

State of New Hampshire Supreme Court

APPEALS OF

SAVE OUR GROUNDWATER,
TOWN OF NOTTINGHAM,
and
TOWN OF BARRINGTON

N.H. Sup. Ct. No. 2004-0601

MOTION FOR REHEARING AND RECONSIDERATION

NOW COMES Save Our Groundwater (SOG), by and through its attorney Joshua L. Gordon, and respectfully requests this honorable Court to rehear this case and reconsider its ruling.

As grounds it is stated:

1. This Court's approach to statutory interpretation is well settled. "We are the final arbiter of legislative intent as expressed in the words of the statute *considered as a whole*. We first examine the language of the statute and ascribe the *plain and ordinary meanings to the words* used. We interpret statutes in the context of the *overall statutory scheme and not in isolation*." *City of Rochester v. Corpening*, ___ N.H. ___ (decided May 26, 2006) (citations omitted, emphasis added). "Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the *policy sought to be advanced* by the entire statutory scheme." *Simpson v. Young*, ___ N.H. ___ (decided May 16, 2006) (emphasis added). "We construe *all parts of a statute together* to effectuate its overall purpose and *avoid an absurd or unjust result*." *State v. Horner*, ___ N.H. ___ (decided Mar. 15, 2006) (emphasis added).

I. Public Trust

2. In its decision, this Court ruled that groundwater is not subject to the statutory public trust doctrine contained in RSA 481:1. RSA 485-C:1, however, which this Court ruled *does* apply to this case, provided (before its recent amendments): “The state as *trustee* of [groundwater] for the *public* benefit” declares its authority to provide stewardship. RSA 485-C:1 also provided: “The state, which has general responsibility for groundwater management in the *public trust*” has authority for groundwater regulation. The statute thus states the public trust doctrine clearly and unambiguously, and it is apparent that the Court overlooked or misapprehended the law, thereby undermining the “policy sought to be advanced by the entire statutory scheme.”

II. Wetlands

3. RSA 482-A:3, I provides that “[n]o person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state.” This Court ruled that the statute does not contain the word “water,” *Slip.Op.* at 6, and that therefore it does not prohibit the removal of water. Despite the statute’s declared purpose of “protect[ing] . . . wetlands . . . from despoliation and unregulated alteration,” RSA 482-A, I, this Court’s interpretation allows a person to remove as much water as they like as long as it can be accomplished without erecting a structure. This is an “absurd result,” contrary to accepted modes of statutory interpretation.

III. Need

4. As this Court noted, the groundwater statute requires an applicant to make a showing of “need.” RSA 485-C:4,XII(b). This Court construed the word “need” to mean “a want of something requisite, desirable, or useful.” *Slip.Op.* at 13. Regardless of what dictionary is consulted, the “plain and ordinary meaning” of “need” is not “want.”

IV. Burden of Proof

5. RSA 485-C:21, I provides that “[n]o person may withdraw 57,600 gallons or more of [groun]water in any 24-hour period . . . without the prior approval of the department.”

Heretofore it is been the duty of the applicant to prove the water could be removed without adverse impacts before a permit could be approved. After the Court’s ruling, it is now DES’s or an intervenor’s burden to prove the removal will cause adverse impacts before a permit can be denied, so long as the applicant is willing to monitor, report, and mitigate. *Slip.Op.* at 18. This reversal of the burden of proof constitutes an “unjust result” emasculating rather than implementing the “overall statutory scheme.”

WHEREFORE Save Our Groundwater respectfully requests this honorable Court to rehear this case and reconsider its ruling.

Respectfully submitted
for Save Our Groundwater
by its attorney,

Dated: June 14, 2005

Joshua L. Gordon, Esq.
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I hereby certify on this 14th day of May 2006, a copy of the foregoing is being forwarded to Save Our Groundwater, % Denise Hart, PO Box 182, Barrington, NH 03825; Steven B. Conklin, 80 Al Wood Dr., Barrington, NH 03825; James H. Page, Jr., Robin Marshall, & Thomas Marshall, PO Box 1254, Dover, NH 03821; Ed Mosca, Esq., Soltani & Mosca, PLLC, P.O. Box 457, Epsom, NH 03234 (for USA Springs, Inc.); Mark E. Beliveau, Esq., Pierce Atwood, 1 New Hampshire Ave., Suite 350, Portsmouth, NH 03801 (for Town of Barrington); E. Tupper Kinder, Esq., Nelson, Kinder, Mosseau and Saturley, PC, 99 Middle Street, Manchester, NH 03101 (for Town of Nottingham); Michael P. Nolin, Commissioner, N.H. DES, P.O. Box 95, Concord, NH 03302; Jennifer Patterson, Assistant Attorney General, Office of the Attorney General, 33 Capitol St., Concord, N.H. 03301; Linda A. Jenkins, Jenkins Legal Services, PO Box 177, Eaton Center, NH 03832; Roy A. Duddy, Duddy Law Offices PA, 175 Route 101, Bedford, NH 03110; and to Gordon R. Blakeney, Jr., 105 Loudon Road B-4 Suite C, Concord, NH 03301.

Dated: June 14, 2005

Joshua L. Gordon, Esq.