State of New Hampshire
Supreme Court

NO. 2011-0217

2011 TERM

NOVEMBER SESSION

Town of Amherst

v.

Norman E. Hebert, Trustee of HJC Realty Trust

RULE 7 APPEAL OF FINAL DECISION OF
HILLSBOROUGH COUNTY (NORTH) SUPERIOR COURT

BRIEF OF DEFENDANT/APPELLANT NORMAN HEBERT, TRUSTEE

By: Joshua L. Gordon, Esq.
NH Bar ID No. 9046
Law Office of Joshua L. Gordon
75 South Main Street #7
Concord, NH 03301
(603) 226-4225

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

NEW HAMPSHIRE CASES

OTHER STATES' CASES

NEW HAMPSHIRE STATUTES

CONSTITUTIONS AND RULES

SECONDARY SOURCES

QUESTIONS PRESENTED

I. Does the Amherst Wetland Ordinance require Mr. Hebert file a Water Resources Management Plan?

Preserved: ARGUMENT (Aug. 24, 2010), *Appx.* at 117; STRUCTURING CONFERENCE ORDER, n.* (Mar. 23, 2010), *Appx.* at 99; OPENING STATEMENT, *Trn.* at 15-18.

II. If a Water Resources Management Plan is required, does the Amherst Wetland Ordinance violate New Hampshire's zoning enabling statutes by effectively prohibiting agriculture due to the onerous requirements of a Water Resources Management Plan?

Preserved: ANSWER ¶ 5 (Dec. 30, 2009), *Appx.* at 94; STRUCTURING CONFERENCE ORDER, n.* (Mar. 23, 2010), *Appx.* at 99; OPENING STATEMENT, *Trn.* at 15.

III. Is Amherst's Wetlands Ordinance facially unconstitutional when it does not delineate the wetlands it purports to protect, and requires owners to self-delineate using scientific standards most people could not reasonably understand nor readily implement?

Preserved: AGREEMENT, *Town of Amherst v. Norman Hebert*, Milford Dist.Ct. 07-cv-164 (Aug. 8, 2008), Exh. 33, *Appx.* at 54; REQUEST FOR FINDINGS AND RULINGS (Aug. 24, 2010), *Appx.* at 115; ARGUMENT (Aug. 24, 2010), *Appx.* at 117; STRUCTURING CONFERENCE ORDER, n.* (Mar. 23, 2010), *Appx.* at 99; OPENING STATEMENT, *Trn.* at 19-20.

IV. Did Amherst violate Mr. Hebert's rights by enforcing zoning restrictions when his property could not be delineated by reference to the ordinance or any publicly available map, and the Town failed to prove Mr. Hebert's property comprised a wetland?

Preserved: AGREEMENT, *Town of Amherst v. Norman Hebert*, Milford Dist.Ct. 07-cv-164 (Aug. 8, 2008), Exh. 33, *Appx.* at 54; REQUEST FOR FINDINGS AND RULINGS (Aug. 24, 2010), *Appx.* at 115; ARGUMENT (Aug. 24, 2010), *Appx.* at 117; STRUCTURING CONFERENCE ORDER, n.* (Mar. 23, 2010), *Appx.* at 99; OPENING STATEMENT, *Trn.* at 19-20.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Norman Hebert is the trustee of the HJC Realty Trust, which owns the property where he lives in Amherst, New Hampshire. *Trn.* at 91; ADJUD.ORDER (Feb. 7, 2011), *Appx*. at 117. In 2006 Mr. Hebert decided that to adopt a more sustainable lifestyle he would "put up wind turbines and do some farming." *Trn.* at 92, 111, 124-29. He initially grew sugar beets, and in 2008 enjoyed a 2000-pound crop, *Trn.* at 130, as part of a University of New Hampshire demonstration project. After the resulting University study found beets would not be an economic biofuel until the price of gas reached $6 or $7 per gallon, *Trn.* at 113-14, 130-31, Mr. Hebert turned to growing squash, turnips, pumpkins, corn, and gourds. *Trn.* at 114, 129. In the future he hopes to take advantage of a conservation grant with the USDA to dig an irrigation pond and expand the farming, and perhaps have some animals. *Trn.* at 129.

I. Clandestine Wetland

Mr. Hebert's land is in a zone where agricultural use is permitted, *Trn*. at 32, but it was mainly forested and needed to be cleared and stumped before farming. Thus in 2006 he went to town hall, asked about a forestry permit, and learned none was necessary because he had less than 10 acres. *Trn.* at 92, 137. Mr. Hebert also looked at tax and zoning maps, and found his property did not appear in any way specially designated. *Trn*. at 92. There was no indication on any town map that his land contained a wetland, was in a wetland district, or was part of any specially protected watershed. *Trn*. at 92-93, 137.

Mr. Hebert went further than town hall. He looked at United States Geological Survey maps, and went to the Hillsborough County Conservation Service. For his farming plans he looked at soils maps, and saw a copy of Amherst's wetlands protection district maps. None of these showed his land

contained a wetland, was in a wetland district, or was part of any specially protected watershed. *Trn.* at 93. Much later Mr. Hebert learned that in 2000 the Town had conducted two studies, "Amherst Wetland Assessment and Prime Wetland Designation Report," and "Pennichuck Brook Watershed." These were not freely available however, and Mr. Hebert separately requested and paid for them. LETTER FROM MR. HEBERT TO TIEDEMANN (Jan. 11, 2007), Exh. B, *Appx*. at 79; *Trn.* at 94-96. Nonetheless, these studies also did not show his land contained a wetland, was in a wetland district, or was part of any specially protected watershed. *Trn.* at 95-96. The court held that Mr. Hebert checked maps and "made reasonable efforts before beginning … work to determine whether any wetlands would be impacted." ADJUD.ORDER, *Appx*. at 121, 136.

Mr. Hebert also looked at his land, which at the time was forested, ground frozen and covered with leaves. He saw nothing raising his concern about wetlands. *Trn*. at 92, 137. Mr. Hebert hired a professional forester and a logger. They also toured the land, and said nothing about wetlands or wetness. *Trn.* at 112. Mr. Hebert read the Amherst zoning ordinance. He saw no prohibitions against farming or erecting a wind turbine. *Trn.* at 92. He was aware of the wetlands ordinance, but did not pay much attention to it. *Trn.* at 99-101.

Charles Tiedemann, Amherst's Code Enforcement Officer, admitted in his testimony that in the Fall of 2006 before Mr. Hebert cut, there was no map which would have shown Mr. Hebert's land was in a wetlands or restricted area. *Trn*. at 69. The Town even admitted that had Mr. Hebert been able to discern any protected areas on a map, their boundaries would be "only an approximation." Even though he had no reason to suspect a wetland, the Town demanded that in conformance with its ordinance Mr. Hebert should have "hire[d] a soil scientist to delineate the edge of the wetlands." *Trn.* at 39.

Mr. Hebert testified, "I had no way of knowing that that place was wet without hiring a soil scientist to come out and to – and to survey it just out of – for no reason, no intention." *Trn*. at 121. He didn't know or suspect it was a wetland because "[t]hey were unidentified and unknown before the fact." *Trn.* at 139. When Mr. Hebert was later confronted with the allegation that he unlawfully cut trees in a wetland, Code Enforcement Officer Tiedemann testified that "Mr. Hebert came in and claimed that his land wasn't in the wetlands." *Trn.* at 39.

Nonetheless, the Town now claims that Mr. Hebert's land is in a wetland overlay district, and thus subject to its wetlands ordinance. *Trn.* at 32-33, 36. It also claims the wetland is part of the Pennichuck Brook Watershed, the source of drinking water for Nashua, Amherst, and other towns, and thus protected under even more stringent regulations. *Trn.* at 33. Based on no discernable topographical, hydrological, pedological, botanical, or any other scientific evidence, the court held that Mr. Hebert's logging was in a wetland and within the Pennichuck watershed. ADJUD.ORDER, *Appx*. at 122, 131-32

The Town calls Mr. Hebert activities a "logging operation" and a "dredge and fill operation." *Trn.* at 34. Mr. Hebert objected to the characterization because the words have statutory meaning in the environmental field. RSA 482-A; N.H. ADMIN. RULE, Env-Wt 101.35 & .43; *Trn.* at 124-25. There is no evidence in the record Mr. Hebert did anything more than cut trees and pull stumps. ADJUD.ORDER, *Appx*. at 122. Clearing land, moreover, is a necessary precondition to farming and thus a traditional part of agricultural New Hampshire. Robert Frost, *The Death of the Hired Man* (1914) (Old Silas comes home to die yet promises to "clear the upper pasture" and "ditch the meadow"); *Trn.* at 21, 121.

The abutters, the Town, and ultimately the New Hampshire Department of Environmental

Services (DES), however, saw Mr. Hebert's land only *after* he cleared it. Code Enforcement Officer Tiedemann testified that the wetlands were "obvious," but admitted he did not see the land until after a neighbor complained Mr. Hebert had clear-cut. *Trn.* at 34, 37; ADJUD.ORDER, *Appx*. at 122.

Mr. Hebert concedes the pictures in the court's record make the wetness obvious. *Trn.* at 137-38. They were taken, however, on December 27, 2006. *See* PHOTOS, Exhs. 2-9, *Appx*. at 8-15. Mr. Hebert suggests, and the pictures corroborate, there was no snow in Amherst and the land was partially frozen. During the week preceding Mr. Tiedemann's inspection, there had been a thaw and three days of rain. Moreover, the excavator had created deep tracks and large holes where it had pulled stumps, and water runs downhill; hence the pools depicted in the photos. *Trn.* at 34-36, 112-13; *see also*, PHOTOS, Exhs. 2-9, *Appx*. at 8-15; PHOTO, Exh. 6 (described by Code Enforcement Officer Tiedemann, *Trn*. at 35) ("the excavator is in the mud"). The exhibits therefore do not show what existed or what Mr. Hebert saw before he cut. *Trn.* at 112-13.

II. Code Enforcement

On the day the photos were taken, Code Enforcement Officer Tiedemann wrote a cease-and-desist letter to Mr. Hebert. It alleged that the Amherst ordinance describes a 100-foot buffer around Public Water Protection Wetlands, and that Mr. Hebert had excavated within it. The letter ordered Mr. Hebert to stop excavating. It also ordered him to file for permits with the Federal Environmental Protection Agency, the New Hampshire DES, and to "prepare" and "present … to the Amherst Planning Board for approval" a "Water Resource Management Plan" which "will show how you are to restore the 100 foot buffer." LETTER FROM TIEDEMANN TO HEBERT (Dec. 27, 2006), Exh. 10, *Appx.* at 16.

III. Mr. Hebert Satisfies the State

A few days later Mr. Tiedemann notified the DES Wetlands Bureau of Mr. Hebert's activities, MEMO FROM TIEDEMANN TO DES (Jan. 2, 2007), Exh. 12, *Appx.* at 18, and then followed-up with background information, including a formal Wetlands Bureau complaint form, maps Mr. Tiedemann created for DES, and the photographs taken in December. Mr. Tiedemann also invited DES to visit the site as soon as possible and to take immediate action against Mr. Hebert. LETTER FROM TIEDEMANN TO DES (Jan. 5, 2007), Exh. 13, *Appx.* at 19; *Trn.* at 40.

DES responded with a letter to Mr. Hebert alleging he had dredged and filled a wetland without a permit, notifying an investigation had been commenced, and inviting Mr. Hebert to respond. LETTER FROM DES TO HEBERT (Jan. 12, 2007), Exh. 14, *Appx.* at 20. Mr. Hebert called DES and told the agency he had checked maps and found no wetlands. DES explained that "no town has a complete map of all wetlands," suggested Mr. Hebert hire a wetlands scientist to delineate them, told Mr. Hebert they will have to be restored, and offered to tour the property. DES PHONE REPORT (Jan. 26, 2007), Exh. 15, *Appx.* at 21 (double underline in original).

DES did a tour, noting there were maples, highbush blueberries, and sphagnum moss. DES took a soil sample and determined there was "hydric wetland soil" present. The DES inspector also saw the ruts left by the excavator and that the stumps were gone, and hand-drew a map of Mr. Hebert's lot. The inspector recommended enforcement action and restoration. FIELD INSPECTION REPORT (Jan. 31, 2007), Exh. 17, *Appx.* at 23. A few days later DES notified Mr. Hebert of a violation, required hiring a qualified wetlands scientist, and demanded the development and implementation of a restoration plan. LETTER OF DEFICIENCY (Feb. 8, 2007), Exh. 19, *Appx.* at 26.

Out of respect for the environmental laws, Mr. Hebert uncomplainingly complied. *Trn.* at

138. He hired a DES-certified wetlands scientist, who developed a restoration plan, which was approved by the DES. SITE PLAN OF PROPOSED WETLAND RESTORATION (July 13, 2007), Exh. 11, *Appx*. at 17 (only the plan identification panel is included in the appendix, but the entire plan has been transferred to this Court by order); RESTORATION PLAN APPROVAL (July 19, 2007), Exh. 21, *Appx.* at 30. Mr. Hebert worked through the summer and fall, and in November 2007 his soil scientist informed DES that remediation was complete. LETTER FROM DANFORTH TO DES (Nov. 15, 2007), Exh. A, *Appx.* at 71.

The next spring DES inspected, but was not satisfied with the placement of some stumps and "slash." FIELD INSPECTION REPORT (May 12, 2008), Exh. 24, *Appx.* at 36; LETTER FROM DES TO HEBERT (May 30, 2008), Exh. 25, *Appx.* at 42; EMAIL FROM DES TO HEBERT (June 23, 2008), Exh. 26, *Appx*. at 44; *Trn.* at 41, 107-09. Because his DES-approved scientist had told him everything was done, but then six months later DES decided it wasn't, Mr. Hebert felt double-crossed. EMAIL FROM HEBERT TO DES (June 24, 2008), Exh. 27, *Appx.* at 45; *Trn.* at 70, 97-99, 132-137. DES conducted two more field inspections and issued letters advising Mr. Hebert to comply. FIELD INSPECTION REPORT (July 10, 2008), Exh. 28, *Appx.* at 47; LETTER FROM DES TO HEBERT (July 11, 2008), Exh. 29, *Appx.* at 48; FIELD INSPECTION REPORT (Sept. 16, 2008), Exh. 30, *Appx.* at 49; LETTER FROM DES TO HEBERT (Sept. 24, 2008), Exh. 31, *Appx.* at 51. Finally, in December 2008 DES wrote a letter to Mr. Hebert that it had conducted its final inspection, and "determined that the deficiencies … have been corrected." DES indicated it will "close its enforcement file," and thanked Mr. Hebert for his assistance. LETTER OF COMPLIANCE (Dec. 3, 2008), Exh. 32, *Appx.* at 53; *Trn.* at 48, 99, 138; ADJUD.ORDER, *Appx*. at 5. Because the Town filed the initial complainant, Amherst was copied on all DES correspondence, and was aware Mr. Hebert satisfied the State.

IV. Amherst Water Resource Management Plan

The Town of Amherst, meanwhile, had reiterated that Mr. Hebert's activities were a violation of its ordinance, and in addition to any DES requirements he needed also to file a Water Resource Management Plan (WRMP) with the Town. LETTER FROM FERNALD TO LITTLE (Aug. 8, 2007), Exh. 22, *Appx.* at 33. The grounds the Town gave for requiring Mr. Hebert file a WRMP were clearcutting, *Trn.* at 68, "disturbance of soils" *Trn.* at 89, and that there was no alternative to filing a WRMP. *Trn.* at 76-78.

The contents of such a plan are onerous. They include: filing with the United States Environmental Protection Agency, review by New Hampshire Natural Heritage Inventory, review by the Pennichuck Water Works, review by the Amherst Conservation Commission, review by the Amherst Board of Health, compliance with the Amherst Storm Water Regulations, storm water management to accommodate 2-year and 10-year storm water peaks, storm water facilities capable of filtering solids which are "easily cleaned" and "designed for grease and oil removal," identification of "rare or endangered species … within 500 ft.," "provisions for the protection of any rare or endangered species," "identification of ecologically sensitive areas and features," identification of "wildlife and wildlife habitats,""provisions for the protection of the ecologically sensitive areas and features," mapping of "the edge of wetlands within 500 ft.," plans for fertilization and pest control, plans for monitoring and reporting of surface and groundwater, and "provisions for future maintenance of the engineering design, operating and monitoring controls to be implemented." AMHERST ZONING ORDINANCE §4-11 D. (*Water Resource Management Plans*), Exh. 1, *Appx.* at 1; AMHERST PLANNING BOARD AGENDA (Mar. 4, 2009), Exh. 38, *Appx.* at 61. The town proposed posting a bond to ensure compliance with all these items, *id.* and even wants details of the contouring

of Mr. Hebert's crop rows. *Trn.* at 48.

From his reading of the ordinance however, Mr. Hebert understood that to conduct agriculture in Amherst, he must comply with the State's recommended "Best Management Practices" (BMP). ADJUD.ORDER, *Appx*. at 121-22. These practices are specified in Amherst's ordinance by reference to a State publication. AMHERST ZONING ORDINANCE §4-11 B. 8. (specifying "Manual of Best Management Practices of Agriculture in New Hampshire"); *see* New Hampshire Department of Agriculture, MANUAL OF BEST MANAGEMENT PRACTICES OF AGRICULTURE IN NEW HAMPSHIRE (July 2008), Exh. C, *Appx.* at 80 (because of size of document, only identifying pages included in appendix). The Manual of Best Management Practices contains explicit guidelines for erosion control, chemical application, soil conservation, and most every conceivable detail of farming. Because Mr. Hebert willingly accepted BMP compliance demanded by the ordinance, he felt the Town had no reason to require anything further. Mr. Hebert also felt it was inappropriate to subject his farm to review by the town Conservation Commission. *Trn.* at 104-05. Moreover, having spent two years on remediation – ten thousand dollars on a soil scientist, and thirty thousand dollars on restoration – all for cutting trees he didn't know couldn't be cut, he suggested that showing DES compliance should obviate the need for further filings with the Town. LETTER FROM LITTLE TO FERNALD (Aug. 28, 2007), Exh. 23, *Appx.* at 35; *Trn.* at 104-05, 138.

Given the potential reach of an Amherst WRMP, the Town's suggestion that Mr. Hebert could request waivers – for which he must "provide reasons" and be "specific" – was little consolation. *Trn.* at 61; LETTER FROM TIEDEMANN TO LITTLE (Sept. 8, 2008), Exh. 34, *Appx.* at 56; LETTER FROM TIEDEMANN TO LITTLE (Sept. 15, 2008), Exh. 36, *Appx.* at 58; ADJUD.ORDER, *Appx*. at 127.

V. Milford District Court Agreement

This standoff led the Town to seek compliance in the district court. On the day of the parties' hearing, they entered a settlement, which provides in part: "Norman Hebert agrees to file the Application [for a WRMP], but he does not concede that he should be required to file it." AGREEMENT, *Town of Amherst v. Norman Hebert*, Milford Dist.Ct. 07-cv-164 (Aug. 8, 2008), Exh. 33, *Appx.* at 54.

Attached to the Agreement was the July 2007 wetland restoration plan showing a 25-foot buffer, which had been prepared by Mr. Hebert's soil scientist and approved and complied with in the DES proceeding. On the face-page of the plan was a handwritten note: "This plan will be submitted with an Application for approval of a Water Resource Management Plan." The note was initialed by the Town's lawyer ("BRF"), the Town's Code Enforcement Officer ("CRT"), and Mr. Hebert's lawyer ("SL"). SITE PLAN OF PROPOSED WETLAND RESTORATION (with handwritten note and initials) (undated), Exh. 33A, *Appx.* at 55; ADJUD.ORDER, *Appx*. at 126.

The Town concedes that Mr. Hebert filed a WRMP and an application for its approval. *Trn*. at 60 (Q: "[D]id he submit a plan and application? A: He did."), 80 (testimony of Code Enforcement Officer Tiedemann: "[T]his plan was filed with the application for a water resource management plan."); ADJUD.ORDER, *Appx*. at 127. The Town was still not satisfied, however, because Mr. Hebert's submissions did not address each item in the lengthy list noted *supra*, LETTER FROM TIEDEMANN TO LITTLE (Sept. 8, 2008), Exh. 34, *Appx.* at 56; LETTER FROM TIEDEMANN TO LITTLE (Sept. 15, 2008), Exh. 36, *Appx.* at 58, and because, the Town alleged, "backup information" was omitted. *Trn.* at 46-47, 59-60, 64.

Mr. Hebert believed his plan and application as submitted were sufficient. LETTER FROM LITTLE TO TIEDEMANN (Sept 10, 2008), Exh. 35, *Appx.* at 57. He also believed that the list of items

the Town wanted addressed was excessive and onerous, some information was impossible to obtain, many of the items did not apply to his situation, and that pursuant to statute the ordinance provides an agricultural exemption to the WRMP requirement. LETTER FROM LITTLE TO TIEDEMANN (Nov. 5, 2008), Exh. 37, *Appx.* at 59. Because the list was nonetheless not fully addressed, the Amherst Planning Board (to which the ordinance says WRMP applications are directed), repeatedly tabled the matter. *Trn.* at 64.

VI. Superior Court Injunction

When it tired of that, the Town sued Mr. Hebert in the Superior Court. PETITION FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES (Sept. 21, 2009), *Appx.* at 87. The Town sought a finding that Mr. Hebert violated the district court agreement, an injunction ordering him to file a WRMP including submission for review by the Conservation Commission, and fines, fees, and costs. *Id.*

After an evidentiary hearing the Hillsborough County North Superior Court (*David A. Garfunkel*, J.) issued an Adjudication Order holding that the Town could require a WRMP and that Mr. Hebert breached the agreement. ADJUD.ORDER, *Appx*. at 129, 135. It enjoined Mr. Hebert to submit an application, and diligently seek approval of his Water Resources Management Plan, including involvement of the Conservation Commission. ADJUD.ORDER, *Appx*. at 121, 133. The court awarded the town $25,000 in penalties with $20,000 held in abeyance pending compliance with the injunction and this appeal, and awarded fees and costs of $11,384.42 which are "continuing to accrue." ADJUD.ORDER, *Appx*. at 133, 136-37; ORDER (May 10, 2011), *Appx*. at 141; ORDER ON MOTION FOR CLARIFICATION (June 8, 2011), *Appx*. at 143. Finally, the court required Mr. Hebert to "post security in the form of a $50,000 bond" to secure performance with the injunction and payment of the fines. ORDER ON MOTION FOR BOND (Oct. 4, 2011), *Appx*. at 138.

Mr. Hebert appealed.

SUMMARY OF ARGUMENT

Norman Hebert first explicates the Amherst wetlands ordinance. He then argues that by the terms of the ordinance, the filing of a Wetlands Resource Management Plan is optional and that the Town was wrong in requiring him to file it. He then argues that the WRMP requirement is so burdensome that it effectively prohibits him from farming on his land, in violation of several statutes. Finally, he argues the Amherst ordinance is unconstitutional because it both failed to delineate his property as a wetland and put the burden on him to show it was a wetland.

ARGUMENT

I. The Amherst Wetlands Zoning Ordinance

Amherst has a comprehensive Wetlands Ordinance, both lengthy and specific.

A. Definition of Wetlands

The first section presents its purpose, defines the Town's wetlands, and creates the wetlands overlay zoning district. The district is "as herein defined as shown on a map," which is named. The ordinance provides that "[i]n the event an area is incorrectly designated" as a wetland, the owner may present "evidence to that effect," and the restrictions in the ordinance "shall not apply."

> Conversely, in the event that an area not so designated [is a wetland] then the restriction[s] … shall apply. Such evidence may be obtained by adequate on-site soils investigation and analysis conducted by a certified soil scientist or certified wetland scientist.

AMHERST ZONING ORDINANCE §4-11 (*General*), *Appx.* at 1-2. The Ordinance provides a definition of wetlands, which "must be based by on-site inspection of all three characteristics of wetlands, namely, hydrology, hydric soils, and hydrophytic plants," in accord with two scientific studies and reference to DES rules. *Id.*

B. Uses in Wetlands

Following that, Part A bars structures in wetlands, but allows a variety of uses, including agriculture, with a reference to Part B. AMHERST ZONING ORDINANCE §4-11 A.2. (*Permitted Uses*), *Appx.* at 2. Part A also allows "[o]ther uses consistent with the intent of the ordinance … pursuant to Part D below." AMHERST ZONING ORDINANCE §4-11 A.9.

C. Conditions for Uses in Wetlands

Following that, Part B sets forth a number of discrete conditions for use of wetland areas.

Among them it requires a 25-foot "naturally vegetated buffer" from the edge of any wetland, AMHERST ZONING ORDINANCE §4-11 B.4. (*Special Provisions*), *Appx.* at 3, and a 100-foot buffer from the edge of a "Public Water Protection Wetland," which is "defined in Part C." AMHERST ZONING ORDINANCE §4-11 B.5. Part B prohibits "alteration of contours" and "filling of land" within a buffer. AMHERST ZONING ORDINANCE §4-11 B.6. Although Part B allows "[a]gricultural activities" in buffers provided they are "conducted in accordance with the Manual of Best Management Practices for Agriculture in New Hampshire," which is cited, it nonetheless prohibits them "within a 25 ft. buffer." AMHERST ZONING ORDINANCE §4-11 B.8. Part B cautions that it not be "construed as prohibiting the permitted uses contained in Part A," among which is agriculture. AMHERST ZONING ORDINANCE §4-11 B.10. Finally, Part B allows that a "Water Resource Management Plan," which "provides for *substitutes* for wetlands restrictions and setbacks," "*may* be submitted." AMHERST ZONING ORDINANCE §4-11 B.9. (emphases added).

D. Public Water Protection Wetlands

Following that, Part C provides for "Public Water Protection Wetlands." It names 43 town wetlands, and a 44th state-designated wellhead protection area. AMHERST ZONING ORDINANCE §4-11 C. (*Public Water Protection Wetlands*), *Appx.* at 3-4.

E. Water Resource Management Plan Alternative Use (WRMP)

Following that, Part D, divided into several sub-parts, allows for and defines an "alternative use" which can be created by approval of a "Water Resource Management Plan." AMHERST ZONING ORDINANCE §4-11 D. (*Water Resource Management Plans Alternative Use*), *Appx.* at 4-7. A WRMP "is intended to provide for the development of a comprehensive plan for the protection of these resources as part of the *site plan* approval process *in lieu* of the standard requirements of the

ordinance listed in Parts A and B." AMHERST ZONING ORDINANCE §4-11 D. (emphases added).

Approval of a WRMP says it allows "greater flexibility" than the ordinance in general. *Id.* Part D is specific that "*when the owner so elects*, a site-specific plan may be adopted, upon review of the Conservation Commission, Pennichuck Water Works …, and approval of the Planning Board." *Id.* (emphasis added). Part D is "applicable" as "an *alternative* to the provisions contained in Parts A and B" and applies if the parcel is greater than 10 acres, involves certain subdivisions, contains 2 acres of contiguous wetlands, or "falls within the standard setbacks of Public Water Protection Wetlands defined in Part C." *Id.* (emphasis added). In order to put land into a Part D WRMP, an owner must meet certain criteria, including establishing a 25-foot wetlands buffer. AMHERST ZONING ORDINANCE §4-11 D. (*General Requirements*).

The Part D WRMP application documents must be submitted to the Conservation Commission and the Pennichuck Water Works for review, and to the Planning Board for approval. AMHERST ZONING ORDINANCE §4-11 D. (*Water Resource Management Plan Requirements*). Such documents must contain 16 (or 19, depending upon how they are counted) provisions regarding risks to water, ecologically sensitive areas, engineering controls, storm water handling, endangered species, prevention of spills and releases, "[p]rohibitions on the use of lawn chemicals or implementation of an integrated pest management plan to govern the use of lawn chemicals," prohibition of salt for winter road and parking lot maintenance, surface and groundwater monitoring, "[a] plan showing the edge of wetlands within 500 ft. of the nearest impact area, and all setback/buffer areas for any Public Water Protection Wetland," and provisions for future maintenance. *Id.* §4-11 D.1.-16, *Appx.* at 6-7.

II. Amherst Wetlands Ordinance Does Not Require a Water Resources Management Plan

A. WRMP is Optional; Requiring it is Beyond the Town's Authority

The Amherst Wetlands Ordinance provides that a WRMP is an "alternative use." In zoning law, the word "use" is a technical term. *See e.g.*, *Dovaro 12 Atl., LLC v. Town of Hampton*, 158 N.H. 222, 228 (2009) (defining "nonconforming use" for grandfathering); *Harrington v. Town of Warner*, 152 N.H. 74, 77 (2005) (distinguishing between "use" and "area" variances); *Fox v. Town of Greenland*, 151 N.H. 600, 606 (2004) (defining "accessory use" and "retail use" regarding how zoning applies); *Frost v. Town of Candia*, 118 N.H. 923, 924 (1978) (defining "change in use" for application of property tax assessment); *State v. 4.7 Acres of Land*, 95 N.H. 291, 295 (1948) (defining "public use" for eminent domain).

A "use" means "engag[ing] in a use of the land." *Harrington v. Town of Warner*, 152 N.H. at 78 (2005). "Alternative" means that one has a choice – the ability to "elect" and "the option of choosing … between the alternatives." *Walker v. Hayes*, 100 N.H. 90, 91 (1956).

The language of the ordinance makes clear that the WRMP alternative is a choice. In its purposes section it says:

> Part D of the ordinance is intended to provide for the development of a comprehensive plan for the protection of [natural] resources as part of the site plan approval process *in lieu of* the standard requirements of the ordinances listed in Parts A and B above. Under the provisions contained in this part, the Town and landowners are *offered* greater flexibility in establishing effective controls through development, implementation and maintenance of site specific Water Resource Management plans."

AMHERST ZONING ORDINANCE §4-11 D (emphases added).

"[I]n lieu of" means "instead of or in place of." *Greene v. Conlon Const. Co.*, 646 S.E.2d 652, 655 (N.C. App. 2007) (citing Black's Law Dictionary, 8th Ed.), "or in substitution for." *Milam*

Bldg. Co. v. Dannelley, 57 S.W.2d 345, 347 (Tex.App. 1933). "[T]he plain meaning of "in lieu of" is mutually exclusionary." *First Alex Bancshares, Inc. v. United States*, 830 F. Supp. 581, 585 (W.D. Okla. 1993).

Part D likewise allows filing of a WRMP "when the owner so elects." Similarly, Part B likewise provides that a WRMP "substitutes for wetlands restrictions and setbacks." It says a WRMP "*may* be submitted."

> The intention of the Legislature as to the mandatory or directory nature of a particular statutory provision is determined primarily from the language thereof. Words and phrases which are generally regarded as making a provision mandatory include "shall" and "must." On the other hand, a provision couched in permissive terms is generally regarded as directory or discretionary. This is true of the word "may." It is the general rule that in statutes the word "may" is permissive only, and the word "shall" is mandatory.

Appeal of Rowan, 142 N.H. 67, 71 (1997), quoting *In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 553 (2008).

There is only permissive – but no mandatory – language in the ordinance associated with the WRMP. And there is no language giving the Town authority to *require* a WRMP. The ordinance merely offers to some landowners a WRMP as an alternative to complying with the standard parts of the ordinance. It appears to be intended to provide flexibility for developers who cannot otherwise meet setback requirements. The reasons the Town claimed for requiring a WRMP here – clearcutting of trees, disturbance of soils, and an ordinance mandate – have no basis in its language.

Mr. Hebert wanted only to cut the trees necessary to farm his land. Farming is a use permitted in his zoning district, and he was ready and able to comply with the various provisions of Parts A and B. He thus had no need for the alternative use offered by Part D. For this reason he did not chose it, and both the Town and the Superior Court erred by choosing it for him. Moreover, when the Town

required Mr. Hebert file a WRMP and seek its approval, it acted beyond the authority provided by its legislative body. For this reason also, the court erred in enjoining Mr. Hebert to file and seek approval of the WRMP.

B. WRMP is Part of Site Plan Review, not Applicable to Beet Farming or Tree Cutting

Part D of the ordinance says that a WRMP "is intended to provide for the development of a comprehensive plan for the protection of [natural] resources as part of the *site plan* approval process." AMHERST ZONING ORDINANCE §4-11 D. (emphases added). Amherst has adopted as part of its zoning ordinance site plan regulations, which provide:

> The purpose of these regulations is to provide for Planning Board review and approval or disapproval of all site plans for the development of tracts of land for all uses other than one and two family residential, prior to the issuance of a building permit, whether or not such development includes a subdivision or re-subdivision of land, and to assure that minimum standards will be attained so as to provide for and protect the public health, safety and general well being, in accordance with NH RSA 674:43.

AMHERST ZONING ORDINANCE § C, *Non-Residential Site Plan Review Regulations* (2007), <http://amherstnh.gov/wp-content/uploads/rulesandregulations/p158-184.pdf>, *Appx.* at 145 (only relevant pages included in appendix as document is voluminous).

The statute creating municipal authority for site plan review, conveniently cited at the end of the Amherst site plan review regulations, specifies that it applies only to:

> the development or change or expansion of use of tracts for nonresidential uses or for multi-family dwelling units, which are defined as any structures containing more than 2 dwelling units, whether or not such development includes a subdivision or resubdivision of the site.

RSA 674:43.

Because of limitations imposed by constitutional property rights, authority for site plan

review is construed narrowly, requirements for site plan review must be specified in the ordinance, and only for purposes allowed by the statute:

> Although site review can be an extremely useful and powerful tool for municipalities, there are definite limits to its use. For example, site plans may only be reviewed after the local legislative body has specifically authorized the planning board to exercise site plan control and only communities which have adopted valid zoning ordinances may grant site review control to their planning boards. Further, site review statutes are not self-executing, but rather, the local planning board must adopt specific site review regulations before exercising authority. These regulations must, among other things, define the purposes of site plan review and "specify the general standards and requirements with which the proposed development shall comply, including appropriate reference to accepted codes and standards for construction.

Derry Senior Dev., LLC v. Town of Derry, 157 N.H. 441, 447-48 (2008) (quotations and citations omitted); *Eddy Plaza Associates v. City of Concord*, 122 N.H. 416, 419-20 (1982) ("It is well established that the State has the police power, which it may delegate to its municipalities by enabling legislation, to regulate the subdivision and development of land according to the legitimate ends of such power. It is equally well established that in exercising this delegated power, municipalities can only do so in a manner consistent with the enabling legislation and they are bound by the plain meaning of the language used.") (quotations and citations omitted).

Nothing in the record suggests Mr. Hebert intended any sort of "development" or "nonresidential uses" or ""multi-family dwelling units" that would require site plan review. Likewise nothing in the ordinance suggests that logging or farming, or even excavating, implicates the site plan statute or regulations. Mr. Hebert's land does not even meet the 10-acre minimum for an WRMP alternative. Accordingly, even if the Town has authority to require a WRMP for development projects, it has no authority, whether by statute or the language of the ordinance itself, to require one for Mr. Hebert's farm.

C. Mr. Hebert Satisfied the Wetlands Statute by Farming With Best Management Practices

Because Mr. Hebert did not chose the WRMP alternative, he need only comply with Parts A and B of the ordinance. Part A specifies both "forestry" and "agriculture" in its list of "permitted uses," which refers owners to "see Part B." AMHERST ZONING ORDINANCE §4-11 A.2. Part B specifies that "Agricultural activities in buffers shall be conducted in accordance with the Manual of Best Management Practices for Agricultural in New Hampshire, published by the NH Department of Agriculture, as amended. Such activity is prohibited with a 25 ft. buffer." AMHERST ZONING ORDINANCE §4-11 B.8 (underlining in original). The forestry provision similarly cites a published best-practices manual, but does not specify any buffer. AMHERST ZONING ORDINANCE §4-11 B.7.

The agriculture best-practices manual cited by the ordinance requires "maintain[ing] filter strips next to surface waters receiving runoff from crop fields where manure is applied," and specifies the width of such filter strips as 10 to 20 feet depending upon the slope of the land. MANUAL OF BEST MANAGEMENT PRACTICES OF AGRICULTURE IN NEW HAMPSHIRE at 15, Exh. C, *Appx.* at 80, 86 (because of size of document, only identifying and relevant pages included in appendix). Although there is no discussion in the record regarding whether Mr. Hebert intended to apply manure, he understands he can cut, but cannot farm within 25 feet of a wetland. This was conceded by the Town during trial. *Trn.* at 87 (Testimony of Code Enforcement Officer: "Q. Agriculture is prohibited in the 25 foot setback, correct? A. That's correct. Q. But not anywhere else? A. That's correct.").

In requiring a WRMP rather than compliance with the cited and well-developed best practices standards, the Superior Court erred, and should therefore be reversed.

III. Amherst's Regulation of Mr. Hebert's Farm Effectively Prohibits Agriculture

New Hampshire law supports and preserves agriculture. The zoning enabling statutes provide:

> Agriculture makes vital and significant contributions to the food supply, the economy, the environment and the aesthetic features of the state of New Hampshire, and the tradition of using the land resource for agricultural production is an essential factor in providing for the favorable quality of life in the state. Natural features, terrain and the pattern of geography of the state frequently place agricultural land in close proximity to other forms of development and commonly in small parcels. *Agricultural activities* are a beneficial and worthwhile feature of the New Hampshire landscape and *shall not be unreasonably limited by use of municipal planning and zoning powers or by the unreasonable interpretation of such powers*.

RSA 672:1, III-b (emphasis added). Similarly:

> Nothing in this subdivision shall exempt new, re-established, or expanded agricultural operations from generally applicable building and site requirements such as dimensional standards, setbacks, driveway and traffic regulations, parking requirements, noise, odor, or vibration restrictions or sign regulations; provided, however, that in circumstances where their *literal application would effectively prohibit an agricultural use* allowed by this subdivision*, or would otherwise be unreasonable in the context of an agricultural use,* the board of adjustment, building code board of appeals, or other applicable local board, after due notice and hearing*,* shall grant a waiver from such requirement to the extent necessary to reasonably permit the agricultural use, unless such waiver would have a demonstrated adverse effect on public health or safety, or the value of adjacent property. Such waiver shall continue only as long as utilized for the permitted agricultural use.

RSA 674:32-c, II.

The application of the Amherst ordinance, as applied to Mr. Hebert here, unreasonably limits and effectively prohibits his agricultural activities. He should have been farming in the 75-foot area between the 25- and 100-foot buffers immediately after having cleared them.

Filing a WRMP is costly and burdensome. He would have to specify storm water management to accommodate 2-year and 10-year storm water peaks, and install storm water facilities capable of filtering solids which are "easily cleaned" and "designed for grease and oil removal." He

would have to identify "rare or endangered species … within 500 ft.," and make "provisions for the[ir] protection." He would have to identify "ecologically sensitive areas and features" and "wildlife and wildlife habitats," and also make "provisions for the[ir] protection." He would have to map "the edge of wetlands within 500 ft." He would have to come up with plans for monitoring and reporting on surface and groundwater, and make "provisions for future maintenance of the[ir] engineering design, operating and monitoring controls" which would have "to be implemented." He would have to submit plans for of fertilization and pest control. He would have to tell the town the details – direction, length, depth, width – of his crop rows.

Not only would he have to file with the Planning Board, but also the Conservation Commission and Pennichuck Water Works. Moreover, this is all occasioned by an unreasonable interpretation of the Amherst ordinance which does not require a WRMP. Suggestions that he request waivers are of no value, as they mean yet further filings and appearances before town boards, and there is no guarantee they will be granted.

Finally, Mr. Hebert would have to post a bond, and thus risk losing his money, to ensure compliance with all this. When conditions change, due to weather, markets, or other uncontrollable and unpredictable features of farming, he would have to supplement his WRMP or risk losing his bond. This would mean permanent rounds of submissions and waivers.

This level of government regulation is insurmountable. Agriculture in New Hampshire is often a marginal enterprise. Howard S. Russell, *A Long, Deep Furrow: Three Centuries of Farming in New England* (1982). But Amherst has effectively shut it down. *See Town of Chesterfield v. Brooks*, 126 N.H. 64, 69 (1985) (zoning ordinance must "bear a fair and substantial relationship" to a lawful goal).

IV. Amherst Wetland Ordinance is Invalid Because Alleged Wetlands are not Mapped

A. Zoning Restrictions are Invalid Where Owner Cannot Discern What District the Property is in

It is well established that if a zoning district cannot be discerned by reference to a publicly available map or other document it is facially void.

> The imposition of zoning regulations through the creation of zoning districts presupposes the drawing of district boundaries. Absent a specific requirement imposed by statute or charter, the boundaries of a district may be articulated by a map, described verbally with reference to streets, roads, and the like, or delineated by metes and bounds.
>
> A zoning ordinance which fails to prescribe the boundary lines of zoning districts, by maps, metes and bounds, or other suitable means, is invalid. Such an ordinance fails to inform landowners of the restrictions applicable to their properties, and in some jurisdictions it falls short of compliance with the mandatory requirements of enabling legislation. Thus, a Georgia court disapproved a zoning ordinance which did not include a map. The court said: "It is essential that a map or maps be correlated to the text of the ordinance … and that the map or maps be formally adopted by the governing authority as part of the ordinance.… The map or maps form an indispensable part of the ordinance. Without them the ordinance is void."
>
> A zoning ordinance which employs a map to define its districts commonly includes a statement that an identified map is incorporated in, and made a part of, the ordinance. As maps usually are large and bulky, physical attachment of the map to the ordinance may be awkward, and literal compliance with publication and filing requirements may be difficult. The general rule is that substantial, rather than literal, compliance is required. For example, a Minnesota court held that an illegibly printed zoning map in the publication of a zoning ordinance does not render the ordinance ineffective where a legible copy of the map is readily available for inspection. Similarly, a New Hampshire court held that where the entire town comprised one district with restrictions applying uniformly throughout, the fact that the proposed zoning map was not on display at the town meeting although it was on file with the town clerk was not fatal to the ordinance.
>
> While the physical problem of attachment has prompted some courts to approve less than literal compliance, it is essential that the map referred to be clearly identified, and be officially accessible to the public. Absent these factors, the ordinance may be declared invalid even though proponents of the ordinance produce a photostat which proves the existence of a map which arguably is the one referred to in the text of the ordinance.

> An ordinance is invalid if it refers to a map which does not exist, even though the inclusion of a map is not mandated by the enabling statutes. Such an ordinance creates no ascertainable districts and fails to inform landowners of the restrictions applicable to their property. … The Colorado Court of Appeals ruled a county could not bar the operation of a commercial composting business in a zoning district where the business was not permitted as a matter of right, because it could not produce a zoning map establishing the property's zoning.

1 Patricia Salkin, AMERICAN LAW OF ZONING § 9:3 (5th ed.) (citing numerous cases) (mention of New Hampshire case is *Gutoski v. Town of Winchester*, 114 N.H. 414 (1974)).

The standard land use treatises and legal encyclopedias consistently reiterate this principle. 8 McQuillin, THE LAW OF MUNICIPAL CORPORATIONS §25:96 (3rd ed.) ("The zones or districts must be described with reasonable certainty, and must have definite boundaries so that the ordinance may be practically applied. Zoning district boundaries must appear upon the zoning map with definiteness so that landowners can rely upon predictable content within the zoning ordinance map for the purpose of deciding where they can develop structures. An indefinite description making it impossible to ascertain whether or not a particular use is in a zone where such use is prohibited will defeat an injunction sought by a municipality against that use. If an ordinance contains restrictions on use in a district, but fails to either define or designate such district, the ordinance is void for vagueness on its face and of no force or effect to prevent the contemplated use of the property."); 1 Salkin, AMERICAN LAW OF ZONING §9:2 (5th ed.) ("The courts have held that zones must have 'beginning and terminating points,' and that a zoning ordinance is invalid which fails to describe zones by metes and bounds, by streets, roads, or other physical objects, or by reference to a map."); 83 AM.JUR.2d *Zoning and Planning* §125 ("A municipality has the obligation to create zoning maps which clearly delineate the boundaries of zoning districts. The boundaries of zoning districts must be reasonably certain, and lack of certainty may render the ordinance unenforceable."); 101A C.J.S.

Zoning and Land Planning §27 ("The authority to zone contemplates fixed areas with defined boundaries, and a zoning regulation should describe with certainty the districts or districts within which particular restrictions are applicable. Zoning ordinances which fail sufficiently to fix the areas and define the boundaries of the intended use districts created thereby may be invalid."); *Annotation*, Validity of Zoning Regulations, with Respect to Uncertainty and Indefiniteness of District Boundary Lines, 39 A.L.R.2d 766 (collecting cases in numerous jurisdictions).

Numerous cases demonstrate that if an owner cannot reasonably determine what zone their land is in, by reference to a map or other clear delineation, the ordinance is invalidated. *Bd. of County Com'rs v. Rohrbach*, 226 P.3d 1184, 1188 (Colo. Court. App. 2009) *cert. denied*, WL 893813 (Colo. Mar. 15, 2010) (Where "[t]he Board was not able to find and did not introduce that map into evidence … the court could not ascertain the zoning adopted by the Board.… Accordingly, we conclude, as a matter of law, that the Board did not establish the zoning classification of the Rohrbachs' parcel."); *Hanover Hall v. Planning Bd. of City of Stamford*, 475 A.2d 1114, 1116-17 (Conn. 1984) (ordinance invalid because "[t]he map was inadequate to apprise the owners of land within each land use category of how their particular parcel would be affected, if at all, by the amendment"); *State v. Huntington*, 143 A.2d 444, 447 (Conn. 1958) ("The districts must be described with reasonable certainty and must have definite boundaries so that the regulations may be practically applied."); *Auditorium, Inc. v. Bd. of Adjustment of Mayor & Council of Wilmington*, 91 A.2d 528, 533 (Del. 1952) ("All zoning ordinances establishing zone district boundaries are required to do so within reasonable certainty so that the zone districts will have definite boundaries reasonably capable of being ascertained by the public and the administrative bodies charged with the enforcement of the ordinance. The establishment of zone district boundaries may not be left to the

uncertainty of proof by extrinsic evidence. The boundaries must be definitely established by the ordinance itself. The establishment of zones is ineffective when the fixing of the boundaries of the zones is left to the ungoverned discretion, caprice or arbitrary action of municipal administrative bodies or officials."); *Moon v. Smith*, 189 So. 835, 839 (Fla. 1939) ("A map or plat could have been otherwise identified in and made a part of the ordinance, but this was not done. Because of the lack of definiteness of description and location of the several zones, the ordinance was ineffectual to establish the several zones."); *City Council of Augusta v. Irvin*, 137 S.E.2d 82, 85 (Ga.App. 1964) (ordinance invalid where "[i]t is clear that no map was adopted by reference by the city council and board of commissioners"); *Summerell v. Phillips*, 282 So. 2d 450, 453 (La. 1973) (ordinance unconstitutional where owner cannot establish zoning district with certainty); *Kosalka v. Town of Georgetown*, 752 A.2d 183, 184 (Me. 2000) ("We conclude … that the "conserve natural beauty" requirement is an unconstitutional standardless delegation of legislative authority and therefore a violation of due process."); *Selectmen of Sudbury v. Garden City Gravel Corp*., 14 N.E.2d 112, 113 (Mass. 1938) ("The zoning by-law does not describe the several zones by metes and bounds, or by streets, roads or other physical objects. It does not refer to any map."); *Minnesota Dept. of Natural Res. v. City of Waterville*, 354 N.W.2d 544, 546 (Minn.App. 1984) (ordinance invalid where no map delineated zoning districts); *City of Carthage v. Walters*, 375 So. 2d 228, 230 (Miss. 1979) (ordinance invalid because "there was simply no way to tell from the map what precise lands were embraced within the various use districts"); *Deans v. West*, 203 N.W.2d 504, 507 (Neb. 1973) ("[A]n official zoning map or maps must contain sufficient information to permit a person of ordinary intelligence to locate on the map any specific legally described tract of land, and to determine with reasonable accuracy and precision the boundaries of any zoning district."); *Slattery v. Caldwell Twp*.,

199 A.2d 670, 671 (N.J. App.Div. 1964) ("Where it is not possible to define with certainty the boundaries of a zone from the ordinance itself and a zoning map, the ordinance cannot be enforced and is invalid."); *Izenberg v. Bd. of Adjustment of City of Paterson*, 114 A.2d 732, 736 (N.J.App. Div. 1955) ("Zones must have beginning and terminating points."); *Keeney v. Vill. of LeRoy*, 254 N.Y.S.2d 445, 447-48 (N.Y. 1964) ("Minimally every property owner is entitled to know with precision in which one of two districts his property has been placed. The determination should not be left to the village officials to decide from time to time by whim or caprice which one of three maps is the 'official' one."); *Dowsey v. Vill. of Kensington*, 177 N.E. 427, 429 (N.Y. 1931) ("Residence districts into which business may not intrude must have definite boundaries."); *City of Utica v. Paternoster*, 315 N.Y.S.2d 418, 421 (N.Y.Sup. Court. 1970) ("[T]he boundaries as set by the legislature must be reasonably definite so that a property owner may determine his right by reference to the ordinance and official map itself. He must not be forced to resort to extrinsic evidence to determine his rights."); *H.P.V.T. Corp. v. McGuire*, 294 N.Y.S.2d 787, 791 (N.Y.Sup. Court. 1968) ("Since the boundary here in dispute has not been specifically defined by the ordinance itself and is not indicated on the zoning map in question … it is the opinion of the court that the decision of the Zoning Board is arbitrary and should be annulled."); *Festino v. De Aprix*, 262 N.Y.S.2d 146, 150 (N.Y. Sup. Court. 1965) ("An individual examining the resolution and the map would be left totally uninformed as to what the nature of the amendment was and what it covered and whether he was in any way whatsoever affected." "The Courts have consistently held that every property owner is entitled to know with precision in which one of two districts his property has been placed."); *Wasem v. City of Fargo*, 190 N.W. 546, 547 (N.D. 1922) ("But since the ordinance became effective, how may an owner of an undertaking establishment, desirous of obeying the law,

determine whether his location now is, or yesterday was, in a lawful or unlawful place? For the test of the validity of the ordinance depends upon its universality; its universal application in determining a definite and certain restricted location. In this case the test of the validity of the ordinance is not made dependent upon proof that within a certain designated area wherein the mortuary is located the properties are either mainly or wholly occupied for residences."); *City of Cherokee v. Tatro*, 636 P.2d 337, 338-39 (Ok. 1981) (ordinance unconstitutional because "Nowhere within the ordinance is there a definition of the term 'resident district' and the ordinance is not accompanied by a metes and bounds, or legal description, or map or plat by which the geographical boundaries of a 'resident district' may be determined." "There being no way in which it could be determined from within the wording of the Cherokee ordinance whether the Tatro property lay within the 'resident district' and was thereby subject to use restrictions therein prescribed, there was no valid zoning ordinance to apply as against Tatro's contemplated use of his property."); *Fierst v. William Penn Mem'l Corp*., 166 A. 761, 762 (Pa. 1933) (ordinance invalid because map not available to public: "Not by inference, but by direct statement, those interested were entitled to know where they could examine the map."); *Jacquelin v. Zoning Hearing Bd. of Hatboro*, 558 A.2d 189, 191 (Pa.Cmwlth. 1989) ("zoning maps must clearly delineate zoning district boundaries so that landowners can rely upon predictable content within the zoning ordinance and map for the purpose of deciding where they can and cannot develop structures. It thus follows that a municipality has a duty to create zoning maps which clearly delineate zoning district boundaries. A municipality that fails in this duty ought not be permitted to place the onus of that failure upon an applicant…. Accordingly, where, as here, property is situated in close proximity to two zoning districts and a municipality's zoning maps and records are indefinite as to the line of demarcation between the two zoning districts, the burden of

proving in which zoning district the property falls is upon the municipality."); *Tohickon Valley Transfer, Inc. v. Tinicum Twp. Zoning Hearing Bd.*, 509 A.2d 896, 904 (Pa. Cmwlth. 1986) ("Zoning district boundaries … must appear upon the zoning map with definiteness in order that landowners can rely upon predictable content within the zoning ordinance and map for the purpose of deciding where they can develop structures and where they cannot do so.… Such zoning district boundaries … are not to be administered as if they were elastic and movable, lest they be used as tools for non-uniform enforcement."); *State ex rel. Weiks v. Town of Tumwater*, 400 P.2d 789, 791 (Wash. 1965) ("The ordinance in failing, by map or otherwise, to establish zone boundaries is clearly a nullity and void.").

Some of these cases are based on the state's enabling statute, some are based on a map-requirement in the ordinance, some simply invalidate the unmapped zoning restriction without specifying the basis, and some are constitutional. *Summerell v. Phillips*, 282 So. 2d 450 (La. 1973) (ordinance unconstitutional where owner cannot establish zoning districts with certainty); *Kosalka v. Town of Georgetown*, 752 A.2d 183, 184 (Me. 2000) ("We conclude … that the 'conserve natural beauty' requirement is an unconstitutional standardless delegation of legislative authority and therefore a violation of due process."); *Britton v. Town of York*, 673 A.2d 1322, 1324 (Me. 1996) (zoning ordinance unconstitutionally vague when it "would force persons of general intelligence to guess at its meaning, leaving them without assurances that their behavior complies with legal requirements"); *City of Cherokee v. Tatro*, 636 P.2d 337, 3381 (Ok. 1981) (ordinance unconstitutional because "[n]owhere within the ordinance is there a definition of the term 'resident district' and the ordinance is not accompanied by a metes and bounds, or legal description, or map or plat by which the geographical boundaries of a 'resident district' may be determined.").

As a constitutional matter, the foundational zoning case serves as an example: "Annexed to the [Euclid] ordinance, and made a part of it, is a *zone map*, showing the location and limits of the various use, height, and area districts." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 383 (1926) (emphasis added).

In *Burgess v. City of Concord*, 118 N.H. 579 (1978), the municipality did not comply with notice and hearing requirements of the statute governing amendments to official maps, prompting this Court to hold the map amendment invalid. Conversely, restrictions on property have been upheld when the zoning district can be discerned. *Olszak v. Town of New Hampton*, 139 N.H. 723, 727 (1995) (denial of permission to build a bridge in overlay district barring such development because "town zoning map is specifically incorporated into the zoning ordinance. The Pemigewasset Overlay District is clearly delineated on the zoning map, and the district unmistakably widens at the Magoon Brook inlet.… The ordinance, with its inclusion of the map, is sufficiently clear to alert the average person that the inlet is to be considered part of the river."); *Rowe v. Town of North Hampton*, 131 N.H. 424, 426 (1989) (variance denied in part because "property is located in an area designated as an inland wetland conservation area on the town's wetlands map"); *Town of Nottingham v. Harvey*, 120 N.H. 889 (1980); *Carbonneau v. Town of Exeter*, 119 N.H. 259 (1979) (zoning map incorporated by reference gave owners sufficient notice of change in boundaries); *Gutoski v. Town of Winchester*, 114 N.H. 414 (1974) (because zoning map "was available to be seen in the town clerk's office," owner had sufficient notice of restrictions).

The reference-to-map requirement is necessary regardless of the type of zoning, and applies to wetlands districts. *Hirsch v. Maryland Dept. of Natural Res.*, 416 A.2d 10, 18 (Md. 1980) ("dispositive argument raised by [owner] is that the Department's failure to comply with [the]

requirement to file the maps … among the land records rendered the … wetlands regulations invalid."); *see also*, *Rowe v. Town of North Hampton*, 131 N.H. 424, 426 (1989) (variance denied as "property is located in an area designated as an inland wetland conservation area on the town's wetlands map.").

New Hampshire's enabling statues require the use of publicly available maps to delineate zoning district boundaries so that owners or prospective buyers have notice. RSA 674:10 &11. Our constitutions mandate the same. U.S. CONST. amds. 5, 14; N.H. CONST. pt. I, arts. 2, 8, 12, 14, 23.

Accordingly, a zoning restriction which cannot be discerned by a reasonable person with reference to a publicly available map is not valid.

B. Mr. Hebert Could not Discern What Wetlands District His Property was in

There is no dispute here that Mr. Hebert made a diligent effort to discover wetlands on his property by reference to every map known to exist, and that no map or other document would have disclosed the presence of a wetland on his property. Although the Ordinance provides a definition of a wetland – having the associated mix of "hydrology, hydric soils, and hydrophytic plants" – these are matters not reasonably within the ordinary knowledge of land owners.

Although the Ordinance makes reference to a map purporting to specify what places in Amherst are considered wetlands, Mr. Hebert's land is not delineated on it. And although the ordinance contains a list of the places the Town considers "public water protection wetlands," Mr. Hebert's land is not listed on it. Mr. Hebert, after reasonable efforts, could not discern any restrictions on his property.

Whether based on the constitution, statutes, or common law, the Amherst wetlands ordinance is invalid both facially and as applied to Mr. Hebert's property. Because the law regarding this matter

is so well established, because the prejudice to Mr. Hebert is so great and affects his right to use his property for a lawful purpose, and because he repeatedly asserted his belief that the Town was acting beyond its authority, the superior court erred in not holding the ordinance unconstitutional regardless of whether there were direct citations to constitutional provisions. SUP.CT. R. 16-A; *State v. Russell*, 159 N.H. 475, 489 (2009). Because this Court would have had *de novo* review had the superior court ruled, any lack of preservation is mitigated.

V. Town Reversed, Rather than Met, its Burden to Prove Property is in Restricted Zone

When municipalities seek injunctions on the use of land, they have the burden to show the activity is in a zone where it is restricted. *Bd. of County Com'rs v. Rohrbach*, 226 P.3d 1184, 1186 (Colo. Court. App. 2009) ("To enjoin a zoning violation, a county must prove both the adoption and violation of a particular regulation."); *Selectmen of Sudbury v. Garden City Gravel Corp*., 14 N.E.2d 112, 113 (Mass. 1938); *Slattery v. Caldwell Twp*., 199 A.2d 670, 671 (N.J. App.Div. 1964); *City of Utica v. Paternoster*, 315 N.Y.S.2d 418, 420 (N.Y.Sup. Court. 1970) (where municipality seeks injunction, "[i]t has the burden of proving that this land was zoned residential as opposed to commercial."); *H.P.V.T. Corp. v. McGuire*, 294 N.Y.S.2d 787, 791 (N.Y.Sup. Court. 1968) ("Where … the boundary line is not specifically defined but can be reasonably determined by the aid of extrinsic proof the ordinance should be upheld. Under such circumstances, however, the burden of proving the proper location rests with the municipality and any doubts as to such proof should be resolved in favor of the landowner."); *Jacquelin v. Zoning Hearing Bd. of Hatboro*, 558 A.2d 189, 191 (Pa.Cmwlth. 1989) ("[W]here … property is situated in close proximity to two zoning districts and a municipality's zoning maps and records are indefinite as to the line of demarcation between the two zoning districts, the burden of proving in which zoning district the property falls is upon the municipality.").

The Amherst ordinance provides that "[i]n the event an area is incorrectly designated" as a wetland, the owner should hire a soil scientist to prove it should not be. The Ordinance also requires a landowner to hire a soil scientist to prove an otherwise *undesignated* place *is* a wetland in the event the Town neglects to designate it.

In both cases Amherst has reversed the burden. Whether designated or not, the Town requires

an owner to show his property is *not* a wetland. The Town adds insult to injury by also requiring an owner to create the maps necessary to make the showing. Requiring owners to map the town so that the ordinance can be enforced is backward, and violates New Hampshire's zoning statues and the State and Federal Constitutions, which all require the use of publicly available maps to delineate zoning district boundaries so that owners and prospective buyers have pre-enforcement notice. RSA 674:10 &11; U.S. CONST. amds. 5, 14; N.H. CONST. pt. I, arts. 2, 8, 12, 14, 23.

Here Amherst reversed, rather than met, its burden of proof.

Accordingly, the ordinance is unconstitutional and invalid both facially and as applied to Mr. Hebert. Moreover, because the law regarding this matter is so well established, because the prejudice to the owner is so great and affects his right to use his property, and because Mr. Hebert repeatedly asserted his belief that the Town was acting beyond its authority, the superior court erred in not holding the ordinance unconstitutional regardless of whether there were direct citations to constitutional provisions. SUP.CT. R. 16-A; *State v. Russell*, 159 N.H. 475, 489 (2009). Because this Court would have had *de novo* review had the superior court ruled, any lack of preservation is mitigated.

CONCLUSION

In accord with the foregoing, this Court should reverse the holding of the superior court, find that the area in which Mr. Hebert cut trees is not a wetland as a matter of fact and law, determine that Mr. Hebert did not violate Amherst's ordinance, hold that there is no need for him to file a WRMP or an application for its approval, allow him to farm on his land without further oversight from the Town or its various boards, nullify orders requiring him to pay fines, fees and costs, and dissolve the $50,000 security bond.

Respectfully submitted,

Norman E. Hebert,
Trustee of HJC Realty Trust,
By his Attorney,

Law Office of Joshua L. Gordon

Dated: November 16, 2011

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
75 South Main Street #7
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Norman E. Hebert, Trustee of HJC Realty Trust Requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case should be decisively determined in this jurisdiction.

I hereby certify that on November 16, 2011, copies of the foregoing will be forwarded to Gary J. Kinyon, Esq.

Dated: November 16, 2011

Joshua L. Gordon, Esq.