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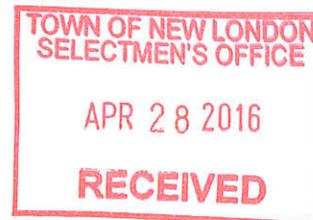
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April 26, 2016



Darlene Forst, Supervisor
NH Wetlands Bureau
NH Department of Environmental Services
PO Box 95
Concord, NH 03302-0095

In re: Dredge and Fill Application of Samuel Rowse 2016-635
47 Sunset Shores, New London, NH

Dear Darlene::

Please accept this letter on behalf of my client, Samuel Rowse, who has a pending application for permit to reconstruct his permanent dockage and over the water boat house on Lake Sunapee. The purpose of this letter is to respond to comments forwarded to the Department by the New London Planning Board, in which it states the proposed modification of the boathouse roof will create more usable space and is in violation of the Zoning Ordinance, and where it also states that the proposed dock reconstruction must be minimalist.

Boathouse: Firstly, as the plans show, the boathouse will not have a second floor. The increased pitch of the roof is proposed solely for snow load, and will constitute empty space in the interior. Secondly, no views are impacted as the shoreline is straight, and at least one abutter has personally called me in support of the application. Finally, as the New Hampshire Supreme Court ruled in Lakeside Lodge v. Town of New London, 158 NH 164 (2008), "the DES guidelines state that only the federal... and state... governments have the authority to impose on-lake regulations upon State-owned public water and that dock and mooring regulations are considered 'on-lake' management". (In that case, the Court distinguished RSA 482-A from the Shoreland Protection Act 483-B, which specifically allows Towns to impose more stringent standards because the land involved is private land.) Accordingly, because the proposed roof pitch will not affect views, create any greater usable space, or violate any legally enforceable Town Ordinance provision, the increase in pitch is justified to assure the continued functionality of the boathouse.

Dock Repair: As stated in the application, the plans provide for a reduction in impact by converting a crib supported dock with piling closest to shore so, even if the Town Ordinance did

apply to docks in public waters, the proposal would in fact be less impacting.

Please know that I will be following up directly with the Town on these matters and that I would expect the Town's issues to be handled at the local level. This would mean that the State should be able to go forward with its separate permitting process notwithstanding the Town's position.

Kindly contact me with any questions you may have.

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. A. Nadeau', with a long horizontal flourish extending to the right.

Regina A. Nadeau

RAN/sps

enclosure (1)

cc: Rob Turpin
Samuel Rowse
Lucy St. John, Town of New London
file

Lakeside Lodge v. Town of New London

Supreme Court of New Hampshire

October 15, 2008, Argued; December 5, 2008, Opinion Issued

No. 2008-247

Reporter

158 N.H. 164; 960 A.2d 1268; 2008 N.H. LEXIS 140

LAKESIDE LODGE, INC. v. TOWN OF NEW LONDON

SUBSEQUENT HISTORY: Released for Publication December 5, 2008

Prior History: [***1] Merrimack.

Disposition: Reversed.

Core Terms

dock, boat, regulation, ordinance, zoning, municipality, wetlands, rights, waters, Lake, public water, users, preempted, shoreland, state law, provisions, navigable, local regulation, mooring, nonconforming, quotation, littoral, argues, repair

Case Summary

Procedural Posture

Respondent town's zoning board of adjustment (ZBA) imposed a boat use limit on petitioner property owner's dock. The Merrimack Superior Court (New Hampshire) affirmed the ZBA's decision. The owner appealed.

Overview

The court held that the legislature had preempted local regulation of private dock use for boat storage on the lake in question. The court first noted that by expressly permitting the owner to repair its dock, the state had placed its imprimatur upon the owner's use of its dock for personal boating. Implicit within this permission was the right to use the entire repaired dock for personal boating and boat docking, a clear exercise of its common law and littoral rights. *RSA 674:21, 1(j)* (2008) did not allow additional municipal regulation of the owner's private dock. To say that the statute conferred general authority incidental to shoreland protection to regulate personal boating and boat docking upon state-owned waters stretched its language beyond logic. *RSA 47:17,*

VII (2003) granted towns only the authority to regulate public docks. It did not imply local authority to regulate the use of private docks for personal boating or boat docking on public waters. Finally, the definition of "wetlands" in *RSA 482-A:2, X* (Supp. 2008) did not, by itself, suggest local authority to regulate personal boating and boat docking on waters held in trust for the public.

Outcome

The court reversed the trial court's decision.

LexisNexis® Headnotes

Real Property Law > Zoning > Judicial Review

HN1 Appellate review of zoning board decisions is limited. The appellate court will uphold the trial court's decision unless the evidence does not support it or it is legally erroneous.

Governments > Legislation > Interpretation

HN2 The court is the final arbiter of the meaning of a statute as expressed by the words of the statute itself.

Governments > Local Governments > Ordinances & Regulations

Real Property Law > Zoning > Ordinances

HN3 A 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. State law preempts local law 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. In addition, state law may preempt local regulation if such regulation frustrates the statute's purpose, or the very nature of the regulated subject

matter demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.

Environmental Law > Natural Resources & Public Lands > General Overview

Governments > Local Governments > Duties & Powers

Real Property Law > Zoning > General Overview

HN4 The state has delegated to municipalities authority to regulate and restrict certain land uses. RSA 674:16 (2008). An overlay district is one that is superimposed over one or more zoning districts and imposes specified requirements in addition to those otherwise applicable for the underlying zone. Where the state has not preempted the area, a municipality may zone to protect its shorelines.

Environmental Law > Natural Resources & Public Lands > General Overview

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN5 The use of lakes of 10 or more acres is controlled by the state, which holds these valuable resources, RSA 483-B:1, II (2003), in trust for public use. RSA 271:20, I (1999); RSA 483-B:1, II (state has the jurisdiction to control the use of the public waters and the adjacent shoreland for the greatest public benefit). The state is the exclusive steward of public trust rights, a bundle of all useful and lawful purposes, such as the common law right to boat recreationally.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN6 Numerous statutes regulate the right to boat. RSA ch. 233-A (1993 & Supp. 2008) ("Access to Public Waters"); RSA ch. 270 (1999 & Supp. 2008) ("Supervision of Navigation; Registration of Boats and Motors; Common Carriers by Water"); RSA ch. 270-A (1999) ("Use of Houseboats"); RSA ch. 270-B (1999) ("Abandoned Boats"); RSA ch. 270-D (1999 & Supp. 2008) ("Boating and Water Safety on New Hampshire Public Waters"); RSA ch. 485 (2001 & Supp. 2008) ("New Hampshire Safe Drinking Water Act"); RSA ch. 485-A (2001 & Supp. 2008) ("Water Pollution and Waste Disposal"); RSA ch. 487 (2001 & Supp. 2008) ("Control of Marine Pollution and Aquatic Growth"). This broad statutory framework is intended to safeguard public waters in light of the fact that competing uses for the enjoyment of these waters, if not regulated for the

benefit of all users, may diminish the value to be derived from them. RSA 270:1, II (1999).

Environmental Law > Natural Resources & Public Lands > General Overview

HN7 As the steward of public waters, the state safeguards the right to use and enjoy public waters by avoiding piecemeal on-water regulation. The public trust doctrine imposes limits upon a municipality's use of public waters. Nowhere is the peremptory judgment of the legislature better expressed than in RSA ch. 483-A, creating the Lakes Management Protection Program and ordering the development of detailed guidelines for coordinated lake management and shoreland protection plans together with recommendations for implementation. RSA 483-A:7, I (Supp. 2008).

Real Property Law > Water Rights > General Overview

HN8 Littoral rights are incidental property rights associated with ownership of lakeshore property. While the state holds title to the bed of the great ponds, littoral owners have rights which are more extensive than those of the public generally. These include the right to use and occupy the waters adjacent to their shore for a variety of recreational purposes. Such littoral rights, however, are always subject to the paramount right of the state to control them reasonably in the interests of navigation, water storage and classification, health and other public purposes.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN9 Construction connotes use. Construction of docks on public waters is prohibited without a Department of Environmental Services (DES) permit. RSA 482-A:3, I(a) (Supp. 2008); RSA 483-B:9, II(c) (Supp. 2008). RSA ch. 482-A prescribes detailed siting and construction requirements. RSA 482-A:3, XIII (2001). The DES administrative rules prescribe additional restrictions. N.H. Code Admin. R. Ann. Env.-Wt 402.01 ("Configuration"), 402.02 ("Navigation Space"), 402.03 ("Dimensions"), 402.04 ("Setbacks").

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN10 The administrative regulations prescribe frontage requirements per "boating slip" for lots with more than seventy-five feet of shoreline frontage in order to lessen congestion, improve public safety and navigation,

protect neighboring property values, provide sufficient area for construction of facilities, provide adequate area for boat maneuvering, and protect health, safety and general welfare. N.H. Code Admin. R. Ann. Env.-Wt 402.13.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN11 The statutory scheme regulating the mooring of watercraft reveals the state's expectation that private dock users will make use of the entire dock for personal boating and docking. RSA 270:59 - 270:72 (1999 & Supp. 2008). The provisions of RSA ch. 270 are intended to maintain jurisdiction to control the use of public waters for the greatest public benefit, RSA 270:60, I(a) (1999), by curtailing the undue proliferation of moorings, RSA 270:60, I(c) (1999). The Department of Safety is charged with issuing mooring permits on Lake Sunapee. RSA 270:61, I (Supp. 2008). Individual mooring permit applications require the applicant to list the length and width of existing docking structures together with the number of boating slips and explain why they are insufficient to meet the user's need. N.H. Code Admin. R. Ann. Saf.-C 408.05(a)(1), 408.06(b)(12)-(13), (15)(d)(1). These provisions impel private dock users to exhaust available watercraft storage before seeking a mooring permit.

Real Property Law > Zoning > Nonconforming Uses

HN12 Although the Supreme Court of New Hampshire has expressly permitted a zoning board of adjustment to define and constrain nonconforming uses, such authority derives from, and is coextensive with, the authority to enact the underlying ordinance because nonconforming use is the byproduct of regulation.

Governments > Local Governments > Duties & Powers

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN13 Cities and towns have only those powers which are granted to them by the legislature. A town lacks specific legislative authority to infringe upon the right to boat. Such authority is necessary to enact on-water regulations within public waters. Specific legislative authorization is required if a local municipality's action infringes upon public trust rights in bodies of water.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN14 By any measure, the boundaries of a town's authority under RSA 674:21, I (2008) are not precisely drawn, RSA 674:16, II (2008), but to say that the statute confers general authority incidental to shoreland protection to regulate personal boating and boat docking upon state-owned waters stretches its language beyond logic.

Governments > Legislation > Interpretation

HN15 A court interprets a statute to lead to a reasonable result.

Environmental Law > Natural Resources & Public Lands > General Overview

Real Property Law > Zoning > Ordinances

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN16 Perhaps the clearest statutory grant of retained, local shoreland protection authority is found within the Comprehensive Shoreland Protection Act, RSA ch. 483-B 2001 & Supp. 2008), which sets the minimum standards for shoreland protection, RSA 483-B:2 (2001), and permits municipalities to adopt land use control ordinances which are more stringent. RSA 483-B:8, I (2001). RSA ch. 483-B, however, lacks any provisions regulating the use of docks for boating or boat docking as part of shoreland protection. Had the legislature intended to permit municipalities to enact such regulations, it could have explicitly done so.

Environmental Law > Natural Resources & Public Lands > General Overview

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN17 The Department of Environmental Services guidelines state that only the federal and state governments have the authority to impose on-lake regulations upon state-owned public water and that dock and mooring regulations are considered "on-lake" management. N.H. Guidelines for Coordinated Lake Mgmt. and Shoreland Prot. Plans 53-54 (2008).

Governments > Legislation > Interpretation

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN18 Vesting localities with broad authority to enact piecemeal on-water regulation of recreational boating and boat docking would threaten the State's need and

158 N.H. 164, *164; 960 A.2d 1268, **1268; 2008 N.H. LEXIS 140, ***1

desire for uniform regulation, which is expressly manifested within the broader statutory scheme governing regulation of public waters. The legislature will not be presumed to pass an act nullifying, to an appreciable extent, the purpose of the statute.

Real Property Law > Zoning > Ordinances

HN19 Municipal zoning ordinances cannot frustrate the purpose or implementation of a general or special law enacted by the state legislature.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN20 Local regulation of wharves may not be exercised contrary to state statutory provisions or policy.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN21 RSA 47:17, VII (2003) grants towns only the authority to regulate public docks. Consistent with well-established rules of statutory interpretation, the New Hampshire Supreme Court does not find within RSA 47:17, VII, implied local authority to regulate the use of private docks for personal boating or boat docking on public waters.

Governments > Legislation > Interpretation

HN22 Normally the expression of one thing in a statute implies the exclusion of another.

Environmental Law > Natural Resources & Public Lands > Wetlands Management

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > State & Local Regulation

HN23 The statutory definition of "wetlands," found within the provisions authorizing local land use regulation, does not, by itself, suggest local authority to regulate personal boating and boat docking on waters held in trust for the public. RSA 482-A:2, X (Supp. 2008) ("Wetlands" means an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions"). The legislature could have defined "wetlands" either to facilitate wetland setbacks or for local wetland regulation outside the sphere of any exclusive state wetland regulation.

Environmental Law > Natural Resources & Public Lands > Wetlands Management

Governments > Local Governments > Duties & Powers

HN24 Municipalities may adopt local ordinances to further wetland protection in areas outside the State's regulation. Local regulation of wetlands is permitted when not in direct conflict with state law.

Headnotes/Syllabus

Headnotes

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH1. 1.

Zoning and Planning > Ordinances > Preemption

A 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.

NH2. 2.

Municipal Law > Construction of Ordinances > Preemption

State law preempts local law 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. In addition, state law may preempt local regulation if such regulation frustrates the statute's purpose, or the very nature of the regulated subject matter demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.

NH3. 3.

Zoning and Planning > Generally > Definitions

An overlay district is one that is superimposed over one or more zoning districts and imposes specified requirements in addition to those otherwise applicable for the underlying zone.

NH4. 4.

Zoning and Planning > Ordinances > Preemption

Where the state has not preempted the area, a municipality may zone to protect its shorelines.

NH5. 5.

Waters > Submerged Lands > Public Trust Doctrine

The state is the exclusive steward of public trust rights, a bundle of all useful and lawful purposes, such as the common law right to boat recreationally.

NH6. 6.

Waters > Submerged Lands > Public Trust Doctrine

As the steward of public waters, the state safeguards the right to use and enjoy public waters by avoiding piecemeal on-water regulation.

NH7. 7.

Waters > Riparian and Littoral Rights and Duties > Ownership and Control

Littoral rights are incidental property rights associated with ownership of lakeshore property. While the state holds title to the bed of the great ponds, littoral owners have rights which are more extensive than those of the public generally. These include the right to use and occupy the waters adjacent to their shore for a variety of recreational purposes. Such littoral rights, however, are always subject to the paramount right of the state to control them reasonably in the interests of navigation, water storage and classification, health and other public purposes.

NH8. 8.

Waters > Riparian and Littoral Rights and Duties > Particular Cases

By expressly permitting an owner to repair its dock in 1995, the state placed its imprimatur upon the use of the dock for personal boating. Construction connotes use.

NH9. 9.

Waters > Riparian and Littoral Rights and Duties > Particular Cases

The court found implicit within the state's permission for an owner to repair its private dock the right to use the entire repaired dock for personal boating and boat docking — a clear exercise of its common law and littoral rights.

NH10. 10.

Waters > Riparian and Littoral Rights and Duties > Generally

The statutory scheme regulating the mooring of watercraft reveals the state's expectation that private

dock users will make use of the entire dock for personal boating and docking. RSA 270:59-:72.

NH11. 11.

Zoning and Planning > Administration and Enforcement > Administrative Authorities

Although a zoning board of adjustment has broad authority to act under the statute defining its powers, it acted ultra vires by imposing a six-user, six-boat limit upon the owner of a private dock. RSA 674:33.

NH12. 12.

Zoning and Planning > Generally > Exceptions, Variances, and Nonconforming Uses

Although a zoning board of adjustment may define and constrain nonconforming uses, such authority derives from, and is coextensive with, the authority to enact the underlying ordinance because nonconforming use is the by-product of regulation.

NH13. 13.

Municipal Law > Generally > Powers

Cities and towns have only those powers which are granted to them by the legislature.

NH14. 14.

Municipal Law > Generally > Powers

A town lacked specific legislative authority to infringe upon the right to boat. Such authority was necessary to enact on-water regulations within public waters.

NH15. 15.

Zoning and Planning > Generally > Construction of Statutory Provisions

By any measure, the boundaries of a town's authority under the statute pertaining to innovative land use controls are not precisely drawn, but to say that the statute confers general authority incidental to shoreland protection to regulate personal boating and boat docking upon state-owned waters stretches its language beyond logic. RSA 674:21, I.

NH16. 16.

Statutes > Generally > Avoidance of Absurd or Unjust Results

A court interprets a statute to lead to a reasonable result.

NH17. 17.

Environment and Natural Resources > Environmental Protection > Particular Matters

The Comprehensive Shoreland Protection Act lacks any provisions regulating the use of docks for boating or boat docking as part of shoreland protection. Had the legislature intended to permit municipalities to enact such regulations, it could have explicitly done so. RSA ch. 483-B.

NH18. 18.

Municipal Law > Generally > Powers

Vesting localities with broad authority to enact piecemeal on-water regulation of recreational boating and boat docking would threaten the state's need and desire for uniform regulation, which is expressly manifested within the broader statutory scheme governing regulation of public waters. The legislature will not be presumed to pass an act nullifying, to an appreciable extent, the purpose of a statute.

NH19. 19.

Zoning and Planning > Ordinances > Preemption

Municipal zoning ordinances cannot frustrate the purpose or implementation of a general or special law enacted by the state legislature.

NH20. 20.

Waters > Riparian and Littoral Rights and Duties > Wharves

Local regulation of wharves may not be exercised contrary to state statutory provisions or policy.

NH21. 21.

Municipal Law > Generally > Powers

The statute pertaining to bylaws and ordinances grants towns only the authority to regulate public docks. Consistent with the court's well-established rules of statutory interpretation, it does not find within the statute implied local authority to regulate the use of private docks for personal boating or boat docking on public waters. RSA 47:17, VII.

NH22. 22.

Environment and Natural Resources > Environmental Protection > Wetlands

The statutory definition of "wetlands," found within the provisions authorizing local land use regulation, does

not, by itself, suggest local authority to regulate personal boating and boat docking on waters held in trust for the public. The legislature could have defined "wetlands" either to facilitate wetland setbacks or for local wetland regulation outside the sphere of any exclusive state wetland regulation. RSA 482-A:2, X.

Counsel: *Orr & Reno, P.A.*, of Concord (*James P. Bassett* and *Jeffrey C. Spear* on the brief, and *Mr. Bassett* orally), for the petitioner.

Upton & Hatfield, LLP, of Concord (*Barton L. Mayer* on the brief and orally), for the respondent.

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

Opinion by: HICKS

Opinion

[**1269] [*166] Hicks, J. The petitioner, Lakeside Lodge, Inc. (Lakeside), appeals an order of the Superior Court (*Abramson, J.*) affirming a boat use limit on Lakeside's Lake Sunapee dock, imposed by the Town of New London Zoning Board of Adjustment (ZBA). We hold that state law and regulations preempt the regulation imposed by the ZBA, and reverse.

The record supports the following relevant facts. Lakeside owns property in New London on Lake Sunapee's waterfront. The property includes a private dock which has been used by Lakeside's owners since at least the 1980s.

The respondent, Town of New London (Town), enacted a zoning ordinance in 1991 (the 1991 ordinance) designating Lakeside's lot within a "Shore Land Overlay District." See (amended 2006). The ordinance prohibits the use of waterfront "common areas" for lake access except in compliance [***2] with its provisions and with planning board approval. *Id.* . A "common area" is defined as one "used by a group of [three] or more unrelated persons or by an association, club or organization consisting of [three] or more members." *Id.* The ordinance also states that "[a]ny use of a common area ... for business or commercial purposes shall be subject to" special exception. *Id.*

After receiving approval from the New Hampshire Department of Environmental Services (DES), Lakeside

completed substantial dock repairs in 1995. The Town maintains that Lakeside's use intensified after these renovations.

[*167] In 2002, the Town asserted that the use of Lakeside's dock by multiple, unrelated persons violated the 1991 ordinance. Lakeside maintained that such use predated [**1270] the 1991 ordinance, and applied to the New London Board of Selectmen (Selectmen) for an exemption, asserting that eleven users secured fifteen boats prior to the 1991 ordinance. The Selectmen determined that no preexisting, nonconforming use existed.

Lakeside appealed and the ZBA ultimately reversed, concluding that at least four users predated the enactment of the 1991 ordinance. The Selectmen issued a ruling interpreting [***3] the ZBA's decision to permit three owners and one non-owner to use the dock. The abutters sought to enforce this ruling in 2004 but the Selectmen declined, citing the lack of clarity from the ZBA as to how to proceed. The abutters appealed to the ZBA for clarification.

In 2007, the ZBA ruled that, because use by Lakeside's three owners predated the 1991 ordinance and because users typically invite guests, "there may be no more than six (6) users and six (6) boats at the dock at any one time." The ZBA intimated that renting dock space exceeded the scope of the "personal" use asserted by Lakeside's three owners. The superior court affirmed.

On appeal, Lakeside raises several arguments, but we need address only the preemption issue.

HN1 "Our review of zoning board decisions is limited." *Guy v. Town of Temple*, 157 N.H. 642, 649, 956 A.2d 272 (2008). We will uphold the trial court's decision unless the evidence does not support it or it is legally erroneous. *Id.*

Lakeside argues that the Town's application of the 1991 ordinance is unlawful because the legislature has preempted local regulation of private dock use for boat storage on Lake Sunapee. Lakeside points to *RSA chapter 482-A*, which [***4] it characterizes as a comprehensive regulatory scheme governing the design and placement of docks over State-owned waters to achieve the State's goal of uniform regulation. Additionally, it argues that the State's permission to repair the dock in 1995 conflicts with local regulation restricting use of the renovated dock.

The Town argues that the State regulates only the construction of private docks, leaving to the Town the authority to regulate their use as extensions of the land. It maintains that dock users must cross the shorefront property to access the dock. It asserts its interest in the availability of parking and bathrooms in addition to its authority to promote environmental ends. It cites our holdings permitting municipalities to create more restrictive rules than the State. Finally, it argues that, by defining "wetlands" within *RSA 674:55* (2008), the legislature intended to share concurrent regulatory authority over wetlands regulation.

[*168] The trial court ruled that the six-user, six-boat restriction was within the ZBA's authority, citing *RSA 47:17, VII* (2003) and our decision in *Gray v. Seidel*, 143 N.H. 327, 726 A.2d 1283 (1999). We disagree.

NH[1,2] [1, 2] **HN2** We are the final arbiter of the meaning of a statute [***5] as expressed by the words of the statute itself. *Weare Land Use Assoc. v. Town of Weare*, 153 N.H. 510, 511, 899 A.2d 255 (2006). **HN3** "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." *N. Country Envtl. Servs. v. Town of Bethlehem*, 150 N.H. 606, 611, 843 A.2d 949 (2004) (quotation and ellipsis omitted). "Preemption may be express or implied." *Id.* "State law preempts local law ... when there is an actual conflict between State and local regulation." *Id.* "A conflict exists when a municipal ordinance or regulation permits that which a [**1271] State statute prohibits or vice versa." *Id.* In addition, State law may preempt local regulation if such regulation "frustrates the statute's purpose," or "[t]he very nature of the regulated subject matter ... demand[s] exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." *Id.* (quotation omitted).

NH[3,4] [3, 4] **HN4** The State has delegated to municipalities authority to "regulate and restrict" certain land uses. *RSA 674:16* (2008). An overlay district, such as that created by the 1991 ordinance, is one "that is [***6] superimposed over one or more zoning districts ... and ... imposes specified requirements ... in addition to those otherwise applicable for the underlying zone." 10 P. ROHAN, ZONING AND LAND USE CONTROLS § 53C.08[2][a], at 53C-444.90 (2008); see, e.g., *Brewster v. Town of Amherst*, 144 N.H. 364, 365, 742 A.2d 121 (1999). "Where the state has not preempted the area, a municipality may zone to protect its shorelines" 2 K.

YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 9:13, at 144 (4th ed. 1996).

The parties and proceedings below assumed that a nonconforming personal use predated the 1991 ordinance. Thus, our inquiry is limited to whether the local attempt to restrict *personal* use of Lakeside's dock is permissible. See *Cherry v. Town of Hampton Falls*, 150 N.H. 720, 725, 846 A.2d 508 (2004).

[5] [5] HN5 The use of lakes of ten or more acres, such as Lake Sunapee, is controlled by the State, which holds these "valuable resources," *RSA 483-B:1, II* (2003), in trust for public use. See *RSA 271:20, I* (1999); *RSA 483-B:1, II* (The State has the "jurisdiction to control the use of the public waters and the adjacent shoreland for the greatest public benefit."). The State is the exclusive steward of public trust rights, a bundle **[***7]** of "all useful and lawful purposes," *State v. Sunapee Dam Co.*, 70 N.H. 458, 460, 50 A. 108 (1900),

[*169] such as the common law right to boat recreationally, see *Hartford v. Gilmanton*, 101 N.H. 424, 425-26, 146 A.2d 851 (1958). See generally 6 WATERS AND WATER RIGHTS 801-12 (Robert E. Beck ed., 1991, 2005 repl. vol.); Annotation, *Rights of Fishing, Boating, Bathing, or the Like in Inland Lakes*, 57 A.L.R.2d 569, 577-78 (1958).

HN6 Numerous statutes regulate the right to boat. See *RSA ch. 233-A* (1993 & Supp. 2008) ("Access to Public Waters"); *RSA ch. 270* (1999 & Supp. 2008) ("Supervision of Navigation; Registration of Boats and Motors; Common Carriers by Water"); *RSA ch. 270-A* (1999) ("Use of Houseboats"); *RSA ch. 270-B* (1999) ("Abandoned Boats"); *RSA ch. 270-D* (1999 & Supp. 2008) ("Boating and Water Safety on New Hampshire Public Waters"); *RSA ch. 485* (2001 & Supp. 2008) ("New Hampshire Safe Drinking Water Act"); *RSA ch. 485-A* (2001 & Supp. 2008) ("Water Pollution and Waste Disposal"); *RSA ch. 487* (2001 & Supp. 2008) ("Control of Marine Pollution and Aquatic Growth"). This broad statutory framework is intended to safeguard public waters "in light of the fact that competing uses for the enjoyment of these waters, if not **[***8]** regulated for the benefit of all users, may diminish the value to be derived from them." *RSA 270:1, II* (1999).

[6] [6] HN7 As the steward of public waters, the State safeguards the right to use and enjoy public waters by avoiding piecemeal on-water regulation. See *Opinion of the Attorney General, No. 0-87-067*, 1989 N.H. AG LEXIS 21 (August 2, 1989) (public trust doctrine

imposes limits upon municipality's use of public waters); see also *RSA 483-B:1, II, IV* (2001) (asserting State's "interest in protecting [the public waters of New Hampshire]" and seeking to avoid "uncoordinated, unplanned and piecemeal development along the state's shorelines"); *RSA 482-A:14-b, II* **[**1272]** (2001) (allowing municipality to petition superior court for enforcement as the remedy for violations of *RSA chapter 482-A*, and requiring notice of such petition to the attorney general and the DES commissioner, "who may take such steps as they deem necessary to ensure uniform statewide enforcement"). Nowhere is the peremptory judgment of the legislature better expressed than in *RSA chapter 483-A*, creating the Lakes Management Protection Program (LMPP) and ordering the "develop[ment of] detailed guidelines for coordinated lake management and shoreland protection **[***9]** plans together with recommendations for implementation." *RSA 483-A:7, I* (Supp. 2008).

[7] [7] In addition to enjoying the common law right to boat recreationally in Lake Sunapee, Lakeside appears to own the littoral rights accompanying its waterfront lot.

HN8 "Littoral rights are incidental property rights associated with ownership of lakeshore property." *Donaghey v. Croteau*, 119 N.H. 320, 323, 401 A.2d 1081 (1979). While the State holds title to the bed of the great ponds, *State v. Stafford Company*, 99 N.H. 92, 97, 105 A.2d 569 (1954), "littoral owners have rights **[*170]** which are more extensive than those of the public generally." *Sundell v. Town of New London*, 119 N.H. 839, 844, 409 A.2d 1315 (1979) (quotation omitted). "These ... include ... the right to use and occupy the waters adjacent to their shore for a variety of recreational purposes" *Id.*; see also *Stafford Company*, 99 N.H. at 97. Such littoral rights, however, "are always subject to the paramount right of the State to control them reasonably in the interests of navigation, water storage and classification, health and other public purposes." *Stafford Company*, 99 N.H. at 97; see also *RSA 483-A:3* (2001).

[8] [8] Against this backdrop we first observe that, by expressly permitting Lakeside **[***10]** to repair its dock in 1995, the State has placed its imprimatur upon the use of Lakeside's dock for personal boating. Presumably, the Town received notice of its opportunity to participate in this process. See *RSA 482-A:3, I* (Supp. 2008). **HN9** Construction connotes use. Construction of docks on public waters is prohibited without a DES permit. See *RSA 482-A:3, I(a)* (Supp. 2008); *RSA 483-B:9, II(c)* (Supp. 2008). *RSA chapter 482-A* prescribes

detailed siting and construction requirements. See *RSA 482-A:3, XIII* (2001). The DES administrative rules prescribe additional restrictions. See *N.H. ADMIN. RULES, ENV-Wt 402.01* ("Configuration"), *402.02* ("Navigation Space"), *402.03* ("Dimensions"), *402.04* ("Setbacks").

Importantly, **HN10** the administrative regulations prescribe frontage requirements per "boating slip" for lots with more than seventy-five feet of shoreline frontage in order

[t]o lessen congestion, improve public safety and navigation, protect neighboring property values, provide sufficient area for construction of facilities, provide adequate area for *boat maneuvering*, and protect health, safety and general welfare.

N.H. ADMIN. RULES, ENV-Wt 402.13 (emphases added); cf. *N.H. ADMIN. RULES, ENV-Wt 402.12* [***11] (applicable to lots with less than seventy-five feet of frontage).

[9] [9] We find implicit within the permission to repair its dock the right to use the entire repaired dock for personal boating and boat docking — a clear exercise of its common law and littoral rights. Cf. *N. Country Envtl. Servs.*, 150 N.H. at 615 (holding that *RSA chapter 149-M* preempted local regulation because the regulatory regime sought to achieve broad goals, delegated power to DES and prescribed [**1273] detailed "design, construction, operation and closure" standards for facilities); *Wasserman v. City of Lebanon*, 124 N.H. 538, 543, 474 A.2d 994 (1984) (ordinance preventing reconstruction of dam [*171] preempted by state law); 6 ROHAN, *supra* § 36.02[1][b], at 36-27 ("A municipality may not ... prohibit a use expressly permitted by state statute.").

[10] [10] **HN11** The statutory scheme regulating the "mooring" of watercraft further reveals the State's expectation that private dock users will make use of the entire dock for personal boating and docking. See *RSA 270:59-:72* (1999 & Supp. 2008). The provisions of *RSA chapter 270* are intended to "maintain[] jurisdiction to control the use of public waters for the greatest public benefit," *RSA 270:60, I(a)* (1999), by [***12] curtailing the "undue proliferation of moorings," *RSA 270:60, I(c)* (1999). The department of safety is charged with issuing mooring permits on Lake Sunapee. See *RSA 270:61, I* (Supp. 2008); see also *N.H. ADMIN. RULES, Saf-C 408.04*. Individual mooring permit applications require the applicant to list the length and width of existing docking structures together with the number of boating slips and

explain why they are insufficient to meet the user's need. See *N.H. ADMIN. RULES, Saf-C 408.05(a)(1), 408.06(b)(12)-(13), (15)(d)(1)*. These provisions impel private dock users to exhaust available watercraft storage before seeking a mooring permit.

[11] [11] The Town argues that *RSA 674:21, I(j)* (2008) allows additional municipal regulation of Lakeside's private dock. We disagree. See *JTR Colebrook v. Town of Colebrook*, 149 N.H. 767, 770-72, 829 A.2d 1089 (2003); 3 A. H. RATHKOPF ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 48:16, at 48-37 to -38 (2008) ("Local control and regulation of navigable waters within a state often is preempted by state law."). But cf. *Cherry*, 150 N.H. at 725 (declining to address validity of ordinance, but stating that DES permit does not prove compliance with ordinance and that "municipality [***13] is not estopped from creating more restrictive rules for wetlands issues than those required by the Wetlands Board" (quotation and brackets omitted)); *Anderson v. Motorsports Holdings*, 155 N.H. 491, 501, 926 A.2d 261 (2007) (quoting language from *Cherry* in rejecting due process argument). Although the ZBA has broad authority to act under *RSA 674:33* (2008), see *Ouellette v. Town of Kingston*, 157 N.H. 604, 610, 956 A.2d 286 (2008), it acted ultra vires by imposing the six-user, six-boat limit upon Lakeside.

[12] [12] Whether the ZBA acted with authority requires examination of whether the conditions on use within the 1991 ordinance apply to personal boating and boat docking. The six-user, six-boat limit was an attempt to define and/or reasonably restrict a grandfathered use — one asserted only after the Town maintained that Lakeside had violated the provisions of the 1991 ordinance restricting the number of non-related waterfront lot users. **HN12** Although we have expressly permitted a ZBA to define and constrain [*172] nonconforming uses, see *Peabody v. Town of Windham*, 142 N.H. 488, 492, 703 A.2d 886 (1997); *Vlahos Realty Co. v. Little Boar's Head District*, 101 N.H. 460, 464, 146 A.2d 257 (1958), such authority derives from, and is coextensive [***14] with, the authority to enact the underlying ordinance because nonconforming use is the byproduct of regulation. Cf. *RSA 674:33, I(a)* (zoning board has power to hear and decide appeals if error alleged "in the enforcement of any zoning ordinance adopted pursuant to *RSA 674:16*"); *Peabody*, 142 N.H. at 493 ("[T]he ultimate purpose of zoning regulations is to reduce nonconforming uses to conformity as quickly as possible.").

NH[13,14] [13, 14] **[**1274]** "It is well established in this State that **HN13** cities and towns have only those powers which are granted to them by the legislature." Dugas v. Town of Conway, 125 N.H. 175, 181, 480 A.2d 71 (1984). The Town lacks specific legislative authority to infringe upon the right to boat. Such authority is necessary to enact on-water regulations within public waters. See *Opinion of the Attorney General, supra* (specific legislative authorization required if local municipality's action infringes upon public trust rights in bodies of water); 6 WATERS AND WATER RIGHTS, *supra* at 807 (legislative grant of authority required if municipality's action interferes with public trust rights); Erbsland v. Vecchiolla, 35 A.D.2d 564, 313 N.Y.S.2d 576, 578 (App. Div.), appeal denied, 27 N.Y.2d 485 (1970) (holding that municipality's **[***15]** zoning power did not extend into navigable waters because they "are within the sole jurisdiction and control of the State of New York").

NH[15,16] [15, 16] The Town enacted the 1991 ordinance by invoking RSA 674:21, I(j), a grant of authority to develop "innovative land use controls" to accomplish environmental objectives. See 15 P. LOUGHLIN, NEW HAMPSHIRE PRACTICE, LAND USE PLANNING AND ZONING § 15.07, at 89-90 (Supp. 2007) (describing inception of innovative land use control legislation). **HN14** By any measure, the boundaries of the Town's authority under RSA 674:21, I (2008) are not precisely drawn, see RSA 674:16, II (2008), but to say that the statute confers general authority incidental to shoreland protection to regulate personal boating and boat docking upon State-owned waters stretches its language beyond logic. See Weare Land Use Assoc., 153 N.H. at 511 **HN15** ("We interpret a statute to lead to a reasonable result"); JTR Colebrook, 149 N.H. at 771.

[17] [17] **HN16** Perhaps the clearest statutory grant of retained, local shoreland protection authority is found within the Comprehensive Shoreland Protection Act, RSA chapter 483-B, which sets the minimum standards for shoreland protection, see RSA 483-B:2 (2001), and **[***16]** permits municipalities to "adopt land use control ordinances ... which are more stringent." RSA 483-B:8, I (2001); see also N.H. Dep't of Envtl. Servs. v. Marino, 155 N.H. 709, 713-17, **[*173]** 928 A.2d 818 (2007) (discussing and upholding constitutionality of RSA chapter 483-B). RSA chapter 483-B, however, lacks any provisions regulating the use of docks for boating or boat docking as part of shoreland protection. See RSA ch. 483-B (2001 & Supp. 2008). "Had the legislature intended to permit municipalities to enact [such

regulations], it could have explicitly done so." JTR Colebrook, 149 N.H. at 771-72.

NH[18-20] [18-20] **HN17** The DES guidelines state that "only the federal ... and state ... government[s] ha[ve] the authority to impose on-lake regulations" upon State-owned public water and that dock and mooring regulations are considered "on-lake" management. THE N.H. GUIDELINES FOR COORDINATED LAKE MGMT. AND SHORELAND PROT. PLANS 53-54 (DES 2008), available at <http://des.nh.gov/organization/commissioner/pip/publications/wd/doc/>. Indeed, **HN18** vesting localities with broad authority to enact piecemeal on-water regulation of recreational boating and boat docking would threaten the State's need and desire for **[***17]** uniform regulation, which is expressly manifested within the broader statutory scheme governing regulation of public waters. "The legislature will not be presumed to pass an act ... nullifying, to an appreciable extent, the purpose of the statute." Weare Land Use Assoc., 153 N.H. at 511-12; Erbsland, 313 **[**1275]** N.Y.S.2d at 578 (allowing municipality to regulate navigable waters owned by the state "would have the effect of nullifying rights which the State has the authority to grant"); 6 ROHAN, *supra* § 36.02[1][a], at 36-25 **HN19** ("[M]unicipal zoning ordinances cannot frustrate the purpose or implementation of a general or special law enacted by the state legislature."); 3 RATHKOPF, *supra* at 48-37 **HN20** ("[L]ocal regulation of wharves ... may not be exercised contrary to state statutory provisions or policy.").

[21] [21] **HN21** RSA 47:17, VII, relied upon by the trial court in rejecting Lakeside's preemption argument, grants towns only the authority to regulate *public* docks. See RSA 47:17, VII; Gray, 143 N.H. at 330. Consistent with our well-established rules of statutory interpretation, we do not find within RSA 47:17, VII, implied local authority to regulate the use of private docks for personal boating or boat docking **[***18]** on public waters. St. Joseph Hosp. of Nashua v. Rizzo, 141 N.H. 9, 11-12, 676 A.2d 98 (1996) **HN22** ("Normally the expression of one thing in a statute implies the exclusion of another." (quotation omitted)).

[22] [22] Contrary to the ZBA's assertion, **HN23** the statutory definition of "wetlands," found within the provisions authorizing local land use regulation, does not, by itself, suggest local authority to regulate personal boating and boat docking on waters held in trust for the public. See RSA 482-A:2, X (Supp. 2008) ("Wetlands' means an area that is inundated or saturated by surface water or groundwater at a frequency and duration

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sufficient to [*174] support, and that under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”). The legislature could have defined “wetlands” either to facilitate wetland setbacks or for local wetland regulation outside the sphere of any exclusive State wetland regulation. See *Blagbrough Family Realty Trust v. Town of Wilton*, 153 N.H. 234, 238, 893 A.2d 679 (2006) (HN24 “[M]unicipalities may adopt local ordinances to further wetland protection in areas outside the State’s regulation.”); *Cherry*, 150 N.H. at 725 (examining compliance with local [***19] wetlands ordinance); 3

RATHKOPF, *supra* at 48-37 (“Local regulation of wetlands is permitted when not in direct conflict with state law.”).

Given our conclusion, we do not reach the other issues raised in this appeal.

Reversed.

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