' interest outweighs the importance of immunizing the defendant from extended liability." *Libbey v. Hampton Water Works Co., 118 N.H. 500, 502, 389 A.2d 434, 435 (1978)* (brackets and quotation omitted).

School **[***18]** attendance impairs both the ability of students to protect themselves and the ability of their parents to protect them. It is this impairment of protection from which the special relationship between school and student arises and from which the duty of supervision flows. We decline, however, to accept the plaintiffs' argument that every school employee shoulders a personal duty simply by virtue of receiving a paycheck from the school district. Instead, [HN6] the duty falls upon **[*718]** those school employees who have supervisory responsibility over students and who thus have stepped into the role of parental proxy. Those employees who share such a relationship with a student and who acquire actual knowledge of abuse or who learn of facts which would lead a reasonable person to conclude a student is being abused are subject to liability if their level of supervision is unreasonable and is a proximate cause of a student's injury.

While the impairment of protection creates an affirmative duty, it also circumscribes the limits of that duty. Thus the existence of a duty is limited to those periods when parental protection is compromised. That is not to say that employees with a special relationship **[***19]** to a student may not be liable for injuries that occurred off school premises or after school hours, if the student can show that the employee's negligent acts **[**280]** or omissions, within the scope of his or her duty, proximately caused injury to the student. See *Hoyem, 585 P.2d at 858*. This is a question for the jury. *Murray v. Boston & Maine R. R., 107 N.H. 367, 374, 224 A.2d 66, 72 (1966)*.

We note that [HN7] the principal or superintendent rarely has primary supervisory authority over a student. Because, however, it is the school to which parents turn over custody of their children and from which they expect safety and because the superintendent and principal are charged with overseeing all aspects of the school's operation, we hold that a duty of supervision is owed to each student. Where the principal or superintendent knows or should know that a particular school employee poses a threat to a student, entrustment of the student to the care of that employee will not satisfy the duty of reasonable supervision.

B. Duties Based on Relationship to Abusing Employees

Up to this point, we have discussed only personal liability of school employees based on a special relationship to the **[***20]** student. We turn now to the question of liability based on a relationship to the allegedly abusing school employees.

We have previously recognized a cause of action against an employer for negligently hiring or retaining an employee that the employer knew or should have known was unfit for the job so as to create a danger of harm to third persons. See *Cutter v. Town of Farmington, 126 N.H. 836, 840-41, 498 A.2d 316, 320 (1985)*; *LaBonte v. National Gypsum Co., 113 N.H. 678, 681, 313 A.2d 403, 405 (1973)*. This cause of action is distinct from one based upon the doctrine of respondeat superior and is a theory of direct, not vicarious, liability. *Cutter, 126 N.H. at 840, 498 A.2d at 320*. In Cutter, we cited *Restatement (Second) of Agency § 213* (1958), which provides that "[a] person conducting an activity through servants or agents is **[*719]** subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper persons."

> [An agent] may be incompetent because of his reckless or vicious disposition, and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily **[***21]** brings him into contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity.

Restatement (Second) of Agency § 213 comment d; see also *Restatement (Second) of Torts § 302B comment e* (1965) ("a reasonable man is required to anticipate and guard against the intentional, or even criminal, misconduct of others . . . where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such

misconduct").

A cause of action for negligent hiring or retention, however, does not lie whenever an unfit employee commits a criminal or tortious act consistent with a known propensity. As several courts have properly recognized, the plaintiff must establish "some [causal] connection between the plaintiff's injury and the fact of employment." *Dieter v. Baker Service Tools, 739 S.W.2d 405, 408 (Tex. Ct. App. 1987)*; see also *Bates v. Doria, 150 Ill. App. 3d 1025, 502 N.E.2d 454, 458, 104 Ill. Dec. 191 (Ill. App. Ct. 1986)*. This causal requirement is necessary because "were such a connection not required, an employer would essentially be an insurer **[***22]** of the safety of every person who happens to come into contact with his employee simply because of his status as employee." *Bates, 502 N.E.2d at 459*.

The requirement of causal connection to employment does not mean, however, that the employee's criminal conduct must have been performed within the scope of employment, during working hours, or even while the perpetrator was an employee. See *Henley v. Prince George's County, 60 Md. App. 24, 479 A.2d 1375, 1383 (Md. Ct. Spec. App. 1984)*; *Bates, 502 N.E.2d at 458*; *Dieter, 739 S.W.2d at 408*. Liability exists not because of when the injury occurs, but because "the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct." *Restatement (Second)* **[**281]** *of Torts § 302B comment e* (emphasis added). Thus, employers have been held liable for criminal conduct by off-duty employees or former employees where such conduct was consistent with a propensity of which the employer knew or should have known, and the association between the plaintiff and the employee was occasioned by the employee's job. See, e.g., *Ponticas v. K.M.S.* **[***23]** *Investments, 331 N.W.2d 907 (Minn. 1983)* (apartment owner liable for rape of tenant at knifepoint by resident manager in middle of the night after resident manager learned during repair visit **[*720]** that plaintiff's husband was away); *McGuire v. Arizona Protection Agcy., 125 Ariz. 380, 609 P.2d 1080 (Ariz. Ct. App. 1980)* (burglar alarm installation company liable where former employee who had installed alarm in plaintiff's home later broke in and stole items after disconnecting alarm); see also *Coath v. Jones, 277 Pa. Super. 479, 419 A.2d 1249 (Pa. Super. Ct. 1980)*; *Welsh Mfg., Div. of Textron v. Pinkerton's, 474 A.2d 436 (R.I. 1984)*; *Harvey Freeman & Sons v. Stanley, 259 Ga. 233, 378 S.E.2d 857 (Ga. 1989)*.

Applying these legal principles to the present case, we find that [HN8] a school district or school administrative unit (school) has a duty not to hire or retain employees that it knows or should know have a propensity for sexually abusing students. Where the plaintiff can establish that the school knew or reasonably should have known of such a propensity, the school will generally be liable for the foreseeable sexual abuse of students by that employee. Liability based on **[***24]** negligent hiring or retention is not limited to abuse that occurs during the school day. A school may be liable for abuse of a student by a school employee outside of school hours where there is a causal connection between the particular injury and the fact of employment. Also, a school can only be liable for injuries suffered after it knew or should have known of the employee's propensity. In any event, liability will only lie if the employee's conduct was tortious.

[HN9] Some school officials may also be subject to personal liability under negligent hiring or retention theories. Those officials who have hiring and firing authority with respect to subordinates must exercise that authority reasonably, and, once such an official becomes aware or should have become aware that a subordinate was sexually abusing a student, retention could be unreasonable.

Finally, we consider the negligence per se question -- i.e., whether the reporting requirement of *RSA 169-C:29* should be engrafted onto the standard of care in an action based on negligent hiring or retention. [HN10] While we held in section I that the reporting statute is not applicable in an action based on negligent supervision, we **[***25]** hold that it is applicable in a negligent hiring or retention action. Accordingly, under these circumstances, failure to report abuse in accordance with the statute could give rise to liability, provided the plaintiff can show that reporting would have prevented the subsequent abuse.

III. Existence of Duties Beyond Graduation

The third question asks whether any statutory or common law duties extend beyond the graduations of the plaintiffs. We do not address this issue with respect to "statutory duties" because we do not recognize a separate private right of action under the reporting statute. The common law duties based on special relationships to the **[*721]** plaintiffs, discussed in section II, are

circumscribed by the scope of that relationship, which will not ordinarily extend beyond graduation.

Duties based on a relationship to the abusing employees, however, may give rise to liability for abuse that occurs after graduation. As discussed above, liability based on negligent hiring or retention is circumscribed by the requirement that there be a causal connection between the fact of employment and the injury. Thus, [HN11] liability might exist for abuse after school hours or after graduation **[***26]** where, but for the hiring and retention of the abusing employee, there would have been no relationship between abuser and victim.

[282]** IV. Constitutional Causes of Action

The fourth and fifth questions ask whether the alleged facts state violations of the guarantees of part I, article 2 of the State Constitution and whether such violations give rise to causes of action for damages -- i.e., "constitutional torts." Specifically, the fourth question refers to the right of enjoying life and liberty, while the fifth question refers to article 2's equal protection guarantees. We need not decide whether the alleged facts, if proved, constitute a violation of either of these rights, because even assuming that they would, we hold that no private cause of action for damages would be available.

The issue before us is circumscribed by two considerations: the settled principle that a denial of a constitutional right "demands some vindication in the law," *Rockhouse Mt. Property Owners Assoc. v. Town of North Conway, 127 N.H. 593, 598, 503 A.2d 1385, 1388 (1986)*; see also N.H. CONST. pt. I, art. 14, and the recognition that our constitution does not specify remedies for its violation. **[***27]** As we recognized in Rockhouse, once an infringement has been established, the issue becomes one of the "appropriate way to redress the denial." *Rockhouse Mt. Property, 127 N.H. at 598, 503 A.2d at 1388*. [HN12] While this court ultimately has the authority to fashion a common law remedy for the violation of a particular constitutional right, we will avoid such an extraordinary exercise where established remedies -- be they statutory, common law, or administrative -- are adequate. See *127 N.H. at 598-99, 503 A.2d at 1388*; see also *Bush v. Lucas, 462 U.S. 367, 76 L. Ed. 2d 648, 103 S. Ct. 2404 (1983)* (refusing to recognize constitutional tort for federal employee demoted for public comments in light of civil service remedies notwithstanding that such remedies "provide[] less than complete remedy for the wrong"); *Kelley Property Dev. v. Town of Lebanon, 226 Conn. 314, 627 A.2d 909, 922 (Conn. 1993)*; *Provens v. Stark Cty, MRDD, 64 Ohio St. 3d 252, 594 N.E.2d 959, 965 (Ohio 1992)*; *Corum v. University of North Carolina, 330 N.C. 761, 413 S.E.2d 276, 291 (N.C. 1992)*. Where no established remedy exists or the **[*722]** established remedies would be meaningless, however, we will not hesitate to exercise **[***28]** our authority to create an appropriate remedy.

Rockhouse illustrates the application of these principles. In Rockhouse, landowners who were seasonal residents of North Conway petitioned the town to lay out a road in their development. After the selectmen denied the request, the landowners sued the selectmen individually for damages, claiming that the selectmen had violated their equal protection rights by denying their petition simply because they were not year-round residents. The only established remedy available to the plaintiffs was the statutory right to seek de novo review of the selectmen's decision in superior court. This statutory remedy was available in all cases where selectmen refused to lay out a road, regardless of whether the selectmen's refusal was due to "mere error or an [unconstitutional] intent to discriminate." *Rockhouse, 127 N.H. at 598, 503 A.2d at 1388*. Even though the statutory remedy made no provision for damages and would "not provide any additional recompense when the denial has resulted from unconstitutional conduct rather than mere error," we held that the established remedy was adequate and refused to create any additional remedy. **[***29]** *Id. at 599, 503 A.2d at 1389*.

Turning to the present case, we hold that the established common law remedies available to the plaintiffs provide an adequate remedy for the harms alleged, and therefore we decline to recognize a new "constitutional tort." To begin with, the plaintiffs can recover in tort from the abusers themselves. Those school officials who had authority over the abusers may be liable for injuries inflicted after they became aware of the abuse. Further, as discussed in section II, liability may fall on an employee charged with the supervision of a student. Finally, the school district or school administrative unit may be liable under a respondeat superior theory for those torts of its employees that were performed in the course of their employment. This array of common law remedies may not be as "complete" as would be an additional constitutional tort, but we nonetheless hold that it is adequate. We therefore decline

to **[**283]** recognize a new constitutional tort under these particular alleged facts.

Remanded.

JOHNSON, J., did not sit; BOIS, J., retired, sat by special assignment under *RSA 490:3*; all concurred. **[***30]**

In re Jack O'Lantern, Inc.

No. 7957

SUPREME COURT OF NEW HAMPSHIRE

118 N.H. 445*; *387 A.2d 1166*; *1978 N.H. LEXIS 435

June 19, 1978

PRIOR HISTORY: **[***1]** Appeal from Original County.

DISPOSITION: *Order below vacated.*

HEADNOTES

1. Administrative Law--Burden of Proof

To meet the burden of proof on appeal from decision of State administrative agency, appellant must show the order appealed from is clearly unreasonable, unlawful, or unjust.

2. Highways--Regulation of Signs--Interstate Highways

Where statute provided that certain businesses adjacent to interstate highways may maintain no more than 50 feet from the advertised activity on-premises sign that states name and address of the owner and an identification of the services produced or found on the property, associate commissioner of the New Hampshire Department of Public Works and Highways erred in finding sign invalid on erroneous test of "primary purpose" and "principal business." RSA 249-A:5 III(c) (Supp. 1975).

3. Administrative Law--Orders and Regulations--Modification of Statute

An administrative agency may not add to, change, or modify a statute by regulation or through case-by-case adjudication.

4. Highways--Regulation of Signs--Removal

Ruling by associate commissioner of the New Hampshire Department of Public Works and Highways that an advertising sign acceptable under State statute should be removed must be reversed in view of implied, if not actual, threat by federal highway official that not finding that the sign should be removed could lead to a loss of federal bonus money.

5. Administrative Law--Status of Administrative Bodies--Neutrality

It is imperative that the neutrality and impartiality of administrative agencies not be impaired.

6. Highways--Regulation of Signs--On-Premises Sign

Sign advertising hiking activities located within 35 feet of hiking trail was valid on-premises sign. RSA 249-A:5 III(c) (Supp. 1975).

COUNSEL: *Stanton E. Tefft* and *Daniel J. Harkinson*, of Manchester (*Mr. Tefft* orally), for the plaintiff.

David H. Souter, attorney general (*James E. Morris*, attorney, orally), for the State.

JUDGES: Douglas, J. All concurred.

OPINION BY: DOUGLAS

OPINION

[*445] **[**1166]** This is an appeal by Jack O'Lantern, Inc., d.b.a. Jack O'Lantern Resort, pursuant to *RSA 541:6*, challenging adverse findings and rulings by the associate highway commissioner. The **[*446]** principal issues relate to whether a certain sign erected by a New Hampshire corporation in Woodstock, New Hampshire, constitutes a valid on-premises sign and whether pressure by a federal bureaucrat unduly tainted a State administrative hearing. We reverse.

The Jack O'Lantern Resort, located along route 3 in Woodstock, New Hampshire, was established in 1948. As northward construction of Interstate Highway 93 continued **[**1167]** in the late 1960's and early 1970's, that highway divided the land owned by the Resort, leaving approximately 113 acres west of the turnpike. The western part of the resort did not contain any buildings; none of the primary **[***2]** activity of the resort occurred there. For several years the resort brochure had, however, reflected the fact that guests of the resort could use hiking trails on and around "Mount Pumpkin," located to the west of the interstate highway. Access to the 113 acres is obtained by either crossing under the highway through a culvert or by travelling north on route 3 and doubling back along a right-of-way to the hiking trail area.

In early 1975 the president of the corporation approached the State highway department to determine whether signs might be erected on the western portion of the corporation's land. The highway department had not adopted any rules at that time, nor have they yet adopted rules pursuant to a statutory grant of authority, RSA 249-A:5 IV(b), VI (Supp. 1975). *See State v. Hutchins, 117 N.H. 924, 380 A.2d 257 (1977)*. The president of the corporation, Robert Keating, determined to attempt to sell the land. A 728-square-foot sign was erected indicating that the land was for sale and that interested parties should apply at the Resort.

Certain businesses adjacent to interstate highways may maintain an on-premises sign that states the name and address of the owner **[***3]** and an identification of the services produced or found on the property. No more than one such sign advertising activities conducted on the real property "shall be permitted more than 50 feet from the advertised activity. . . ." RSA 249-A:5 III(c) (Supp. 1975). Subsection VI provides that no such sign will be permitted that does not conform to national standards set forth in the Code of Federal Regulations. Federal regulations permit on-premises signs advertising activities that are conducted upon the real property on which the signs are located. *23 C.F.R. § 750.105(a) (1977)*. Furthermore, no sign may exceed 150 square feet in area except on-premises signs not more than 50 feet from the advertised activity being conducted upon the real property that contains the sign. *23 C.F.R. § 750.108(g) (1977)*.

[*447] After the sign was erected, employees of the department of public works and highways notified the corporation that the sign went too far in advertising land for sale, in part because of a large pumpkin painted on the sign that has always been the logo of the resort. A series of conferences and negotiations ensued, culminating in a hearing on October 17, 1975, before **[***4]** the associate commissioner of the New Hampshire Department of Public Works and Highways. He ruled that the sign advertised an activity not conducted on the property and ordered its removal. Upon Jack O'Lantern's timely request for a rehearing, the order for removal was suspended pending modification of the sign. The sign was changed to substitute "hiking trails" for the words "land for sale," and a further hearing was held on June 30, 1977, before the associate commissioner. On October 5, 1977, he issued findings of fact and another order for removal of the sign. A timely motion for rehearing and appeal was made to the court under *RSA 541:6*.

At the second hearing the associate commissioner did not doubt that there are hiking trails on the western side of the highway, nor that the nearest hiking trail was less than 35 feet from the sign. Nevertheless, the associate commissioner found that "notwithstanding the sign's reference to 'Hiking Trails', its primary purpose is to advertise the Jack O'Lantern Resort, whose principal business and services are not conducted or offered on the particular parcel of property where the sign is located." The sign was found to be a nuisance within **[***5]** the meaning of RSA 249-A:9 (Supp. 1975), and was ordered removed.

The State relies upon *Mannone v. Whaland, 118 N.H. 86, 382 A.2d 918 (1978)*, for the proposition that there must be a showing by Jack O'Lantern that there was no evidence presented to sustain the order. As *Mannone* pointed out, to meet the burden of proof on appeal from a decision **[**1168]** of a State administrative agency the appellant must show that the order appealed from is clearly unreasonable or unlawful. The presumption in

favor of the administrative decision could be overcome by a showing that "no evidence was presented in the record to sustain the order." *Mannone v. Whaland, 118 N.H. at 88, 382 A.2d at 919*. This, however, is not the only limit on the discretion of an administrator. Total absence of evidence is not required. Even if there is evidence to support the order, it may be set aside if "by a clear preponderance of the evidence . . . such order is unjust or unreasonable." *RSA 541:13*; *Beaudoin v. Rye Beach Village Dist., 116 N.H. 768, 773, 369 A.2d 618, 622 (1976)* (Grimes, J. dissenting). **[*448]** Here the commissioner, despite the language of RSA 249-A:5 III, utilized a test **[***6]** involving "primary purpose" and "principal business." This was an erroneous test. An agency may not add to, change, or modify the statute by regulation or through case-by-case adjudication. *Reno v. Hopkinton, 115 N.H. 706, 707, 349 A.2d 585, 586 (1975)*. When an agency focused on the purpose of the taxpayer rather than the treatment received by the land, and employed a primary use test under the provisions of the current use taxation statute, we struck down such a determination. *Blue Mountain Forest Association v. Croydon, 117 N.H. 365, 373 A.2d 1313 (1977)*. We find the same infirmity with the decision at issue before us.

Additionally, this decision might have been colored by the involvement of a federal official who, in administering the interstate highway system, conveyed an implied, if not actual, threat that a contrary decision could lead to a loss of federal bonus money provided to New Hampshire by the Federal Highway Administration. Before the first hearing in this case, the Division Administrator of the Federal Highway Administration submitted *ex parte* to the hearing officer a written opinion that the sign did not qualify for an exemption and must be removed. **[***7]** After the hearing, the federal official advised that modification of the sign must be made by the State "in an expeditious manner." At the first hearing, the federal official, Mr. Comstock, when asked if the State hearing officer was free to come to his own conclusion replied, "In some ways yes, in some ways no, I suppose." He then discussed a possible loss of federal bonus money and agreed that the letter he had written clearly implied that federal funds could be in jeopardy. This was apparent to the associate highway commissioner. In concluding the second hearing, he said that "if we execute a ruling that is not concurred in by the Federal Government that there is a penalty clause for making an independent judgment. That's what it boils down to."

The growth in federal aid raises the ever-present danger that this State may no longer be the independent sovereign required by New Hampshire Constitution part 1, article 7. Threats by federal bureaucrats, such as occurred in this case, can taint an otherwise fair and proper State administrative hearing. The State hearing officer in this case conducted a full hearing; however, the danger "expressed" by Mr. Comstock that a "wrong" **[***8]** decision might have adverse funding consequences requires a reversal. "Recent cases have demonstrated the difficulty in formulating broadly phrased rules regarding the due process requirement of an impartial tribunal in **[*449]** situations where the tribunal has come in contact with the case in some other capacity." *Burhoe v. Whaland, 116 N.H. 222, 223, 356 A.2d 658, 659 (1976)*. It is imperative that the neutrality and impartiality of administrative agencies not be impaired. The conduct of Mr. Comstock presents at least the appearance that pressure was applied to the State. *See id.; Atherton v. Concord, 109 N.H. 164, 171, 245 A.2d 387, 392 (1968)* (Grimes, J., dissenting); *cf. Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972)*.

Because the sign is within fifty feet of an on-premises activity, it is a valid on-premises sign.

Order below vacated.

APPEAL OF DAVID DUVERNAY *& a*. (New Hampshire Department of Environmental Services)

No. 2009-487

SUPREME COURT OF NEW HAMPSHIRE

160 N.H. 132*; *993 A.2d 246*; *2010 N.H. LEXIS 33

February 18, 2010, Submitted
April 9, 2010, Opinion Issued

SUBSEQUENT HISTORY: Released for Publication May 14, 2010.

PRIOR HISTORY: [*1]**
Department of Environmental Services.

DISPOSITION: Reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner taxpayers applied for a tax exemption under *RSA 72:12-a* (Supp. 2009) for two septic systems servicing their residential property. Respondent New Hampshire Department of Environment Services (DES) denied their application. The taxpayers appealed.

OVERVIEW: The DES found that the septic systems were pollution control facilities but that granting a tax exemption would not reasonably promote some proper object of public welfare or interest. The court held that this was error. *RSA 72:12-a* provided that qualifying pollution control facilities "shall" receive a tax exemption. Nothing in the statute permits the DES to exercise its discretion to deny an exemption to a qualifying facility. The DES's arguments relied upon a misunderstanding of the court's holding in Appeal of Town of Rindge. In that decision, the court did not intend to imply that any additional public benefit, other than pollution control, was required for a facility to be entitled to a tax exemption under *RSA 72:12-a*. Although the court cited specific examples of additional public benefits in dicta, it never held that these additional benefits were constitutionally required under N.H. Const. pt. I, art. 10 and N.H. Const. pt. II, art. 5. As long as a facility qualified under the plain meaning of the statute, and thus promoted the public benefit of controlling pollution, the DES had no discretion to deny an applicant a tax exemption.

OUTCOME: The court reversed the DES's decision.

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Standards of Review > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence
[HN1] Review of agency decisions is narrow in scope. Agency findings are deemed prima facie lawful and reasonable and an appellate court does not sit as a trier of fact in reviewing them. However, the court will overturn agency decisions when the appealing party shows by a clear preponderance of the evidence that the agency's decision is unjust, unreasonable or unlawful.

Tax Law > State & Local Taxes > Real Property Tax > Exemptions
[HN2] See *RSA 72:12-a, I* (Supp. 2009).

Tax Law* > *State & Local Taxes* > *Real Property Tax* > *Exemptions
[HN3] *RSA 72:12-a* (Supp. 2009) provides that qualifying pollution control facilities shall receive a tax exemption. Nothing in the statute permits the New Hampshire Department of Environmental Services to exercise its discretion to deny an exemption to a qualifying facility.

Administrative Law* > *Agency Rulemaking* > *Rule Application & Interpretation* > *General Overview
[HN4] An agency may not add to, change, or modify a statute by regulation or through case-by-case adjudication.

Constitutional Law* > *General Overview
Tax Law* > *State & Local Taxes* > *General Overview
[HN5] Exemptions are constitutional if they are supported by just reasons, and thereby reasonably promote some proper object of public welfare or interest.

Tax Law* > *State & Local Taxes* > *Real Property Tax* > *Exemptions
[HN6] In Appeal of Town of Rindge, the Supreme Court of New Hampshire did not intend to imply that any additional public benefit, other than pollution control, was required for a facility to be entitled to a tax exemption under *RSA 72:12-a* (Supp. 2009). Although the court cited specific examples of additional public benefits in dicta, it never held that these additional benefits were constitutionally required. As long as a facility qualifies under the plain meaning of the statute, and, thus, promotes the public benefit of controlling pollution, the New Hampshire Department of Environmental Services has no discretion to deny the applicant a tax exemption.

HEADNOTES

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

1. Taxation--Exemptions From Taxation--Particular Statutes The statute pertaining to water and air pollution control facilities provides that qualifying pollution control facilities *shall* receive a tax exemption. Nothing in the statute permits the New Hampshire Department of Environmental Services to exercise its discretion to deny an exemption to a qualifying facility. Thus, the Department erred in denying a tax exemption for septic systems on the ground that although the systems were pollution control facilities, granting an exemption would not reasonably promote some proper object of public welfare or interest. *RSA 72:12-a*.

2. Statutes--Generally--Agency's Interpretation An agency may not add to, change, or modify a statute by regulation or through case-by-case adjudication.

3. Taxation--Exemptions From Taxation--Generally Exemptions are constitutional if they are supported by just reasons, and thereby reasonably promote some proper object of public welfare or interest.

4. Taxation--Exemptions From Taxation--Particular Statutes In *Appeal of Town of Rindge*, the court did not intend to imply that any additional public benefit, other than pollution control, was required for a facility to be entitled to a tax exemption. Although the court cited specific examples of additional public benefits in dicta, it never held that these additional benefits were constitutionally required. As long as a facility qualifies under the plain meaning of the statute pertaining to water and air pollution control facilities, and thus promotes the public benefit of controlling pollution, the New Hampshire Department of Environmental Services has no discretion to deny the applicant a tax exemption. N.H. CONST. pt. I, art. 10; N.H. CONST. pt. II, art. 5; *RSA 72:12-a*.

COUNSEL: David E. DuVernay, by brief, *pro se*.

Michael A. Delaney, attorney general (*K. Allen Brooks*, senior assistant attorney general, on the brief), for the respondent.

JUDGES: DALIANIS, J. BRODERICK, C.J., and DUGGAN, HICKS and CONBOY, JJ., concurred.

OPINION BY: DALIANIS

OPINION

[247] [*132]** DALIANIS, J. The petitioners, David and Rae DuVernay, appeal a decision of the respondent, New Hampshire Department of Environmental Services (DES), denying their application for a tax exemption for two septic systems servicing their residential property. *See RSA 72:12-a* (Supp. 2009). We

reverse.

The following facts are not in dispute. The DuVernays own property adjacent to Lake Monomonac in Rindge. Their property includes two buildings: a single-family home, which is their primary residence, and a small cottage. Each building has its own septic system. In 2009, they **[*133]** applied to DES for a pollution control tax exemption under *RSA 72:12-a* for the two septic systems and the associated real property. DES investigated the DuVernays' application, and concluded that the septic systems were pollution control facilities within the meaning of *RSA 72:12-a*. However, it denied their application for a tax exemption, **[***2]** stating that "granting a tax exemption for these individual septic treatment systems, would not, in [DES's] judgment, reasonably promote some proper object of public welfare or interest." (Quotation omitted.) DES relied upon our decision in *Appeal of Town of Rindge, 158 N.H. 21, 26-27, 959 A.2d 188 (2008)*, in which we upheld a tax exemption under the same statute for Franklin Pierce University's wastewater treatment facility. The DuVernays filed a motion for reconsideration, which DES denied. This appeal followed.

[HN1] Our review of agency decisions is narrow in scope. *Appeal of Town of Bethlehem, 154 N.H. 314, 318, 911 A.2d 1 (2006)*. "Agency findings are deemed *prima facie* lawful and reasonable and we do not sit as a trier of fact in reviewing them. However, we will overturn agency decisions when the appealing party shows by a clear preponderance of the evidence that the agency's decision is unjust, unreasonable or unlawful." *Id*. (citation omitted).

RSA 72:12-a, I, provides:

> [HN2] Any person, firm or corporation which builds, constructs, installs, or places in use in this state any treatment facility, device, appliance, or installation wholly or partly for the purpose of reducing, controlling, or eliminating any source **[***3]** of **[**248]** air or water pollution shall be entitled to have the value of said facility and any real estate necessary therefor, or a percentage thereof determined in accordance with this section, exempted from the taxes levied under this chapter for the period of years in which the facility, device, appliance, or installation is used in accordance with the provisions of this section.

[1, 2] The DuVernays argue that because DES found that their septic systems are pollution control facilities pursuant to the plain meaning of *RSA 72:12-a*, its denial of their application was unjust, unreasonable and unlawful. We agree. [HN3] *RSA 72:12-a* provides that qualifying pollution control facilities *shall* receive a tax exemption. Nothing in the statute permits DES to exercise its discretion to deny an exemption to a qualifying facility. *See In re Jack O'Lantern, Inc., 118 N.H. 445, 448, 387 A.2d 1166 (1978)* [HN4] ("An agency may not add to, change, or modify the statute by regulation or through case-by-case adjudication."); *cf. Appeal of Public Serv. Co. of N.H., 124 N.H. 79, 88, 470 A.2d 855 (1983)* (noting that the relevant inquiry under the statute is the purpose of the facility and not its effectiveness in controlling pollution).

[*134] DES concedes that the **[***4]** word "shall" in *RSA 72:12-a* is a mandatory command, *see McCarthy v. Wheeler, 152 N.H. 643, 645, 886 A.2d 972 (2005)*, but argues that it acted reasonably and lawfully because Part II, Article 5 of the New Hampshire Constitution, which requires uniformity and equality in assessment and collection of property taxes, does not permit a tax exemption for the DuVernays' septic system. All of DES's arguments, however, rely upon a misunderstanding of our holding in *Appeal of Town of Rindge*.

[3] In *Appeal of Town of Rindge*, the town appealed a DES decision granting Franklin Pierce University a tax exemption for its wastewater treatment facility under the same statute. *Appeal of Town of Rindge, 158 N.H. at 23*. In affirming DES's decision, we addressed a similar constitutional argument raised by the town based upon Part I, Article 10 and Part II, Article 5 of the State Constitution. *Id. at 26*; *see Opinion of the Justices (Mun. Tax Exemptions for Elec. Util. Personal Prop.), 144 N.H. 374, 378, 746 A.2d 981 (1999)* [HN5] ("Exemptions are constitutional if they are supported by just reasons, and thereby reasonably promote some proper object of public welfare or interest." (quotation omitted)). Specifically, the town argued that granting **[***5]** the exemption for the wastewater treatment facility, which was mandated by regulation, failed to promote a proper object of public welfare or public interest. *Appeal of Town of Rindge, 158*

N.H. at 26. It asserted that: "No public interest is served when a tax break is given to a taxpayer who does nothing except what the law requires." *Id*. (quotation omitted).

In explaining why the town could not prevail upon this argument, we pointed out that, contrary to the town's presumptions, the university's tax exemption did, in fact, promote several specific proper objects of public welfare or interest. *Id. at 27*. We noted, for example, that a tax exemption could encourage the preemptive installation of devices or the installation of higher quality devices than the minimum that the law requires. *Id*. We also observed that another public benefit "stems from the fact that the university's facility fulfills a pollution control obligation which might otherwise fall to Rindge." *Id*.

Here, DES concedes that for pollution control facilities that are *not* mandated by regulation, "the constitutional analysis regarding public benefit is usually easy" because **[**249]** "[p]ollution control devices provide public benefit **[***6]** by protecting the environment." On the other hand, for pollution control facilities that are already required, DES reads *Appeal of Town of Rindge* as holding that granting a tax exemption would be unconstitutional unless the facility provides the same or similar additional public benefits as those we identified in that case. In short, DES contends that, when a pollution control facility is mandated by regulation, some *additional* public benefit is required. We disagree.

[4] [*135] [HN6] In *Appeal of Town of Rindge*, we did not intend to imply that any additional public benefit, other than pollution control, was required for a facility to be entitled to a tax exemption under *RSA 72:12-a*. Although we cited specific examples of additional public benefits in dicta, we never held that these additional benefits were constitutionally required. Indeed, in explaining that a tax exemption "may" affect when an entity elects to install a particular device or what type of device it installs, we did not find that the specific pollution control devices installed by the university in fact were installed earlier than required by law or that they were of a higher quality than those required by law. *Id*. As long as a facility **[***7]** qualifies under the plain meaning of the statute, and, thus, promotes the public benefit of controlling pollution, DES has no discretion to deny the applicant a tax exemption.

Reversed.

BRODERICK, C.J., and DUGGAN, HICKS and CONBOY, JJ., concurred.

North Country Environmental Services, Inc. v. Town of Bethlehem & a.

No. 2003-337

SUPREME COURT OF NEW HAMPSHIRE

150 N.H. 606*; *843 A.2d 949*; *2004 N.H. LEXIS 38

January 7, 2004, Argued
March 1, 2004, Opinion Issued

SUBSEQUENT HISTORY: **[***1]** Released for Publication April 1, 2004.
Rehearing denied by *N. Country Envtl. Servs. v. Town of Bethlehem, 2004 N.H. LEXIS 58 (N.H., Mar. 30, 2004)*
Related proceeding at *Appeal of Bethlehem (N.H. Dep't of Envtl. Servs.), 154 N.H. 314, 911 A.2d 1, 2006 N.H. LEXIS 167 (2006)*

PRIOR HISTORY: Grafton.
N. Country Envtl. Servs., Inc. v. Town of Bethlehem, 2003 N.H. Super. LEXIS 11 (2003)

DISPOSITION: Affirmed in part; reversed in part; vacated in part; and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff environmental services company and defendants, a town and its planning and zoning boards, challenged an order from a superior court (New Hampshire), which was a judgment on the merits of the company's petition for declaratory relief and on the town's counterclaims and counter-petition for declaratory relief.

OVERVIEW: The case concerned an ongoing litigation between the company and the town arising out of the company's landfill operations. The parties sought declaratory relief on application of the town's ordinances and zoning laws regarding the construction and use of landfills. Since both parties disagreed with the declaratory judgment made, they appealed. The court held that the state's statutory scheme under N.H. Rev. Stat. Ann. ch. 149-M for disposal of solid waste constituted a comprehensive regulatory scheme governing design, construction, and operation of solid waste management facilities. Such an exhaustive treatment meant the state scheme preempted municipal regulation, except that under *N.H. Rev. Stat. Ann. § 149-M:9(VII)*, companies could be required to obtain local approval where such approval did not conflict with the state scheme. Given this structure, the court found that the superior court properly held the town's ordinance was preempted where it concerned the building of landfills, but that the town's zoning law was not because it allowed residents to use either the town's or the company's landfill. However, a res judicata determination was erroneous and required remand.

OUTCOME: The court affirmed that part of the declaratory judgment that held that portions of the town's ordinances were preempted by state law, affirmed the holding that the town's zoning amendments were not preempted, reversed the judgment holding that res judicata did not apply, and remanded for a determination on whether the town's existing site plan regulations were applicable, lawful, and consistent with state law.

LexisNexis(R) Headnotes

Governments* > *State & Territorial Governments* > *Relations With Governments

Real Property Law > Zoning & Land Use > Local Planning
Real Property Law > Zoning & Land Use > Ordinances
[HN1] The state preemption issue is essentially one of statutory interpretation and construction - whether local authority to regulate under a zoning enabling act is preempted by state law or policy. Preemption may be express or implied.

Governments > Legislation > Interpretation
Governments > Local Governments > Ordinances & Regulations
Governments > State & Territorial Governments > Relations With Governments
[HN2] Implied preemption may be found when the comprehensiveness and detail of the state statutory scheme evinces legislative intent to supersede local regulation. State law preempts local law also when there is an actual conflict between state and local regulation. A conflict exists when a municipal ordinance or regulation permits that which a state statute prohibits or vice versa. Even when a local ordinance does not expressly conflict with a state statute, it will be preempted when it frustrates the statute's purpose.

Governments > Legislation > Interpretation
Governments > State & Territorial Governments > Relations With Governments
[HN3] The mere fact that a state law contains detailed and comprehensive regulations of a subject does not, of itself, establish the intent of the legislature to occupy the entire field to the exclusion of local legislation. To determine whether the legislature has intended to occupy the field, the court may look to the whole purpose and scope of the legislative scheme and need not find such intent solely in the statutory language. The very nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.

Governments > Legislation > Interpretation
Governments > State & Territorial Governments > Relations With Governments
[HN4] The following questions are pertinent in determining whether the state has preempted a field: (1) does the ordinance conflict with state law; (2) is the state law, expressly or impliedly, to be exclusive; (3) does the subject matter reflect a need for uniformity; (4) is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation; and (5) does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature.

Governments > Legislation > Interpretation
Governments > Local Governments > Ordinances & Regulations
Governments > State & Territorial Governments > Relations With Governments
[HN5] When the state has preempted an entire regulatory field, any local law on the subject is preempted, regardless of whether the terms of the local and state law conflict.

Environmental Law > Solid Wastes > Disposal Standards
Governments > State & Territorial Governments > Relations With Governments
[HN6] The state legislature has declared the subject matter of N.H. Rev. Stat. Ann. ch. 149-M to be of statewide concern. The purposes of the law are to protect human health, preserve the natural environment, and conserve precious and dwindling natural resources. *N.H. Rev. Stat. Ann. § 149-M:1* (Supp. 2003). Another purpose is to ensure benefit to the citizens of New Hampshire by providing for solid waste management options which will meet the capacity needs of the state while minimizing adverse environmental, public health and long-term economic impacts. *N.H. Rev. Stat. Ann. § 149-M:11(II)* (Supp. 2003).

Environmental Law > Solid Wastes > Disposal Standards
Environmental Law > Solid Wastes > Permits > General Overview
Governments > Public Improvements > Sanitation & Water
[HN7] Under *N.H. Rev. Stat. Ann. § 149-M:5* (Supp. 2003), the legislature has designated the State Department of Environmental Services (DES) to be responsible for enforcing N.H. Rev. Stat. Ann. ch. 149-M. Among other solid waste management responsibilities, DES must establish state solid waste management policies and goals, regulate private and public facilities by administering a state permit system, and prepare a statewide solid waste plan. *N.H. Rev. Stat.*

Ann. § 149-M:6 (Supp. 2003).

Environmental Law > Solid Wastes > Disposal Planning
Environmental Law > Solid Wastes > Disposal Standards
Environmental Law > Solid Wastes > Permits > General Overview
[HN8] A state permit is required before one constructs, operates or initiates the closure of a solid waste management facility. *N.H. Rev. Stat. Ann. § 149-M:9* (Supp. 2003). The State Department of Environmental Services (DES) may not issue a permit unless it determines that the proposed solid waste facility provides a substantial public benefit. *N.H. Rev. Stat. Ann. § 149-M:11(III)* (Supp. 2003). In making this determination, DES must consider, among other things: (1) the short- and long-term need for a solid waste facility of the proposed type, size, and location to provide capacity to accommodate solid waste generated within the borders of the state; and (2) the ability of the proposed facility to assist the state in achieving its goals, the goals of the state solid waste management plan, and the goals of one or more solid waste management plans submitted by local districts.

Environmental Law > Solid Wastes > Disposal Standards
Environmental Law > Solid Wastes > Permits > General Overview
Governments > State & Territorial Governments > Relations With Governments
[HN9] Although the purposes of N.H. Rev. Stat. Ann. ch. 149 relate to state goals and policy, the law gives local government a role in solid waste management. For instance, before issuing a state permit, The State Department of Environmental Services (DES) must consider the concerns of the citizens and governing bodies of the host municipality, county, and district and other affected persons. *N.H. Rev. Stat. Ann. § 149-M:11(IV)(a)* (Supp. 2003). In certain circumstances, DES must take testimony at a public hearing from local residents about their concerns.

Environmental Law > Solid Wastes > Disposal Standards
Governments > Local Governments > Duties & Powers
Governments > Public Improvements > Sanitation & Water
[HN10] N.H. Rev. Stat. Ann. ch. 149 requires every municipality to either provide a facility or assure access to another approved solid waste facility for its residents. *N.H. Rev. Stat. Ann. § 149-M:17(I)* (Supp. 2003). If the municipality does not meet this obligation, DES will investigate the opportunities for the municipality to build its own facility, use another municipality's facility, or contract with a private facility. *N.H. Rev. Stat. Ann. § 149-M:21*(I)(Supp. 2003). If the State Department of Environmental Services (DES) and the municipality are unable to agree upon an acceptable solution, and DES determines that land must be taken, DES shall institute eminent domain proceedings. *N.H. Rev. Stat. Ann. § 149-M:21(II)-(V)* (Supp. 2003).

Environmental Law > Solid Wastes > Disposal Standards
Governments > Public Improvements > Sanitation & Water
Governments > State & Territorial Governments > Relations With Governments
[HN11] N.H. Rev. Stat. Ann. ch. 149-M constitutes a comprehensive and detailed regulatory scheme governing the design, construction, operation and closure of solid waste management facilities. Such exhaustive treatment of the field ordinarily manifests legislative intent to occupy it.

Governments > Legislation > Interpretation
[HN12] Courts give undefined language its plain and ordinary meaning, keeping in mind the legislation's intent, which is determined by examining the construction of the statute as a whole, and not simply by examining isolated words and phrases. Courts must construe this statutory provision in a manner that is consistent with the spirit and objectives of the legislation as a whole. Courts do not look beyond the language of a statute to determine legislative intent if the language is clear and unambiguous.

Environmental Law > Solid Wastes > Disposal Standards
Governments > Local Governments > Licenses
Governments > State & Territorial Governments > Relations With Governments
[HN13] See *N.H. Rev. Stat. Ann. § 149-M:9(VII)*.

Governments > Legislation > Interpretation
[HN14] Courts can neither delete language from a statute nor add words that the legislature did not see fit to include.

Environmental Law > Solid Wastes > Disposal Standards
Governments > Public Improvements > Sanitation & Water
Governments > State & Territorial Governments > Relations With Governments
[HN15] The phrase in *N.H. Rev. Stat. Ann. § 149-M:9* "not inconsistent with this chapter," read in the context of the entire legislative scheme, means not only that the regulation complies with the letter but also with the spirit of N.H. Rev. Stat. Ann. ch. 149-M. *N.H. Rev. Stat. Ann. § 149-M:9(VII)*. Given the breadth of the state regulatory scheme and the important state purpose it seeks to achieve, local regulation cannot amount to an impermissible veto over the state's exercise of its authority. As required by the spirit and objectives of N.H. Rev. Stat. Ann. ch. 149-M, state law preemption of local regulation of solid waste management facilities must be the norm, not the exception.

Governments > Legislation > Interpretation
Governments > State & Territorial Governments > Relations With Governments
[HN16] When evaluating whether a particular local regulation conflicts with the state scheme, courts should err on the side of finding state law preemption, unless the local regulation concerns where, within a town, a facility may be located.

Governments > State & Territorial Governments > Relations With Governments
[HN17] A local regulation is preempted when it has either effect or intent of frustrating the state regulatory authority.

Civil Procedure > Appeals > Reviewability > Preservation for Review
[HN18] Parties may not have judicial review of matters not raised in the forum of trial.

Civil Procedure > Appeals > Records on Appeal
Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Constitutional Issues
Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Evidence
[HN19] The appealing party bears the burden of demonstrating that it raised its constitutional claims before the trial court. It also has the burden of providing the court with a record sufficient to decide its issues on appeal.

Governments > Local Governments > Ordinances & Regulations
Governments > State & Territorial Governments > Relations With Governments
[HN20] To be a lawful regulation, the town must have applied the regulations in good faith and without exclusionary effect. Applicable regulations are those to which any industrial facility would be subjected.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
[HN21] Res judicata, or claim preclusion, bars relitigation of any issue that was or might have been raised with respect to the subject matter of the prior litigation. The essence of the doctrine is that a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
[HN22] For the doctrine of res judicata to apply, three elements must be met: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered on the first action. The term "cause of action" means the right to recover and refers to all theories on which relief could be claimed arising out of the same factual transaction.

Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
[HN23] The doctrine of res judicata applies to declaratory judgment proceedings. Where a plaintiff seeks a declaratory judgment, he is not seeking to enforce a claim against the defendant, but rather a judicial declaration as

to the existence and effect of a relation between him or her and the defendant. The grant of a declaration conclusively settles the issues presented to the trial court regarding the parties' rights.

Civil Procedure > Appeals > Remands
[HN24] Ordinarily, an appellate court will not remand a question of law to the trial court to resolve in the first instance.

COUNSEL: Brown, Olson & Wilson, P.C., of Concord (Bryan K. Gould & a. on the brief), and Sheehan Phinney Bass + Green, P.A., of Manchester (John E. Peltonen on the brief and orally) for the plaintiff.

Boutin & Associates, P.L.L.C., of Londonderry (Brenda E. Keith on the brief, and Edmund J. Boutin orally), for the defendants.

JUDGES: Dalianis, J. NADEAU and DUGGAN, JJ., concurred.

OPINION BY: Dalianis

OPINION

[*607] [951]** Dalianis, J. This case concerns on-going litigation between the plaintiff, North Country Environmental Services, Inc. (NCES), and the defendants, the Town of Bethlehem and its planning and zoning boards (town). In 2001, we issued an opinion regarding prior litigation between NCES and the town. *See N. Country Envtl. Servs. v. Town of Bethlehem, 146 N.H. 348, 772 A.2d 330 (2001)* (*NCES I*). Like *NCES I*, the instant dispute arises out of NCES' landfill operations. The parties appeal the order of the Superior Court (*Burling*, J.) **[***2]** upon the merits of NCES' petition for declaratory relief and the town's counterclaims and counter-petition for declaratory relief. We affirm in part, reverse in part, vacate in part, and remand.

[952]** *I. Background*

A. NCES I

Since 1976, a private landfill has existed on an eighty-seven acre parcel in Bethlehem that NCES now owns. *See id. at 350-51*. The first landfill comprised four acres pursuant to a variance the town granted the original landowner in 1976. *See id. at 350*. In 1983, the landfill expanded to ten acres. *See id.* In 1985, the town granted a special exception to expand the landfill to an additional forty-one acres. *See id.* The town imposed twenty-three **[*608]** conditions upon the special exception. *See id.* The expansion of the landfill has been a source of litigation since 1986.

NCES and its predecessors-in-interest have sought State permits to expand the landfill operations in stages within the fifty-one acres (the original ten acres and the forty-one acres that were the subject of the special exception). *See N.H. Admin. Rules*, Env-Wm 102.159. Stage I involved eighteen of the fifty-one acres. *See NCES I, 146 N.H. at 351*. **[***3]** The State granted permission for Stage I in 1987. *See id*. Stage II involved an additional seven acres. *See id*. The State granted permission for Stage II in 1989. *See id*. Stage II included two phases. *See N.H. Admin. Rules*, Env-Wm 102.124.

NCES I concerned the town's efforts to enjoin the second phase of Stage II. *See NCES I, 146 N.H. at 351*. The town relied, in part, upon the 1976 variance and the 1985 special exception. *Id. at 352*. We affirmed the trial court's ruling that the 1976 variance contained "no limitation on the area NCES' land filling operations could occupy on the ten-acre lot." *Id. at 353-54*. We also affirmed the court's determination that "neither the 1985 special exception, nor the 1986 conditions attached thereto, contained any express limitation on the size of the landfill." *Id. at 355*. Thus, we held that NCES had town approval to use fifty-one acres, the entire area encompassed by the 1976 variance and 1985 special exception, for its landfill operations. *See id. at 353-55*.

The town also relied upon two amendments to the town's zoning ordinance. *See id. at 350-51*. **[***4]** The first amendment, enacted in 1987, prohibits the existence of any private solid waste disposal facility in any town district. *See id. at 350*. The second amendment, enacted in 1992, prevents the location of any solid waste disposal facility or the expansion of an existing landfill in any district, unless the town owns the facility. *See id*.

We affirmed the lower court's determination that the town could not rely upon these amendments to enjoin Stage II, phase two. *See id. at 352-53*. Although NCES argued that the State Solid Waste Management Act, *RSA chapter 149-M*, preempted these amendments, we did not reach this issue. *See id. at 353*. Instead, we affirmed the trial court's ruling that neither amendment applied to NCES' operations on the fifty-one acres because the

operations "were pre-existing, permitted uses at the time of the 1987 amendment." *Id.*; *see also RSA 674:19* (1996). Because the amendments did not apply to NCES' operations on the fifty-one acres, it was unnecessary for us to decide whether State law preempted them. *NCES I, 146 N.H. at 353*.

The current litigation puts **[***5]** the issue of State law preemption under *RSA chapter 149-M* squarely before the court.

[*609] *B. Current Litigation*

The current dispute primarily relates to actions NCES and the town took while *NCES I* was pending. During that time:

[953]** (1) NCES applied for and received a State permit to begin Stage III of the expansion, which involved additional land within the fifty-one acres. Stage III operations began in December 2000.

(2) NCES entered into a lease with Commonwealth Bethlehem Energy, LLC (CBE) to construct and operate a landfill gas utilization (LGU) facility on the fifty-one acres. *See N.H. Admin. Rules*, Env-Wm 2502.02(a)(6), 2506.07 (lined landfills must have decomposition gas control system). CBE received a temporary State permit to build the LGU facility, which is currently operational.

(3) The town notified NCES that it could not expand its landfill without first obtaining site-plan review and building permits from the town. Because of the *NCES I* litigation, however, the town did not initiate enforcement proceedings.

(4) The town notified CBE that it could not construct the LGU facility without a building permit and prior site approval. The town also asserted that **[***6]** the LGU facility violated a 1986 town ordinance prohibiting incinerators.

(5) In 2000 and 2001, the town amended its zoning laws to limit the height of "solid waste disposal facilities" to no more than ninety-five feet "measured from the natural and undisturbed contour of the land under any existing or future landfill."

In September 2001, NCES petitioned the trial court for, among other things, declarations that: (1) the town is precluded from exercising its site-plan review authority over and applying its height ordinance to the landfill's development within the fifty-one acre parcel; and (2) the town's height ordinance and site plan review regulations are preempted by *RSA chapter 149-M*.

The town counterclaimed for breach of contract and violation of certain of the conditions of the 1985 special exception. Additionally, the town sought a declaration that, with respect to Stage III and the LGU facility, NCES must bring a site plan to the planning board and, if the plan is approved, must then obtain a building permit.

After the instant lawsuit was filed, in April 2002, NCES applied for a State permit to develop Stage IV of the landfill. Nearly all of Stage IV involves land outside **[***7]** of the fifty-one acres. That same month, the town amended its counter-petition to seek the following declarations: (1) the part of Stage IV that expands beyond the fifty-one acres addressed in **[*610]** *NCES I* is prohibited by the town's zoning ordinances, including the 1987 and 1992 amendments; and (2) prior to continuing to seek State approval for Stage IV, NCES must apply for and obtain "all local approvals." NCES received State permission for Stage IV in March 2003.

C. Trial Court's Ruling

Following a four-day bench trial, the court issued a lengthy order on the merits of the parties' petitions. The court made the following rulings regarding the town's zoning ordinances: (1) the 1987 zoning amendment is preempted by *RSA chapter 149-M* because it is inconsistent with the State legislative scheme; (2) the 1992 zoning amendment is not preempted by *RSA chapter 149-M* and may be used by the town to prohibit expansions of the landfill beyond the fifty-one acres; (3) because the town's 1986 ordinance forbidding incinerators is preempted by the State Air Pollution Control Act, *RSA chapter 125-C*, the town may not apply it to the LGU facility; and (4) the town may apply its height ordinance **[***8]** to any development of the landfill within the fifty-one acres, including Stage III and portions of Stage IV.

[954]** With respect to the town's building permit and site-plan review requirements, the court ruled that: (1) portions of a town's site-plan review process are preempted by *RSA chapter 149-M*, while others are not; (2) the town may apply the non-preempted portions of the site-plan review process to all landfill construction that has taken place after Stage II, phase two; and (3) because the landfill is a permitted use within the fifty-one acres

and because its form is regulated by the State, the town may not require NCES to obtain a building permit to expand the landfill, but may require it to obtain a building permit to build specific structures, such as the LGU facility, on the landfill.

Finally, the court ruled that only two of the conditions of the 1985 special exception that the town asserted NCES had violated were enforceable. Neither NCES nor the town has appealed this ruling.

II. Discussion

A. State Law Preemption

On appeal, NCES asserts that *RSA chapter 149-M* preempts the entire field of solid waste management facility regulation, except as set forth in *RSA 149-M:9* **[***9]** , *VII* (Supp. 2003), which NCES argues permits only local regulation of facility location. Accordingly, NCES contends that *RSA chapter 149-M* preempts the 1992 zoning amendment, the height ordinance, the town's entire site-plan review process and its building **[*611]** permit requirement. The town counters that, as the trial court ruled, *RSA chapter 149-M* preempts only certain aspects of solid waste management facility regulation.

1. General Principles

"[HN1] The state preemption issue is essentially one of statutory interpretation and construction - whether local authority to regulate under a zoning enabling act . . . is preempted by state law or policy." 3 A.H. Rathkopf *& a., Rathkopf's The Law of Zoning and Planning* § 48.2 (2003). Preemption may be express or implied. *See id.* §§ 48.2, 48.4, at 48-5 to 48-6; *cf. Koor Communication v. City of Lebanon, 148 N.H. 618, 620, 813 A.2d 418 (2002)* (discussing preemption of State law by federal law). Express preemption is not claimed here. [HN2] Implied preemption may be found when the comprehensiveness and detail of the State statutory scheme evinces legislative intent to supersede local regulation. *See* **[***10]** 3 Rathkopf, *supra* § 48.4, at 48-6. State law preempts local law also when there is an actual conflict between State and local regulation. *See id.* A conflict exists when a municipal ordinance or regulation permits that which a State statute prohibits or vice versa. 5 E. McQuillin, *Municipal Corporations* § 15.20, at 107 (3d ed. rev. 1996). 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.*

[HN3] "The mere fact that a state law contains detailed and comprehensive regulations of a subject does not, of itself, establish the intent of the legislature to occupy the entire field to the exclusion of local legislation." 6 E. McQuillin, *Municipal Corporations* § 21.34, at 335 (3d ed. rev. 1998); *see JTR Colebrook v. Town of Colebrook, 149 N.H. 767, 770, 829 A.2d 1089 (2003)*. To determine whether the legislature has intended to occupy the field, the court may look to the whole purpose and scope of the legislative scheme and need not find such intent solely in the statutory language. 6 McQuillin, *supra* § 21.34, at 335. "The very nature of the regulated subject matter **[***11]** may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." *Id.* at 336.

> [HN4] The following questions are pertinent in determining whether the state has preempted the field: does the ordinance **[**955]** conflict with state law; is the state law, expressly or impliedly, to be exclusive; does the subject matter reflect a need for uniformity; is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation; and does the ordinance stand **[*612]** as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature.

Id. at 335-36. [HN5] When the State has preempted the entire regulatory field, *any* local law on the subject is preempted, regardless of whether the terms of the local and State law conflict. *See id.* at 334-35; *see also Casico v. City of Manchester, 142 N.H. 312, 315, 702 A.2d 302 (1997)*.

2. Comprehensiveness of State Statutory Scheme

[HN6] The legislature has declared the subject matter of *RSA chapter 149-M* to be of statewide concern. The purposes of the law are to "protect human health, . . . preserve the natural environment, **[***12]** and . . . conserve precious and dwindling natural resources." *RSA*

149-M:1 (Supp. 2003). Another purpose is to "ensure benefit to the citizens of New Hampshire by providing for solid waste management options which will meet the capacity needs of the state while minimizing adverse environmental, public health and long-term economic impacts." *RSA 149-M:11, II* (Supp. 2003).

The means to achieve these goals is "proper and integrated management of solid waste." *RSA 149-M:1*. [HN7] The legislature has designated the State Department of Environmental Services (DES) to be responsible for enforcing *RSA chapter 149-M*. *RSA 149-M:5* (Supp. 2003); *see also RSA 149-M:4, V* (Supp. 2003). Among other solid waste management responsibilities, DES must establish State solid waste management policies and goals, regulate private and public facilities by administering a State permit system, and prepare a statewide solid waste plan. *RSA 149-M:6* (Supp. 2003).

[HN8] A State permit is required before one constructs, operates or initiates the closure of a solid waste **[***13]** management facility. *RSA 149-M:9* (Supp. 2003). DES may not issue a permit unless it determines that the proposed solid waste facility provides "a substantial public benefit." *RSA 149-M:11, III* (Supp. 2003). In making this determination, DES must consider, among other things: (1) "the short- and long-term need for a solid waste facility of the proposed type, size, and location to provide capacity to accommodate solid waste generated within the borders of [the State]"; and (2) "the ability of the proposed facility to assist the state in achieving" its goals, the goals of the State solid waste management plan, and the goals of one or more solid waste management plans submitted by local districts. *Id*.

In enacting the "substantial public benefit" requirement, the legislature found that: (1) the legislature "is responsible to provide for the solid waste management needs of the state and its citizens"; (2) "to provide for these needs, [the legislature] must ensure that adequate capacity exists within **[*613]** the state to accommodate the solid waste generated within the borders of the state"; (3) "facilities necessary to meet state solid **[***14]** waste capacity needs must be designed and operated in a manner which will protect the public health and the state's natural environment"; (4) "an integrated system of solid waste management requires a variety of types of facilities to accommodate the entire solid waste stream"; and (5) enacting statutes to address these needs "is an exercise of the police power granted to the general court" under the State Constitution. *RSA 149-M:11, I* (Supp. 2003).

[HN9] Although the purposes of *RSA chapter 149-M* relate to State goals and policy, the **[**956]** law gives local government a role in solid waste management. *See Town of Pelham v. Browning Ferris Indus. of N.H., 141 N.H. 355, 359, 683 A.2d 536 (1996)* (interpreting prior law). For instance, before issuing a State permit, DES must consider "the concerns of the citizens and governing bodies of the host municipality, county, and district and other affected persons." *RSA 149-M:11, IV(a)* (Supp. 2003). In certain circumstances, DES must take testimony at a public hearing from local residents about their concerns. *See id.*

In enacting the chapter, the legislature found that "the process **[***15]** of disposal of solid waste has been and should continue to be primarily the responsibility of municipal government." Laws 1996, 251:1. The legislature also found that "although municipalities have primary responsibility for solving the problems of solid waste disposal, solutions should not only be based on individual municipal needs, but should include environmentally safe and economical answers which involve more than one community." *Id*.

RSA chapter 149-M [HN10] requires every municipality to "either provide a facility or assure access to another approved solid waste facility for its residents." *RSA 149-M:17, I* (Supp. 2003); *see also RSA 149-M:23-:25* (Supp. 2003). If the municipality does not meet this obligation, DES will investigate the opportunities for the municipality to build its own facility, use another municipality's facility, or contract with a private facility. *RSA 149-M:21, I* (Supp. 2003). If DES and the municipality are unable to agree upon an acceptable solution, and DES determines that land must be taken, DES "shall institute eminent domain proceedings." *RSA 149-M:21* **[***16]** *, II-V* (Supp. 2003).

Additional provisions of *RSA chapter 149-M* provide for State enforcement of the chapter through investigations and State-imposed penalties for non-compliance and violations. *See RSA 149-M:13-:16* (Supp. 2003).

[*614] *3. Comprehensiveness of Regulatory Scheme*

RSA 149-M:7 (Supp. 2003) grants DES broad authority to adopt rules necessary to enforce *RSA chapter 149-M*, including those governing the criteria for all types of solid waste management facilities and those related to the State permit system. *See RSA 149-M:7, II, III, XV*; *see also Town of Pelham, 141 N.H. at 362* (interpreting prior law).

Pursuant to DES regulations, *all* solid waste management facilities, including those exempt from the State permit requirement, must meet universal siting, design, construction, operation and closure standards. *See N.H. Admin. Rules*, Env-Wm 101.02(c), 2701.02. Each type of facility is also subject to a host of additional requirements. *See N.H. Admin. Rules*, Env-Wm. ch. 2100 (collection, storage and transfer facilities); *N.H. Admin. Rules*, Env-Wm. **[***17]** ch. 2200 (processing and treatment facilities); *N.H. Admin. Rules*, Env-Wm. ch. 2300 (composting facilities); *N.H. Admin. Rules*, Env-Wm. ch. 2400 (incineration facilities); *N.H. Admin. Rules*, Env-Wm. ch. 2500 (landfills).

Each of the landfill-specific requirements is set forth in abundant detail. *See N.H. Admin. Rules*, Env-Wm ch. 2500. For instance, the siting regulations include the following setback requirements:

> (a) There shall be a minimum 100-foot buffer strip between the property line and the footprint of the landfill.
>
> (b) There shall be a minimum 300-foot buffer between the footprint of the landfill and Class I and Class II roads and a minimum 100-foot buffer between the footprint of the landfill and Class III through Class VI roads.
>
> **[**957]** (c) There shall be a minimum distance of 500 feet maintained between the footprint of the landfill and all existing residences not owned by the applicant.
>
> (d) The footprint of a landfill receiving putrescible wastes shall not be located within 10,000 feet of any airport runway used by turbojet aircraft or 5,000 feet of any airport runway used by only piston-type aircraft.

N.H. Admin. Rules, Env-Wm 2504.04. Additional **[***18]** siting requirements pertain to ground water, surface water and geologic conditions. *See N.H. Admin. Rules*, Env-Wm 2504.02, 2504.03, 2504.05. The regulations require, for example, that the base of the bottom liner system of a lined landfill "shall be a minimum of 6 feet above the seasonal high groundwater table and confirmed bedrock surface." *N.H. Admin. Rules*, Env-Wm 2504.02(d). In addition, the footprint of a landfill may not be located within **[*615]** "200 feet upgradient and 100 feet downgradient of a wetland" or "within 200 feet of any perennial surface water body, measured from the closest bank of a stream and closest shore of a lake." *N.H. Admin. Rules*, Env-Wm 2504.03(d), (e).

The design regulations are equally detailed. For instance, an applicant must show that the materials used for the subgrade of a landfill "have a saturated hydraulic conductivity of 1 x 10-4 cm/sec or less." *N.H. Admin. Rules*, Env-Wm 2505.03(b). Other design requirements include: (1) designing and maintaining main access roads leading to and from the working face of the landfill so that they support the required loading and limit traffic congestion, road safety hazards and dust production; (2) fencing **[***19]** main access roads onto/into the property "if necessary to catch blowing paper"; and (3) designing final grades to "blend with surrounding features to the greatest extent possible." *N.H. Admin. Rules*, Env-Wm 2505.11(g), (h), (j).

Similarly, the operating regulations specify the inspections and maintenance that a landfill permittee must perform daily or weekly. *See N.H. Admin. Rules*, Env-Wm 2506.08.

Each applicant must submit a site report to DES that includes, among other things: maps and a narrative discussion of the facility's impact on flood hazard zones, wetlands, water sources and endangered species; a hydrogeological report of the site if the facility has managed or will manage waste which has the potential to cause groundwater or surface water contamination; and discussion of anticipated traffic impacts by the facility. *N.H. Admin. Rules*, Env-Wm 314.10.

We hold that *RSA chapter 149-M* [HN11] constitutes a comprehensive and detailed regulatory scheme

governing the design, construction, operation and closure of solid waste management facilities. Such exhaustive treatment of the field ordinarily manifests legislative intent to occupy it. *See Arthur Whitcomb, Inc. v. Town of Carroll, 141 N.H. 402, 407, 686 A.2d 743 (1996)*; **[***20]** *cf. Koor Communication, 148 N.H. at 621* (federal regulations have same preemptive force as federal statutes).

Our conclusion that *RSA chapter 149-M* is comprehensive and detailed does not end our preemption inquiry, however, because one of its provisions, *RSA 149-M:9, VII*, authorizes additional municipal regulation. *See Casico, 142 N.H. at 316*. The parties dispute the scope of municipal regulation that *RSA 149-M:9, VII* allows.

[*616] *4. Additional Municipal Regulation Under RSA 149-M:9, VII*

We first scrutinize the language used in *RSA 149-M:9, VII*. *See JTR Colebrook, 149 N.H. at 770*. [HN12] We give undefined language its plain and ordinary **[**958]** meaning, keeping in mind the legislation's intent, which is determined by examining the construction of the statute as a whole, and not simply by examining isolated words and phrases. *Id.* We must construe this statutory provision in a manner that is "consistent with the spirit and objectives of the legislation as a whole." *Id. at 770-71* (quotation omitted). We **[***21]** do not look beyond the language of a statute to determine legislative intent if the language is clear and unambiguous. *See Pennelli v. Town of Pelham, 148 N.H. 365, 368-69, 807 A.2d 1256 (2002)*.

RSA 149-M:9, VII provides:

> [HN13] The issuance of a facility permit by the department shall not affect any obligation to obtain local approvals required under all applicable, lawful local ordinances, codes, and regulations not inconsistent with this chapter. Local land use regulation of facility location shall be presumed lawful if administered in good faith, but such presumption shall not be conclusive.

A plain reading of the statute is that *RSA chapter 149-M* does *not* preempt lawful, applicable local regulations that are consistent with State law. The first sentence of this provision requires State permit applicants to obtain approvals under "all applicable, lawful" local regulations that are consistent with *RSA chapter 149-M*. The second sentence clarifies that the lawfulness of local land use regulation of facility location will be presumed when it is administered in good faith.

NCES reads the reference in the first sentence to "all applicable, **[***22]** lawful local ordinances, codes, and regulations" in context with the reference in the second sentence to "local land use regulation of facility location," and concludes that a private solid waste facility may be subject only to local regulation of facility location. Read this way, the statute permits a municipality only to regulate where a solid waste facility may be located.

We reject NCES' interpretation as unreasonable. NCES' interpretation requires that we ignore the legislature's use of the word "all" in reference to local ordinances, codes and regulations. [HN14] We can neither delete language from a statute nor add words that the legislature did not see fit to include. *See Appeal of Baldoumas Enters., 149 N.H. 736, 739, 829 A.2d 1056 (2003)*.

Were it not for this provision, we would agree with NCES that *RSA chapter 149-M* completely preempts the field of solid waste management regulation. The State's legislative and regulatory framework is pervasive **[*617]** and comprehensive and the very nature of the subject it addresses, solid waste, requires state regulation to "achieve the uniformity necessary to serve the state's purpose." 6 McQuillin, *supra* § 21.34, at 335-36. In **[***23]** *RSA chapter 149-M*, the legislature has provided a regulatory framework for coordinating solid waste management statewide and for ensuring that the State's solid waste management needs will be met.

The comprehensiveness and detail of the State scheme dictates that we construe *RSA 149-M:9, VII* narrowly. We hold that [HN15] the phrase "not inconsistent with this chapter," read in the context of the entire legislative scheme, means not only that the regulation complies with the letter but also with the spirit of *RSA chapter 149-M*. *RSA 149-M:9, VII*. Given the breadth of the State regulatory scheme and the important State purpose it seeks to achieve, local regulation cannot

"amount to an impermissible veto over the State's exercise of its authority." *Town of Pelham, 141 N.H. at 363* (quotation and citation omitted). As required by the spirit and objectives of *RSA chapter 149-M*, State law preemption of local regulation **[**959]** of solid waste management facilities must be the norm, not the exception. Accordingly, [HN16] when evaluating whether a particular local regulation conflicts with the State scheme, courts should err on the side of finding **[***24]** State law preemption, unless the local regulation concerns where, within a town, a facility may be located.

5. Preemption of Town Regulation of Development Outside Fifty-One Acres

We next examine whether applying the town's height ordinance, building permit requirement, 1992 zoning amendment and site plan review regulations to the portion of Stage IV that is outside of the fifty-one acres is consistent with *RSA chapter 149-M*.

a. Building Permit and Height Ordinance

We agree with the trial court that the town may not require NCES to obtain a building permit before constructing the portion of Stage IV that falls outside of the fifty-one acres. As the trial court aptly ruled, and as the town concedes, the landfill's structure, which includes its footprint, content and final grade slope, is regulated exclusively by DES. For this reason, we also hold that it would frustrate the intent of *RSA chapter 149-M* for the town to apply its height ordinance to the landfill's development. *See Casico, 142 N.H. at 317* ([HN17] local regulation preempted when it has either effect or intent of frustrating the State regulatory authority). We are not persuaded **[***25]** by the trial court's determination that **[*618]** height is unrelated to a landfill's footprint, stability and volume. We believe that height is integrally related to a landfill's capacity, which is regulated exclusively by DES.

b. 1992 Zoning Amendment

We hold that *RSA chapter 149-M* does not facially preempt the 1992 zoning amendment. The amendment conflicts with neither the terms of *RSA chapter 149-M* nor its spirit. It does not prohibit that which *RSA chapter 149-M* permits or vice versa. *See* 5 McQuillin, *supra* § 15.20, at 107. Indeed, as the trial court noted, the 1992 amendment reflects "the choice a town is permitted to make under the general parameters of municipal responsibility established in *RSA 149-M:17[, I]*." *See also RSA 149-M:23-:25*.

We further hold that *RSA chapter 149-M* does not preempt the amendment as applied to the portion of Stage IV that is beyond the fifty-one acres. The town currently complies with *RSA chapter 149-M* by granting its residents access to NCES' landfill. *See RSA 149-M:17, I*; *see also RSA 149-M:23-:25*. Under these **[***26]** circumstances, it does not violate *RSA chapter 149-M* for the town to prohibit development of the portion of Stage IV that falls outside of the fifty-one acres. We agree with the trial court that, with the 1992 amendment, the town has not exempted itself from its obligation to partake in the State plan of integrated solid waste management. The amendment indicates that, in the future, presumably when there is no additional capacity in NCES' landfill on the fifty-one acres, the town will either provide its own facility or assure its residents access to another approved facility. *See RSA 149-M:17, I*; *see also RSA 149-M:23-:25*. We express no opinion as to whether future applications of the 1992 zoning amendment may be inconsistent with *RSA chapter 149-M*.

NCES asserts that the 1992 amendment as applied to Stage IV is inconsistent with *RSA chapter 149-M*. As NCES observes, when granting the permit, DES had to have determined that there was a "need for a solid waste facility of the proposed type, size, and location to provide capacity to accommodate solid waste generated **[**960]** within the borders of [the State]." *RSA 149-M:11* **[***27]** *, III(a)*. Thus, NCES argues, the town should not be permitted to rely upon the 1992 amendment to prohibit development of Stage IV. To the contrary, *RSA 149-M:9, VII* required NCES to comply with "all applicable, lawful local ordinances, codes, and regulations not inconsistent with" *RSA chapter 149-M before* it obtained a State permit to construct the portion of Stage IV falling outside of the fifty-one acres. It cannot now rely upon the State permit to argue that the town ordinances with which *RSA 149-M:9, VII* mandated it comply are preempted.

[*619] NCES maintains that the 1992 amendment is an unlawful exercise of zoning authority. *See RSA 672:1, III* (1996); *RSA ch. 674*. Specifically, NCES argues that

the amendment is improper because it distinguishes between users of land, not uses of land, *see Vlahos Realty Co. v. Little Boar's Head District, 101 N.H. 460, 463-64, 146 A.2d 257 (1958)*, and because it contravenes the general welfare of the region it affects, *see Britton v. Town of Chester, 134 N.H. 434, 441, 595 A.2d 492 (1991)*. As the trial court did not address these arguments **[***28]** and as resolving them might require additional factual findings, we remand them to the trial court for resolution in the first instance.

NCES further contends that the 1992 amendment is invalid because: (1) it improperly discriminates between town-owned and privately-owned landfills in violation of the State Equal Protection Clause, *see* N.H. CONST. pt I, arts. 2, 12; and (2) applying the amendment to Stage IV is an arbitrary and unreasonable restriction upon NCES' property rights as guaranteed by Part I, Article 2 of the State Constitution.

The town counters that NCES failed to preserve these constitutional challenges. NCES asserts that it raised its constitutional claims as defenses to the town's counter-claims. NCES, however, has not provided us with its responsive pleading to the town's counter-claims. While the parties agree that NCES made constitutional arguments in its trial memorandum, they disagree as to what NCES argued.

It is a long-standing rule that [HN18] parties may not have judicial review of matters not raised in the forum of trial. *Reynolds v. Cunningham, Warden, 131 N.H. 312, 314, 556 A.2d 300 (1988)*. [HN19] NCES bears the burden of demonstrating that it **[***29]** raised its constitutional claims before the trial court. *See id.* It also has the burden of providing the court with a record sufficient to decide its issues on appeal. *See Rix v. Kinderworks Corp., 136 N.H. 548, 553, 618 A.2d 833 (1992)*; *see also Sup. Ct. R.* 13. Because NCES has failed to demonstrate that it preserved its constitutional claims for appellate review, we decline to review them.

c. Site Plan Review

We are unable to determine whether the town's site plan regulations as applied to portions of Stage IV are consistent with *RSA chapter 149-M* because neither party has provided them to us. *See Wolters v. Am. Republic Ins. Co., 149 N.H. 599, 604, 827 A.2d 197 (2003)*; *see also Sup. Ct. R.* 13. We observe that the trial court's ruling with respect to site plan review does not address the town's existing regulations, but instead generally discusses the interplay between *RSA chapter 149-M* and the site plan review regulations that a town *may* adopt under *RSA 674:44* (1996). It **[*620]** appears that the trial court may have rendered an advisory opinion as to actions the town could take in the future. **[***30]** *See Piper v. Meredith, 109 N.H. 328, 330, 251 A.2d 328 (1969)* (superior court has no jurisdiction to give advisory opinions). We vacate and remand for a determination as to whether the town's *existing* site plan **[**961]** regulations are applicable, lawful and consistent with *RSA chapter 149-M*. [HN20] To be lawful, the town must have applied the regulations in "good faith and without exclusionary effect." *Stablex Corp. v. Town of Hooksett, 122 N.H. 1091, 1104, 456 A.2d 94 (1982)*; *see also Town of Pelham, 141 N.H. at 364*. "Applicable" regulations are those "to which any industrial facility would be subjected." *Stablex, 122 N.H. at 1104*; *see also Town of Pelham, 141 N.H. at 364*.

We observe that the town has not appealed the trial court's determination that *RSA chapter 149-M* preempts the following types of site plan review regulations: (1) regulations related to drainage, flooding and protection of groundwater; (2) regulations related to smoke, soot and particulate discharge; and (3) regulations related to odor. Thus, for the purposes of the trial court's review on remand, the court need not review the town's site **[***31]** plan regulations related to these areas, to the extent that any such regulations exist.

6. Town Regulation of Landfill Within Fifty-One Acres

a. Site Plan Review

Because the trial court misapplied the law of res judicata, we reverse its ruling that the town may subject Stage III and the portion of Stage IV that lies within the fifty-one acres to site plan review. [HN21] Res judicata, or claim preclusion, bars relitigation of any issue that was or might have been raised with respect to the subject matter of the prior litigation. *Appeal of Univ. Sys. Bd. (N.H. Pub. Emple. Labor Rels. Bd.), 147 N.H. 626, 629, 795 A.2d 840 (2002)*. The essence of the doctrine is that a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action. *Brzica v. Trustees of*

Dartmouth College, 147 N.H. 443, 454, 791 A.2d 990 (2002).

[HN22] For the doctrine to apply, three elements must be met: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered on the first action. **[***32]** *Id.* The term "cause of action" means the right to recover and refers to all theories on which relief could be claimed arising out of the same factual transaction. *Radkay v. Confalone, 133 N.H. 294, 297, 575 A.2d 355 (1990).*

[HN23] **[*621]** The doctrine applies to declaratory judgment proceedings. *See id.* "Where a plaintiff seeks a declaratory judgment, he is not seeking to enforce a claim against the defendant, but rather a judicial declaration as to the existence and effect of a relation between him or her and the defendant." *Id. at 298* (quotation and brackets omitted). The grant of a declaration "conclusively settles the issues presented to the trial court regarding the parties' rights." *Id.*

In *NCES I*, the trial court granted NCES' request for declarations that: (1) it has all local approvals necessary to conduct landfill operations on the fifty-one acre parcel; and (2) it may continue to develop, construct and operate the landfill within the fifty-one acre parcel. *See NCES I, 146 N.H. at 351* ("The [trial] court ruled that, pursuant to the 1976 variance and the 1985 special exception, NCES could expand its landfill uses through **[***33]** the ten-acre and forty-one acre parcels of the original eighty-seven-acre tract.").

The superior court in the current litigation ruled that these declarations were not dispositive, holding that "the language of the court in the final judgment controls, **[**962]** not the language of the pleading, irrespective of whether the action sought in the petition is granted." The trial court relied exclusively upon the narrative order of the superior court in *NCES I* to determine what was actually litigated or could have been litigated in that lawsuit. It ruled that it was immaterial that the lower court in *NCES I* had granted certain of NCES' requests for declarations. This was error. To the contrary, the declarations NCES obtained were conclusive of the "existence and effect" of the relationship between the parties with respect to NCES' landfill on the fifty-one acres. *See Radkay, 133 N.H. at 298.* In *NCES I*, the parties actually litigated whether NCES had "all local approvals" necessary for expanding the landfill within the fifty-one acres and whether NCES could continue to develop, construct and operate its landfill on the fifty-one acres. *See NCES I, 146 N.H. at 351.* **[***34]** Accordingly, res judicata bars the town from requiring additional local approvals before NCES may construct Stage III and the portion of Stage IV of the landfill that falls within the fifty-one acres.

b. Building Permit for LGU Facility

The trial court ruled NCES was required to obtain a building permit for the LGU facility "subject to the understanding of the Town that the LGU [facility] is not an incinerator, and that the allowable particulate matter released into the air is a preempted issue."

[*622] On appeal, NCES briefly contends that the State Air Pollution Control Act, *RSA chapter 125-C*, preempts not only how much particulate matter may be released into the air, but also any local building permit requirements related to design, installation, construction, modification or operation of emission systems, such as the LGU facility. *RSA chapter 125-C*, unlike *RSA chapter 149-M*, contains no provision authorizing additional municipal regulation. The town cursorily notes that the temporary permit issued for the LGU facility states that receipt of the temporary permit does not exempt CBE from "the need to secure all other required approvals to construct and operate the proposed **[***35]** facility, including those associated with applicable federal, state and local requirements." [HN24] Ordinarily, we would not remand a question of law to the trial court to resolve in the first instance. *See Shannon v. Foster, 115 N.H. 405, 407, 342 A.2d 632 (1975).* We do so in this case *only* because we believe that the scope of preemption under *RSA chapter 125-C* is an important issue and because the parties have not fully subjected it to the crucible of adversary proceedings.

B. Cross-Appeal

In its cross-appeal, the town purports to challenge the trial court's determination that State law preemption precludes the town from applying its 1986 zoning ordinance prohibiting incinerators to the LGU facility. The trial court ruled that the State Air Pollution Control Act, *RSA chapter 125-C*, preempted the 1986 ordinance's application to the LGU facility. Without explanation, the town argues that the trial court should have instead

examined whether *RSA chapter 149-M* preempted applying the ordinance to the LGU facility. As the town has not contested the trial court's ruling regarding preemption of the 1986 ordinance by *RSA chapter 125-C*, we affirm it. In light of this ruling, **[***36]** we need not address the town's argument under *RSA chapter 149-M*.

Affirmed in part; reversed in part; vacated in part; and remanded.

NADEAU and DUGGAN, JJ., concurred.

Appeal of Concord Steam Corporation (New Hampshire Public Utilities Commission)

No. 87-075

SUPREME COURT OF NEW HAMPSHIRE

130 N.H. 422; 543 A.2d 905; 1988 N.H. LEXIS 41

May 6, 1988

PRIOR HISTORY: **[***1]** Appeal from Public Utilities Commission.

DISPOSITION: *Findings and orders vacated in part.*

HEADNOTES

1. Constitutional Law--Due Process--Notice and Hearing

Where governmental action would affect a legally protected interest, the due process clause of the New Hampshire Constitution guarantees to the holder of the interest the right to be heard at a meaningful time and in a meaningful manner. N.H. CONST. pt. 1, art. 15.

2. Constitutional Law--Due Process--Notice and Hearing

A fundamental requirement of the constitutional right to be heard is notice of the impending action that affords the party an opportunity to protect the interest through the presentation of objections and evidence. N.H. CONST. pt. 1, art. 15.

3. Constitutional Law--Due Process--Administrative Agencies

While due process in administrative proceedings is a flexible standard, since public utilities commission (PUC) has important quasi-judicial duties, PUC must be in "meticulous compliance" with constitutional mandate of due process where the agency acts in its adjudicative capacity, implicating private rights, rather than in its rule-making capacity.

4. Public Utilities--Rates--Just and Reasonable

A public utility is constitutionally entitled to a reasonable rate of return through its rates.

5. Public Utilities--Regulatory Agencies--Findings

Findings of the public utilities commission (PUC) concerning the propriety of certain fuel costs charged to ratepayers by a public utility were set aside, and PUC orders relating thereto were vacated in part, where the base-rate proceeding involved recovery of non-fuel costs, and the utility received inadequate notice that the PUC would make the fuel cost findings, which were not germane to the base-rate determination, but which would be conclusive in later proceedings.

COUNSEL: *Orr and Reno P.A.*, of Concord (*David W. Marshall* and *Cordell A. Johnson* on the brief, and *Mr. Marshall* orally), for the petitioner.

Stephen E. Merrill, attorney general (*Charles T. Putnam*, attorney, on the brief and orally), for the State.

JUDGES: Brock, C.J. Souter, J., did not sit; the others concurred.

OPINION BY: BROCK

OPINION

[*423] **[**906]** Concord Steam Corporation (hereinafter CSC or the company) appeals pursuant to *RSA 541:6* from three orders of the public utilities commission (hereinafter PUC) in its docket DR 85-304. In the course of granting part of the company's requested rate increase to cover non-fuel costs, the PUC ruled on matters other than those relating to non-fuel costs. For the reasons that follow, we set aside all PUC findings on the propriety of certain fuel costs charged to ratepayers, and vacate, in part, the orders relating thereto.

CSC's PUC-approved meter rate consists of a base rate for recovery of non-fuel costs, and an energy cost adjustment (hereinafter ECA) rate for recovery of fuel costs. Pursuant to a 1983 agreement, the company moved to reopen an earlier rate-setting **[***2]** proceeding so that the PUC might consider the company's request for an increase in the base rate, for recovery of non-fuel costs, and an attendant increase in the meter rate to $ 9.05 per thousand pounds of steam. In its request, CSC did not seek any adjustment of the ECA rate.

After the PUC granted CSC's request for temporary rates at the $ 9.05 level, CSC requested a further base rate increase, and attendant meter rate increase to $ 10.00 per thousand pounds of **[*424]** steam. The PUC set a temporary meter rate of $ 9.38 per thousand pounds of steam, and held hearings on the proposed permanent rate on June 3, 4 and 16, 1986.

Prior to the hearings, in mid-May, Daniel Lanning, the PUC's Assistant Finance Director, filed written testimony with the PUC and provided a copy to the CSC. In his prefiled testimony, which presented the PUC staff's recommendation on the company's permanent rates, Lanning expressed concern that, through the ECA component of its meter rate, the company had charged ratepayers improperly for certain fuel-related expenses. The basis for Lanning's concern was CSC's two agreements with Wood Fuel Production Company (hereinafter WFP).

On April 2, 1981, CSC had **[***3]** entered into an agreement with WFP for the purchase of wood fuel. WFP, which became operational on the same day, was a limited partnership whose aim was to set up a fuel processing center that would serve primarily CSC. CSC's president and sole shareholder, Roger Bloomfield, was a general partner in WFP with a ten percent interest that was subject to unilateral conversion to a limited partnership interest by the other general partner, a corporation. The corporate general partner, KIC Fuel Company, and the fourteen limited partners were associated with Lazard Freres & Co., the investment banker for CSC in the expansion of its steam system.

When WFP was unable to procure, at prices acceptable to CSC, the wood material necessary for producing wood fuel, CSC sought to terminate the purchase agreement. CSC and WFP executed an agreement, dated September 10, 1981, that terminated the purchase agreement and assigned to CSC WFP's interest in a contract for wood material that WFP had executed in August 1981 with Connecticut Valley Chipping Co., Inc. (hereinafter ConVal). In the termination agreement the company agreed to pay to WFP, during a five-year period, the larger of "an annual royalty **[***4]** on **[**907]** all wood or wood products used as fuel by Concord Steam from any source whatever," or "a royalty based on a deemed annual consumption of 72,000 green tons of wood or wood products, whether or not wood or wood products are in fact used as fuel." CSC itself has acknowledged that the royalties were designed to reimburse WFP for the unrecovered portion of its investment in the fuel processing plant.

Lanning's prefiled statement first expressed the PUC staff's belief that under *RSA 366:3*, which requires a utility to file with the PUC a copy of any agreement with an "affiliate," CSC should have obtained the PUC's approval of the purchase agreement with **[*425]** WFP. Lanning noted that despite the apparently "interlocking directorates," the company had failed to notify the PUC of the contract.

Lanning next addressed CSC's payment to WFP of $ 73,440 for wood delivered during the test year ending December 1985. Because ConVal, and not WFP, was supplying the wood, the PUC staff considered CSC's payments to both WFP and ConVal to be duplicate payments for the same wood. The staff therefore recommended that CSC be required to refund to its ratepayers the $ 73,440 representing **[***5]** test-year royalty expenses recovered through the ECA rate.

During the subsequent hearings, CSC's agreements with WFP were not the subject of extended discussion. In his oral testimony, Lanning explained that the recommended disallowance of test-year royalty expenses would reduce slightly the figure for CSC's cash operating

capital, and thereby affect the PUC's calculation of CSC's authorized base rate. Bloomfield testified briefly about the purchase and termination agreements, although the purchase agreement itself was not introduced into evidence.

In its brief filed with the PUC after the hearings, however, CSC addressed the WFP-related issues that Lanning had raised in his prefiled statement. The company provided a history of WFP and WFP's agreements with the company to illustrate, first, that WFP was not an "affiliate" of CSC and could not be deemed an affiliate simply because Bloomfield himself was an "affiliate," and, second, that the test-year royalties paid to WFP were not duplicate payments subject to refund but, rather, were a return of otherwise unrecovered investment. New Hampshire Hospital, a major CSC ratepayer, filed a brief in which it countered CSC's arguments **[***6]** and agreed with the PUC staff's recommendations.

In November 1986, the PUC issued an order that (1) rejected the CSC's requested meter rate of $ 10.00 per thousand pounds of steam; (2) approved a rate of $ 9.08 per thousand pounds of steam; and (3) directed the company to calculate and devise a means of refunding the excess revenue collected from ratepayers under the previously approved temporary rates. The accompanying report indicated that the PUC had omitted the test-year WFP royalty expenses in calculating the base rate and $ 9.08 meter rate. The report was not limited, however, to matters affecting the base-rate determination, but also contained findings on the company's agreements with WFP, and the resulting royalty payment expenses, thus implicating the ECA rate mechanism through which the company had recovered the royalty expenses.

[*426] In addressing the WFP agreements, the PUC first found that Bloomfield individually was an "affiliate" of CSC, but that the company had failed, contrary to *RSA 366:3*, to inform the PUC of the purchase agreement, and the PUC therefore had no occasion to become concerned about CSC's royalty payments until testimony in June revealed their **[***7]** purpose to reimburse WFP investors for net losses of some $ 400,000. While the PUC noted that the company's failure to file the purchase agreement, without more, would be a sufficient statutory basis for the PUC's disallowance of the estimated $ 400,000 in royalty expenses that the company would incur over five years, the PUC found that Bloomfield's imprudence in executing the purchase and partnership agreements provided an additional basis for disallowance. On the issue of Bloomfield's imprudence, the PUC found that (1) the purchase agreement omitted **[**908]** specifications for the fuel that WFP was to provide CSC, and (2), as a consequence of the carefully structured partnership agreement, Bloomfield lacked management control of WFP and, therefore, the ability to protect his and CSC's interests if the arrangement faltered.

Having determined that CSC improperly charged the royalty expenses to its ratepayers, the PUC concluded that a separate docket would be necessary to calculate the refund due ratepayers.

CSC filed a motion for rehearing or, alternatively, for a hearing in a separate docket to permit the company's presentation of additional evidence pertaining to its agreements **[***8]** with WFP. CSC asserted error in the PUC's suggestion that Bloomfield's "affiliate" status obligated CSC to file the purchase agreement, and error in the PUC's finding of Bloomfield's contractual imprudence without having the purchase agreement itself in evidence. With the motion, the company filed a copy of the purchase agreement. The PUC denied the motion for rehearing, citing the existence of ample support in the record for its findings, and the absence of information in the purchase agreement that would alter its prior decision.

In CSC's ensuing motion for clarification of the order denying a rehearing, the company again requested a separate hearing, asserting its entitlement to such a hearing under the due process clauses of the Federal and State Constitutions. CSC noted that the reasonableness of the royalty expenses, and other transactions with WFP, was a matter beyond the scope of the base-rate ratemaking proceedings, except insofar as the PUC might omit test-year royalty expenses in calculating cash working capital and the resulting base rate. The company asserted its lack of notice, prior to receipt of **[*427]** the PUC's November 1986 report, that the PUC would determine, **[***9]** upon findings of impropriety, the issue of whether the CSC should refund all royalty expenses recovered through ECA rate charges. CSC supplemented the motion with an offer of proof, summarizing testimony that it would present at the requested hearing.

The PUC accepted the offer of proof but nonetheless denied the motion, stating that the additional information in the offer of proof did not invalidate the PUC's original

findings of impropriety. The PUC observed further, in rejecting the company's due process claim, that (1) CSC had not objected to the discussion of royalties during the hearing, (2) CSC had indicated by its discussion of the WFP-related issues in its brief that it had received notice, (3) it was CSC's failure to disclose the purchase agreement that delayed the PUC's discovery of and questioning of CSC about the royalties, and (4) due process does not require advance notice of potential PUC findings in all instances, but is satisfied where the evidence supports the findings.

In this appeal, CSC challenges the PUC's findings that the royalty expenses were improper and therefore improperly charged to ratepayers. The company presents three issues, which we shall consider **[***10]** in turn. We note at the outset that although the PUC has not yet ordered refunds on the basis of its November 1986 findings, CSC properly challenges the findings now, rather than later when the company might be collaterally estopped to dispute them. The issues on appeal therefore are ripe for our consideration. Furthermore, *RSA 541:13* limits our review in this appeal, and precludes our setting aside the PUC's decisions unless CSC demonstrates by a clear preponderance of the evidence that the orders or accompanying reports are unlawful, unjust, or unreasonable.

The company contends, first, that the PUC denied it notice and an opportunity to be heard on the propriety of the royalty payments, thereby violating its right to due process under the United States and New Hampshire Constitutions. We initially address the State constitutional claim and dispose of the due process issue on that basis if we find that the State provision affords adequate protection. *State v. Ball, 124 N.H. 226, 231-32, 471 A.2d 347, 351 (1983)*.

Where governmental action would affect a legally protected interest, the due process clause of the New Hampshire Constitution, N. **[**909]** **[***11]** H. Const. pt. I, art. 15, guarantees to the holder of the interest the right to be heard at a meaningful time and in a meaningful manner. *See Appeal of Portsmouth Trust Co., 120 N.H. 753, 756, 758, 423 A.2d 603, 605-06 (1980)*. A fundamental requirement of the constitutional right to be heard is notice of the **[*428]** impending action that affords the party an opportunity to protect the interest through the presentation of objections and evidence. *See City of Claremont v. Truell, 126 N.H. 30, 35, 489 A.2d 581, 585 (1985)*; *Sununu v. Clamshell Alliance, 122 N.H. 668, 672, 448 A.2d 431, 434 (1982)*.

While due process in administrative proceedings is a flexible standard, this court long has recognized that the PUC has important quasi-judicial duties, and we therefore require the PUC's "meticulous compliance" with the constitutional mandate where the agency acts in its adjudicative capacity, implicating private rights, rather than in its rule-making capacity. *Appeal of Public Serv. Co. of N.H., 122 N.H. 1062, 1073, 454 A.2d 435, 442 (1982)*. The PUC's due process **[***12]** obligation is apparent, moreover, in the statute delineating the agency's broad investigative authority, *see RSA 365:5* and :19, 378:5, and in the provisions of the Administrative Procedure Act, *see RSA 541-A:16*, :18.

That CSC has an interest subject to the protection of due process is not in dispute, for this court has recognized a public utility's entitlement to a reasonable rate of return through its rates. *See New England Tel. & Tel. Co. v. State, 113 N.H. 92, 95, 302 A.2d 814, 817 (1973)*. The issue we must address, therefore, is whether the PUC proceedings were constitutionally sufficient to protect that interest.

The record before us indicates that CSC received inadequate notice that the PUC would make findings on matters not germane in the base-rate determination, which findings would be conclusive in later proceedings. We concede that Lanning's prefiled statement, which referred to CSC's possible violation of the affiliate contract filing requirement, and to the possibility that the test-year expenses were duplicate payments subject to refund, was sufficient to inform CSC of the PUC's concern that the royalty charges might be improper. **[***13]** In the context of a limited ratemaking proceeding, however, Lanning's statement was sufficient to provide notice only that the PUC, in the ratemaking proceeding, might disallow the test-year expenses in calculating the base rate, and that the PUC, in a subsequent proceeding, might consider further the propriety of the royalty expenses.

CSC itself does not deny that the PUC provided the aforesaid limited notice. First, the company was aware that the PUC might disregard the test-year royalty expenses in calculating the base rate. It admits its consequent lack of incentive to produce substantial evidence on the propriety of the payments, given the **[*429]** negligible effect that omission of royalty

expenses would have on the determination of the base rate. The company further asserts that in addressing the royalty payments issue in the brief it filed with the PUC, it assumed that the PUC would commence a separate proceeding, if necessary, to consider the royalty payments issue for purposes other than base-rate calculation. In view of our conclusion that the PUC provided notice for limited purposes that do not include the determination of impropriety and a concomitant refund obligation, **[***14]** we hold that the PUC failed to provide CSC with constitutionally sufficient notice of the impending findings.

In the absence of adequate notice as to the impending findings on royalty payments, CSC had no reason to offer, and did not offer, the objections or evidence that adequate notice would have induced. The company, for example, did not introduce the purchase agreement into evidence at the hearings. The PUC's post-hearings acceptance of the agreement, moreover, was not a constitutionally sufficient substitute for full consideration in hearings and briefs. In making conclusive findings without affording the CSC a meaningful opportunity to be heard, the PUC thus failed to satisfy its obligation of meticulous compliance with the requirements of due process. *See Appeal of Public Serv. Co. of N.H., 122 N.H. at 1073, 454 A.2d at 442*.

[910]** On the basis of the preceding analysis, we set aside the PUC's November 1986 findings that the royalty charges were improper, and vacate the orders denying rehearing and clarification. Because CSC does not challenge the base rate or attendant $ 9.08 meter rate that the PUC authorized in November 1986, we leave **[***15]** undisturbed the November 1986 report and order as they relate to the $ 9.08 rate. Finally, in view of our disposition of CSC's due process claim, we need not consider the company's federal constitutional claim, *see State v. Ball, 124 N.H. at 231-32, 471 A.2d at 351*, or the merits of the disputed findings.

Findings and orders vacated in part.

GREG R. THOMPSON, M.D. v. NEW HAMPSHIRE BOARD OF MEDICINE

No. 97-358

SUPREME COURT OF NEW HAMPSHIRE

143 N.H. 107*; *719 A.2d 609*; *1998 N.H. LEXIS 76

October 14, 1998, Decided

SUBSEQUENT HISTORY: **[***1]** Released for Publication November 16, 1998.

PRIOR HISTORY: Merrimack.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant New Hampshire Board of Medicine sought review of two orders of the Superior Court (New Hampshire), which granted temporary and permanent injunctive relief to plaintiff doctor in defendant's disciplinary proceedings against plaintiff. The superior court found that defendant violated plaintiff's procedural due process rights during the proceedings.

OVERVIEW: Defendant New Hampshire Board of Medicine initiated disciplinary proceeding against plaintiff doctor. During an adjournment of the proceedings, plaintiff sought injunctive relief in the superior court, arguing that his due process rights were being violated in the proceeding. Specifically, plaintiff complained that one member of the attorney general's office was permitted to act as prosecutor, while other was advising the board and helping to preside over the proceeding. Plaintiff also complained that two individuals with conflicts of interest were permitted to sit as public members of defendant. The superior court granted injunction relief based upon its determination that a present threat of irreparable harm existed and that no adequate, alternative remedy at law existed. On appeal, defendant argued that its actions were not final and therefore not subject to judicial review and that the proper remedy would have been appeal to the court. The court affirmed and held that the superior court had the authority to exercise its equitable jurisdiction before final judgment in exceptional circumstances where irreparable harm could result from a due process violation.

OUTCOME: The court affirmed the injunctive relief granted by the superior court to plaintiff doctor in defendant New Hampshire Board of Medicine's disciplinary proceeding against plaintiff. The superior court was authorized to intervene prior to entry of final judgment when there was a possibility that due process violations could cause irreparable harm.

LexisNexis(R) Headnotes

Civil Procedure > Remedies > Injunctions > Elements > General Overview
Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

[HN1] The superior court has the power to grant injunctive relief where a party would otherwise suffer immediate irreparable harm. It is within the trial court's sound discretion to grant an injunction after consideration of the facts and established principles of equity. We will uphold the issuance of an injunction absent an error of law, abuse of discretion, or clearly erroneous findings of

fact.

Civil Procedure > Remedies > Injunctions > Elements > General Overview
Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
[HN2] Generally, the superior court may grant injunctive relief where: (1) a potential due process violation or prejudice has occurred; (2) an important collateral issue completely separate from the merits of the action can be resolved; and (3) failure to review would result in serious and immediate harm. Essentially, the complainant has the burden of persuading the superior court that exceptional circumstances justify a departure from the basic policy of postponing review until after the entry of a final judgment.

Civil Procedure > Remedies > Injunctions > Elements > General Overview
Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine
[HN3] Parties cannot circumvent the statutory appeal process under the guise of a petition for injunctive relief concerning issues directly related to the merits of the underlying proceeding, such as evidentiary rulings, and collateral issues that lack immediate irreparable impact. The superior court may, however, intervene prior to entry of final judgment in exceptional circumstances where, as here, a party raises a due process violation that fundamentally impedes the fairness of an underlying proceeding resulting in immediate and irreparable harm to that party.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
[HN4] See *N.H. Rev. Stat. Ann. § 329:17*, VIII.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
[HN5] *N.H. Rev. Stat. Ann. § 541:18* states that only the New Hampshire supreme court shall suspend an operation of an order of the New Hampshire Board of Medicine.

Administrative Law > Judicial Review > Reviewability > Preclusion
[HN6] See *N.H. Rev. Stat. Ann. § 541:22*.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
Administrative Law > Separation of Powers > Primary Jurisdiction
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction
[HN7] The New Hampshire supreme court's exclusive jurisdiction to review the New Hampshire Board of Medicine's conduct at the sanction hearing arises only after the board issues an order. Until that time, the superior court may exercise its equitable jurisdiction to stay the actions of the board in limited circumstances.

HEADNOTES

1. Injunction - Generally - Discretion of Court

Superior court has power to grant injunctive relief where a party would otherwise suffer immediate irreparable harm; it is within trial court's sound discretion to grant injunction after consideration of facts and established principles of equity, and court on appeal will uphold issuance of injunction absent error of law, abuse of discretion, or clearly erroneous findings of fact.

2. Injunction - Factors - Clear Violation of Rights

Generally, superior court may grant injunctive relief where: (1) potential due process violation or prejudice has occurred; (2) important collateral issue completely separate from merits of action can be resolved; and (3) failure to review would result in serious and immediate harm.

3. Appeal and Error - Interlocutory Appeal - Scope of Review

Superior court did not err in exercising its equitable jurisdiction to review board of medicine's conduct prior to final disposition of disciplinary hearing; where doctor raised issue of a due process violation that fundamentally impeded fairness of underlying proceeding, resulting in immediate and irreparable harm to him, this was an exceptional circumstance justifying intervention of superior court prior to board's entry of final judgment. RSA 329 VIII (1995).

4. Appeal and Error - Interlocutory Appeal - Scope of Review

Supreme court's exclusive jurisdiction to review board of medicine's conduct at a sanction hearing arises only after board issues an order, and where board commenced an ongoing proceeding and had not yet issued a disciplinary sanction, superior court could appropriately exercise its equitable jurisdiction to review and stay the board's actions. RSA 329 VIII; 541

1. Workers' Compensation - Proceedings to Secure Compensation - Notice and Proof of Claim

Employer bore burden of proving it was prejudiced by employee's defective notice of injury, and although determination of whether employer or workers' compensation insurance carrier were prejudiced was a question of fact, when defective notice could properly be asserted was a question of law, reviewable de novo by supreme court.

2. Workers' Compensation - Proceedings to Secure Compensation - Notice and Proof of Claim

Since employer and its insurer failed to properly follow workers' compensation procedures established by former statute as well as their own policies regarding injury reporting, employer could not later claim prejudice from employee's defective notice of injury; due to sheer size of nuclear power plant construction project--employing over ten thousand workers-- employer and its insurer, apparently with department of labor's blessing, developed their own method of reporting workplace injuries, and where employee acted in accordance with those procedures, established for employer's own convenience, it would be unreasonable as a matter of law for employer to claim prejudice. RSA 281 (1977); 281 (1987).

3. Workers' Compensation - Proceedings to Secure Compensation - Attorney Fees

Where statute providing for award of fees and costs in appeals from workers' compensation proceedings was vague as to procedure to be followed for requesting such award, issue of employee's entitlement to attorney's fees and costs was properly before supreme court. RSA 281-A I; 541

4. Workers' Compensation - Generally - Rules of Construction

Supreme court is final arbiter of meaning of workers' compensation statute, and if language of statute is ambiguous, court will adopt construction favorable to claimant in order to give broadest reasonable effect to remedial purpose of workers' compensation laws.

5. Workers' Compensation - Proceedings to Secure Compensation - Attorney Fees

In order for a workers' compensation claimant who initiates appeal process to "prevail" for purposes of RSA 281-A I, that claimant, as a result of the appeal, must have secured a legal right or financial benefit greater than he or she had received prior to the appeal; if employer initiates the appeal, attorney's fees are appropriate when claimant prevails in the defense of his or her entitlement. RSA 281-A I; N.H. Admin. Rule , Lab. 510.05.

6. Workers' Compensation - Proceedings to Secure Compensation - Attorney Fees

Under statute providing for award of attorney's fees and costs to party who "prevails" in an appeal from a workers' compensation proceeding, a benefit entitling a claimant to fees is not limited to payment of compensation; it could include the grant of a nonmonetary benefit, such as a new hearing. RSA 281-A I; N.H. Admin. Rule , Lab. 510.05.

7. Costs - Recovery of Costs and Attorney Fees - Generally

Where an appellant's unsuccessful claims are severable analytically from his successful ones, any attorney's fee award should be reduced to exclude time spent on unsuccessful claims.

8. Workers' Compensation - Proceedings to Secure Compensation - Attorney Fees

A two-step process is to be employed to determine an award of attorney's fees and costs in appeals from workers' compensation proceedings: (1) whether claimant prevailed and is entitled to fees and costs under statute; and (2) whether amount of fees and costs requested is reasonable; supreme court is in best position to determine entitlement to fees and evaluate reasonableness of amount of fees for appeals to supreme court, and compensation appeals board is in best position in the first instance to adjudicate an award for proceedings before it. RSA 281-A I; N.H. Admin. Rule , Lab. 510.05.

COUNSEL: Stanton E. Tefft, of Bedford, by brief and orally, for the plaintiff.

Philip T. McLaughlin, attorney general (Jennifer Brooks Gavilondo, attorney, on the brief and orally), for the defendant.

JUDGES: HORTON, J. All concurred.

OPINION BY: HORTON

OPINION

[610] [*108]** HORTON, J. The defendant, the New Hampshire Board of Medicine (board), appeals two orders of the Superior Court (*Galway*, J.) granting temporary and permanent injunctive relief to the plaintiff, Greg R. Thompson, M.D. The superior court found that the board violated Dr. Thompson's procedural due process rights during the pendency of disciplinary proceedings against him. On appeal, the board contends that the superior court should have refrained from exercising its equitable jurisdiction to review the board's conduct. We affirm.

The board commenced disciplinary proceedings against the plaintiff as a result of allegations that he had engaged in professional misconduct. Dr. Thompson admitted to the allegations, and the board commenced a hearing on **[***2]** February 5, 1997, to determine the appropriate sanction. The board adjourned the hearing at the end of the day without rendering a final decision and kept the record open until February 21.

Dr. Thompson subsequently filed a petition for temporary and permanent injunctive relief with the superior court, claiming that the board had violated his right to due process under the State and Federal Constitutions. Dr. Thompson argued that the board deprived him of a fair and impartial hearing in: (1) permitting one member of the attorney general's office to act as prosecutor, and another to advise the board and help preside over the disciplinary hearing without maintaining adequate "walls of division" between them; and (2) allowing two individuals with conflicts of interest to sit as public members of the board in contravention of *RSA 329:2* (1995 & Supp. 1997). At that time, the board had taken no disciplinary action nor issued any orders concerning Dr. Thompson.

After holding a hearing, the superior court temporarily enjoined the board from conducting **[**611]** further proceedings against Dr. Thompson. The court determined that: (1) a present threat of irreparable harm existed; (2) no adequate, alternative **[***3]** remedy at law existed; (3) there was a likelihood of success on the merits by a balance of the probabilities; and (4) the public interest would not be adversely affected if the court granted the preliminary injunction. *See UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14-15, 533 A.2d 372, 374 (1987)*.

When neither party requested a further hearing on the issue regarding the conduct of the attorney general's office, the superior court permanently enjoined the board from conducting further proceedings against Dr. Thompson unless certain procedural conditions, the substance of which is not relevant to this appeal, were met. After reviewing the information presented at the prior hearing **[*109]** and the transcript of the February 5 hearing, the court found that the board's actions produced an appearance of impropriety "which is so substantial as to be a denial of due process."

Thereafter, the board resumed its hearing against Dr. Thompson in compliance with the court's order. On July 3, the board issued a final order revoking Dr. Thompson's medical license for a period of not less than four years.

On appeal, the board challenges the superior court's exercise of equitable jurisdiction to **[***4]** review its proceedings. Specifically, the board contends that: (1) the board's actions were not "final agency action" subject to judicial review under *RSA 329:17, VIII* (1995); and (2) the supreme court has exclusive appellate jurisdiction to review the board's disciplinary action and stay or suspend an order of the board, *see id.*; *RSA 541:18*, :22 (1997), which provides Dr. Thompson an adequate remedy at law.

We need not review the merits of the injunction because the board did not preserve this issue on appeal. *See Dube v. Town of Hudson, 140 N.H. 135, 138, 663 A.2d 626, 628 (1995)*. The board conceded at oral argument that this appeal focuses exclusively on whether the superior court should have refrained from exercising its equitable jurisdiction to review the actions of the board.

We first address the board's argument that its conduct during the February 5 hearing did not constitute "final agency action" subject to judicial review. *See RSA*

329:17, VIII. In essence, the board argues that Dr. Thompson should have raised any alleged procedural or evidentiary violations in an appeal to this court only after the board had a full opportunity to impose an appropriate sanction. **[***5]** The board contends that the superior court subjected its actions to unwarranted interlocutory review and interfered with the efficiency of disciplinary proceedings. We disagree.

[HN1] The superior court has the power to grant injunctive relief where a party would otherwise suffer immediate irreparable harm. *See UniFirst Corp., 130 N.H. at 13, 533 A.2d at 374*. It is within the trial court's sound discretion to grant an injunction after consideration of the facts and established principles of equity. *See Smith v. N.H. Bd. of Psychologists, 138 N.H. 548, 550, 645 A.2d 651, 652 (1994)*. "We will uphold the issuance of an injunction absent an error of law, abuse of discretion, or clearly erroneous findings of fact." *Id. at 550, 645 A.2d at 652-53*.

[HN2] Generally, the superior court may grant injunctive relief where: (1) a potential due process violation or prejudice has occurred; (2) an important collateral issue completely separate from **[*110]** the merits of the action can be resolved; and (3) failure to review would result in serious and immediate harm. *See Unifirst Corp., 130 N.H. at 14-15, 533 A.2d at 374*; *cf. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 57 L. Ed. 2d 351,* **[***6]** *98 S. Ct. 2454 (1978)* (noting that to fall within a limited exception to the final judgment rule, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment"); *Cohen v. Beneficial Loan Corp., 337 U.S. 541, 545-46, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949)* (discussing federal statute authorizing immediate appeal of orders concerning collateral matters independent of the underlying case itself and "too important to be denied review"). Essentially, the complainant "has the burden of **[**612]** persuading the [superior court] that exceptional circumstances justify a departure from the basic policy of postponing . . . review until after the entry of a final judgment." *Coopers & Lybrand, 437 U.S. at 475*.

[HN3] Parties cannot circumvent the statutory appeal process under the guise of a petition for injunctive relief concerning issues directly related to the merits of the underlying proceeding, such as evidentiary rulings, and collateral issues that lack immediate irreparable impact. The superior court may, however, intervene prior to entry of final judgment **[***7]** in exceptional circumstances where, as here, a party raises a due process violation that fundamentally impedes the fairness of an underlying proceeding resulting in immediate and irreparable harm to that party. *See Unifirst Corp., 130 N.H. at 13-15, 533 A.2d at 373-74*; *cf. Coopers & Lybrand, 437 U.S. at 468* (explaining collateral-order doctrine which permits appellate review prior to final judgment). Accordingly, we cannot say, under the circumstances of this case, that the superior court abused its discretion or committed an error of law when it exercised its equitable jurisdiction to review the board's conduct prior to final disposition of the sanction hearing. *See Smith, 138 N.H. at 550, 645 A.2d at 652-53*.

We next address the board's claim that Dr. Thompson's statutory right to appeal the board's actions to the supreme court and seek a stay or suspension of the board's order from the supreme court provides him an adequate remedy at law. *See RSA 329:17*; *RSA 541:18*, :22. The board essentially argues that even if the board committed due process violations, the superior court lacked jurisdiction to review the board's conduct because Dr. Thompson had not exhausted **[***8]** his administrative remedies at the supreme court level. We disagree.

[HN4] **[*111]** *RSA 329:17, VIII* provides that "[*]disciplinary action* taken by the board under this section may be appealed to the supreme court under RSA 541. However, no *sanction* imposed by the board shall be stayed during appeal." (Emphasis added.) Likewise, [HN5] 541:18 states that only the supreme court "shall suspend the operation of [an] *order*" of the board. (Emphasis added.) In addition, [HN6] *RSA 541:22* states that "no proceeding other than the appeal herein provided for shall be maintained in any court of this state to set aside, enjoin the enforcement of, or otherwise review or impeach any *order* of the commission, except as otherwise specifically provided." (Emphasis added.) Accordingly, [HN7] this court's exclusive jurisdiction to review the board's conduct at the sanction hearing arises only after the board issues an order. Until that time, the superior court may exercise its equitable jurisdiction to stay the actions of the board in limited circumstances. *Cf. Smith, 138 N.H. at 549-50, 645 A.2d at 652-53*; *UniFirst Corp., 130 N.H. at 12-14, 533 A.2d at 373-74*. Here, the board commenced an ongoing proceeding **[***9]** and

had not yet issued its final decision when the superior court granted Dr. Thompson's requests for injunctive relief. As such, the superior court appropriately exercised its equitable jurisdiction to review the board's actions before the board had imposed a disciplinary sanction in this matter.

Moreover, given that "no sanction should be stayed during the appeal," an appeal only to the supreme court may not offer an adequate remedy for some plaintiffs. *RSA 329:17, VIII*. In the case of disciplinary proceedings against a medical doctor, the board has the power to suspend or revoke a doctor's license. Such suspension or revocation remains in effect during the appeal period and may have severe repercussions on the doctor's livelihood. For example, a physician, like Dr. Thompson, most likely would be unable to recover lost income and a decreased patient base during the appeal period. Under the circumstances in this case, it is appropriate for the superior court to have equitable jurisdiction to review the lawfulness of the board's proceedings prior to the imposition of a disciplinary sanction.

The board's remaining arguments either are not preserved for appeal, *see Dube, 140 N.H.* **[***10]** *at 138, 663 A.2d at 628*, or are without merit, *see Vogel v. Vogel, 137 N.H. 321, 322,* **[**613]** *627 A.2d 595, 596 (1993)*. Consequently, we need not address them.

Affirmed.

All concurred.