

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

Merrimack Superior Court
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NOTICE OF DECISION

**Evan J. Mulholland, ESQ
Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord NH 03301-6397**

Case Name: **Town of Newbury, et al v State of NH Dept. of Fish & Game, et al**
Case Number: **217-2010-CV-00672**

Enclosed please find a copy of the court's order of January 24, 2012 relative to:

ORDER

February 08, 2012

William S. McGraw
Clerk of Court

(484)

C: Gregory Hayes Smith, ESQ; Justin C. Richardson, ESQ; Thomas H. Richards, ESQ; K. Allen Brooks, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Town of Newbury and Lake Sunapee Protective Association

v.

New Hampshire Department of Fish and Game,
Glenn Normandeau, Executive Director of the New Hampshire Department of Fish and Game,
and The Council on Resources and Development

No. 10-CV-672

ORDER

The Town of Newbury (the “town”) and Lake Sunapee Protective Association (“LSPA”) (together “petitioners”) originally brought an action for declaratory judgment asking this court to determine whether a proposed boat launch on Lake Sunapee violated a number of statutory provisions. In June of 2011, the court dismissed Counts I and II, to the extent that Count II alleged a violation of RSA 162-C:6, IV, leaving only a portion of Count II and Count III as amended. In a September 19, 2011 order, this court dismissed Count III, leaving the remainder of Count II that did not allege a violation of RSA 162-C:6, IV. Before the court are cross motions for summary judgment. In their motion, the petitioners argue that the boat launch, proposed by the New Hampshire department of fish and game (“F&G”) and approved by the Council on Resources and Development (“CORD”), violates RSA 162-C:6, II and III, and RSA 162-C:10. In their cross motion, the respondents argue that the boat launch is in conformance with the purposes of RSA 162-C. Because the petitioners have sustained their burden of demonstrating that they are entitled to judgment as a matter of law on CORD’s failure to comply with RSA 162-C:6, III, their motion for summary judgment is GRANTED and the respondents’ cross motion for summary judgment is DENIED.

Procedure

The respondents have raised a procedural issue, which must be addressed before the court addresses the merits. The respondents argue that the petitioners essentially challenge CORD's decision to approve the boat launch and that the appropriate avenue for a challenge to a final CORD decision is an appeal. *See* RSA 541. RSA 541:2 states, "When so authorized by law, any order or decision of the commission may be the subject of a motion for rehearing or of an appeal in the manner prescribed by the following sections." Commission means, "the public utilities commission, the milk sanitation board, or any state department or official concerning whose decision a rehearing or appeal is sought in accordance with the provisions of this chapter." RSA 541:6 provides, "Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court." Reading all these sections together, none of them directly address the procedures applicable to this case.

The petitioners never moved for a rehearing or filed a supreme court appeal of CORD's determination that a boat launch is an appropriate use of the property at issue here. Indeed, CORD did not make that determination until after this case had commenced. Because CORD had not taken any formal action, there was nothing to appeal when the petitioners initiated the instant declaratory judgment action. Thus, RSA 541 was not applicable.

Standard

To prevail on a motion for summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III (2005). In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath, 'sufficient ... to indicate that a genuine issue of fact exists so that the party should have the opportunity to prove the fact at trial....'"

Phillips v. Verax, 138 N.H. 240, 243 (1994), quoting *Dolan v. Maple Leaf Health Care Ctr., Inc.*, 119 N.H. 424, 425 (1979). A fact is material if it affects the outcome of the litigation under the applicable substantive law. *Palmer v. Nan King Rest., Inc.*, 147 N.H. 681, 683 (2002). In considering a party's motion for summary judgment, the evidence must be considered in the light most favorable to the non-moving party, together with all reasonable inferences therefrom. *Sintros v. Hamon*, 148 N.H. 478, 480 (2002). Mindful of the standard, the court will set forth the non-prevailing parties' facts.

Facts

In the 1980s, New Hampshire's Land Conservation Investment Program ("LCIP") was interested in purchasing a parcel of property known as Wild Goose in Newbury. Wild Goose included roughly 133 acres with some forestlands and frontage on Lake Sunapee. Part of the reason LCIP was interested in this parcel was because of its potential to increase public access to the lake. The property went into foreclosure. On November 19, 1990, LCIP acquired the property by deed. LCIP then transferred a 3.3-acre parcel abutting Lake Sunapee to F&G. In December of 2009, F&G first proposed the boat launch project. As proposed, the boat launch would require paving over a significant portion of the 3.3 acres, create more than forty parking spaces, service a dual poured-concrete boat ramp, and require the installation of permanent lighting fixtures that would remain lighted throughout the night. F&G submitted an application to the New Hampshire department of environmental services ("DES") for permits to construct this project.

Analysis

The petitioners argue that the project, as now contemplated, varies substantially from that contemplated when LCIP purchased the property and from that contemplated when LCIP transferred the property to F&G. The petitioners further contend that CORD violated its statutory obligation to manage conservation lands acquired by LCIP when it supported the project. Although

the petitioners support their summary judgment request with three arguments, only one is relevant here—that CORD’s support violates its obligation to ensure that the proposed state boat launch preserve the natural beauty of the site as required by RSA 162-C:6, III. The respondents disagree. They argue *inter alia* that CORD need only consider projects in the abstract; thus, CORD fulfilled its obligations with respect to this proposed project. The court agrees with the petitioners.

The parties’ arguments turn on a determination of the authority of and obligations imposed on CORD under RSA 162-C. This is a question of law appropriately decided at the summary judgment stage. *See, e.g., St. Regis Paper Co. v. New Hampshire Water Res. Bd.*, 92 N.H. 164, 174 (1942) (“While the question of authority conferred is one of law not judicially determinable by the executive department of the state government, the question of ‘public use and benefit’ is one of fact not to be reviewed by the courts...”). In the context of this case, the issue to be resolved is whether CORD must consider the specifics of the project proposed by F&G at the 3.3-acre parcel in order to fulfill its statutory duty. The answer is yes.

RSA 162-C:6, III states:

[CORD] shall manage the lands acquired under the former RSA 221-A so as to preserve the natural beauty, landscape, rural character, natural resources, and high quality of life in New Hampshire. The council shall maintain and protect benefits derived from such lands and **maintain public access** to such lands, where appropriate.

(Emphasis added). The purpose of this statute is enunciated in RSA 162-C:6, I:

The general court recognizes that in order to maintain New Hampshire’s distinctive quality of life, strong economic growth must be balanced with responsible conservation initiatives, and that the history of conservation in New Hampshire has been marked by cooperation among government, business, individuals, and conservation organizations. The general court further recognizes the strong traditions of both public and private land ownership and use, and the need to respect investments in the conservation of natural resource lands in the state for the perpetual use of the people of New Hampshire. In addition, the general court recognizes that the land conservation investment program was

undertaken, in part, with significant donations of cash and land value by citizens of the state **who intended that the conservation value of these lands be protected in perpetuity.**

(Emphasis added). Considering these sections together, CORD's duty to manage public lands requires a balancing of the interest in conservation with the interests in recreation and public access. This balancing is most appropriately effectuated by CORD.

Although CORD did hold a July 14, 2011 public hearing to consider F&G's proposed project, it did not delve far enough into the details of the project for it to ensure it was properly discharging its statutory obligations. At the hearing, respondent Glenn Normandeau proposed that CORD focus on two questions, the latter of which was: "Does the proposed use as a boat launch comply with NH RSA 221-A[?]" Petitioners' Motion for Summary Judgment, Exh. B at 2. The New Hampshire department of justice representative present stated, "CORD's only responsibility at this meeting should be to rule if the use of the property as a boat launch was appropriate under the guiding statutes." *Id.* This individual then cited RSA 162-C and explained the statute gives CORD broad discretion to manage public lands. *Id.* at 3. The town then explained its objections to the boat launch and attempted to discuss the specifics of the project as proposed compared to the original project contemplated. At that point another attendee interrupted, commenting that the discussion had progressed "beyond the bounds of CORD's purview over the matter." *Id.* at 5. The attendee continued, "CORD's responsibility should be to rule on the allowability of any boat launch and not to dwell on the specifics of the particular proposal, which ... [is] most appropriately addressed within the permitting process...." *Id.* at 5.

Eventually, Chairperson Morin agreed with this comment, stating the project "is not just about the 3.3 acres, but rather the entire 133.3 acres.... [T]he project does provide for the mandated requirement of providing for recreation ... provides for both natural resource protection and public access." *Id.* at 7. Chairperson Morin further stated "CORD is not there to get involved

with DES permitting matters and ... she would have a very difficult time getting involved with specifics like parking, layout, *et cetera.*" *Id.* at 7.

CORD member, Robert Beaulac, agreed with Ms. Morin "that CORD's authority is to look at the proposed use and that determination of specifics should take place through the permitting process." Mr. Beaulac then moved for a vote to find "the Wild Goose proposal put forth by [F&G] to be consistent with the [LCIP] and consistent with the governing NH statutes, 162-C and 221-A." *Id.* at 7. CORD Member Beth Muzzey then clarified that the vote should only be whether the approval was "of the proposed use as a boat launch, not CORD's approval of the specific boat launch presented." *Id.* at 8. This is the proposal that CORD ultimately approved—the **idea** of a boat launch.

This hearing, and CORD's ultimate approval, did not properly fulfill CORD's responsibilities under RSA 162-C and RSA 221-A. First, respondent Normandeau attempted to limit the discussion to RSA 221-A. Then, Ms. Morin considered property outside the scope of the proposed project as a mitigating factor for any development of the 3.3-acre parcel. In addition, Ms. Morin interpreted CORD's governing statutes as mandating it to provide public access. In fact, the specific language of RSA 162-C:6, III only directs CORD to "maintain public access to [public] lands, **where appropriate.**" (Emphasis added). This language is not mandatory and indicates there may be situations where public access is inappropriate. In any event, public access to Lake Sunapee never existed at this site before LCIP acquired the property. Thus, CORD would be creating access, rather than "maintaining" it. This is a factor CORD could have, but did not, consider at its hearing.

Last, Ms. Morin, Mr. Beaulac, and Ms. Muzzey inappropriately limited the scope of the hearing by refusing to discuss or consider the specifics of the boat launch as proposed. In July of

2011, when this hearing was held, F&G had already submitted permit applications to DES for this project. F&G was in a position to explain the details of the project it intended to construct. Although the project need not be final, and F&G need not possess all permits for a project before seeking approval from CORD, CORD does bear a statutory obligation to consider all specifics that are relevant to its statutory duty. CORD did not fulfill this duty.

A municipal planning board cannot shirk its statutory responsibilities by simply rubber-stamping all proposed projects, conditioned upon the ability of the developer to secure the necessary regulatory permits. Likewise, CORD cannot shirk its statutory responsibilities by approving all proposed projects that provide public access, subject to the requirement of securing all required regulatory permits from agencies such as the DES. In determining whether a project is in conformance with RSA 162-C, CORD would be afforded substantial discretion. *St. Regis Paper*, 92 N.H. at 164. CORD, however, cannot refrain from considering the impact of multiple acres of paving, a dual boat ramp, drainage basins and systems, a restroom facility, permanent light fixtures, the necessary buffer area to protect the lake, or whether the project remains consistent with the statutory purposes it is charged with overseeing. That is precisely what happened in this case—CORD focused on the public access that any boat launch would provide. In addition, it appears some CORD members interpreted their statutory obligation as mandating that CORD provide recreational access. This misinterprets CORD's duty. Even drawing all reasonable inferences in favor of the respondents, CORD's failure to consider the impact of the project as proposed is a failure to fulfill its statutory duty to balance conservation and recreational interests when managing public lands.

Conclusion

Based on the foregoing, the court concludes that the petitioners are entitled to judgment as a matter of law. Accordingly, the petitioners' motion for summary judgment is GRANTED to

the extent that it relies on CORD's failure to comply with RSA 162-C:6, III. The respondents' cross-motion for summary judgment is DENIED.

So ORDERED.

Date: January 24, 2012


LARRY M. SMUKLER
PRESIDING JUSTICE