

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

Merrimack Superior Court  
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**NOTICE OF DECISION**

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Case Name: **Town of Newbury , et al v. State of NH Dept. of Fish & Game , et al**  
Case Number: **217-2012-CV-00308**

Enclosed please find a copy of the court's order of February 19, 2014 relative to:

**ORDER**

February 20, 2014

William S. McGraw  
Clerk of Court

(484)

C: Justin C. Richardson, ESQ; Gregory Hayes Smith, ESQ; Evan J. Mulholland, ESQ

**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS.**

**SUPERIOR COURT**

Town of Newbury and Lake Sunapee Protective Association

v.

New Hampshire Department of Fish & Game  
and Council on Resources and Development

No. 12-CV-308

**ORDER**

The petitioners, the Town of Newbury and Lake Sunapee Protective Association, brought this *certiorari* action to prohibit the respondents, the New Hampshire Department of Fish & Game (“F&G”), Glenn Normandeau, Executive Director of F&G, and the Council on Resources and Development (“CORD”), from constructing a boat launch on Lake Sunapee. The court conducted a view and heard argument on December 21, 2013. Because the petitioners have not sustained their burden of showing that CORD’s decision is illegal or unreasonable, their petition for writ of *certiorari* is DENIED.

F&G wishes to construct a motorized boat launch on a 3.3-acre parcel of land transferred by the New Hampshire Land Conservation Investment Program (“LCIP”) to F&G. The state learned of the property in question in the 1980s. The entire parcel is known as Wild Goose in Newbury. Wild Goose included roughly 133 acres with some forestlands and frontage on Lake Sunapee. LCIP was interested in this parcel partly because of its potential to increase public access to the lake.

The Town of Newbury and the director of parks and recreation (who, at the time, was Wilbur LePage) supported the acquisition. In a March 1, 1989 letter, LePage observed that the

property presents an opportunity to increase public access to Lake Sunapee. (CR. at 667–68). LePage also expressed his desire that the property remain as natural as possible with no paving. (CR. at 667). LCIP confirmed LePage’s understanding in a memorandum that is also included in the certified record. (CR. at 669). Eventually, LCIP sought financial support from the Lake Sunapee Protective Association (“LSPA”). The property went into foreclosure. In the spring of 1990, LCIP director Will Abbott sought Governor and Council approval to acquire the property at the foreclosure auction. Abbott told Governor and Council that the LCIP decision to purchase the subject property was based on the interest at the Department of Resources and Economic Development (“DRED”) in: (1) developing a 3.3 acre parcel with water frontage into a State boat launch; and (2) protecting the 130 acre parcel abutting the State park for its scenic views of the Lake and from the Lake. (CR. at 103–04, 686). Governor and Council approved LCIP’s request. LCIP acquired the property. On November 19, 1990, LCIP acquired the property by deed. The deed conveying the property represents that the land is to be used exclusively for conservation purposes pursuant to RSA 221-A. (CR. at 688). LCIP then transferred a 3.3-acre parcel abutting Lake Sunapee to F&G.

In accordance with the purpose of the purchase, F&G developed a proposal to develop a boat launch site on the 3.3-acre parcel. The proposal goes beyond mere installation of boat access to the lake. Specifically, F&G is proposing multiple acres of paving (including 43 parking spaces), a dual boat ramp, drainage basins and systems, portable toilets, permanent light fixtures, and a buffer area to protect the lake. *See e.g.* (CR at 4) (CORD Decision, April 9, 2012, “Description of Project”). Claiming that the proposal is not consistent with the conservation goals that were inherently incorporated with the acquisition of the property, the petitioners initiated the litigation that has led to this order.

In *Town of Newbury v. F&G*, Merrimack County Superior Ct. Docket No. 2010-CV-672, the petitioners argued, *inter alia*, that CORD failed to fulfill its statutory obligation to balance conservation goals with public access in approving F&G's proposal. *Id.* (Order of Feb. 8, 2012). This court agreed in part and remanded the matter to CORD for further proceedings. *Id.* Thereafter, CORD held a public hearing on April 2, 2012. On April 9, 2012, CORD approved the project following another public session and on-the-record deliberations. The instant request for *certiorari* review followed.

The parties filed cross motions to dismiss and for summary judgment. By order dated, August 27, 2012, the court denied the respondents' motion to dismiss and motion for summary judgment, holding that because a boat launch is a highway and CORD has no authority to permit construction of a new highway project, CORD had no authority to approve a boat launch on Lake Sunapee. The respondents appealed. The Supreme Court reversed and remanded. *See Town of Newbury v. N.H. Fish & Game Dept.*, 165 N.H. 142 (2013). On remand, the sole issue remaining is the court's *certiorari* review of whether CORD's April 9, 2012 decision approving the boat launch violated RSA 162-C:6, II or III, or RSA 162-C:10.

In reviewing an administrative action on a writ of *certiorari*, the court's authority is limited. *In re Kalar*, 162 N.H. 314, 318 (2011). The test to determine whether to grant a writ of *certiorari* is whether the agency has acted illegally with respect to jurisdiction, authority or observance of the law, or has acted arbitrarily, unreasonably, capriciously, or with an unsustainable exercise of discretion. *Gosselin v. N.H. Dep't Corr.*, 153 N.H. 696, 697-98 (2006). The issue of whether CORD acted illegally with respect to its jurisdiction and authority has been resolved. *Town of Newbury v. N.H. Fish & Game Dept.*, 165 N.H. at 146. Thus, the court will direct its

analysis at whether the petitioners have sustained their burden with respect to the remaining elements of their *certiorari* claim.

Several provisions of New Hampshire law govern CORD's authority to review and approve the F&G proposal. RSA 162-C:6, II and III state:

II. In addition to its other responsibilities, the council shall manage and administer the lands acquired and funds established under the land conservation investment program under the former RSA 221-A, according to the provisions of this subdivision and consistent with agreements entered into with persons with ownership interests in such lands.

III. The council 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....

RSA 162-C:10 states:

The lands and interests in lands acquired under the former RSA 221-A through the use of the trust fund for the program shall be held in public trust and used and applied for the purposes of this subdivision. Notwithstanding any other provision of law relating to the disposal of publicly-owned real estate, no deviation in the uses of any land or interest in land so acquired to uses or purposes not consistent with the purposes of this subdivision shall be permitted. The sale, transfer, conveyance, or release of any such land or interest in land from public trust is prohibited.

The petitioners proffer three primary arguments: (1) CORD acted outside its statutory authority in approving the boat launch because RSA 162-C:6 and RSA 162-C:10 require CORD to manage lands for conservation purposes only; (2) CORD's decision violated RSA 162-C:6, II, which requires it to manage lands acquired under RSA 221-A consistent with agreements entered into with persons with ownership interests in those lands; and (3) even if RSA chapter 162-C permits some development of CORD-held lands, it does not permit maximum development to the extent permitted by law, as the F&G project in this case proposes. Not surprisingly, the respondents disagree. They contend that: (1) RSA chapter 162-C should not be read as narrowly as

petitioners propose; (2) even if RSA 162-C:6, II does require CORD to manage lands in conformity with private restrictions, none of the petitioners in this case have standing to enforce those private restrictions because none of them have or ever had an interest in the subject property; and (3) RSA 162-C only requires CORD to balance conservation uses with public access and recreation, which CORD did. The court will address these arguments in turn.

The petitioners' first argument essentially contends that RSA 162-C:10 limits the scope of the entire chapter with its mandatory language that lands acquired under former RSA 221-A "shall be held in public trust." No deviation is permitted. The petitioners also highlight the language providing that "notwithstanding any other provision of law," land shall be used consistent with this subdivision.

In interpreting a statute, the court considers the language in the context of the chapter as a whole, not in isolation. *Town of Newbury v. N.H. Fish & Game Dep't*, 165 N.H. 142, 144 (2013). In this context, the mandatory "shall" language in the first sentence of RSA 162-C:10 refers to the uses and purposes of the subchapter, which entails the entire CORD statute. The "shall" language only requires that property held in trust under this statute be used for purposes contemplated in this statute. The statute as a whole considers public access, recreation, land swapping, and even the use of conservation lands to expand public ways. RSA 162-C:6, III-IV. Thus, the "shall" language contained in RSA 162-C:10 is not as limiting as the petitioners claim it to be.

Additionally, the petitioners cite the "notwithstanding" language in RSA 162-C:10 to argue that the subsection's applicability is limited to the chapter. The court disagrees. When read in the context of its subsection and the chapter as a whole, the "notwithstanding" language plainly states that it applies to law outside the chapter: "Notwithstanding **any other provision of law relating to the disposal of publicly-owned real estate no deviation** in the uses of any land ...

so acquired to uses or purposes not consistent **with the purposes of this subdivision shall be permitted.**” RSA 162-C:10 (emphasis added). In other words, the “notwithstanding” language does not apply to the chapter—it only applies to law outside of RSA chapter 162-C that is inconsistent with the protections provided therein. Any use that would be permissible under RSA chapter 162-C is permitted. As discussed above and further discussed below, the chapter itself permits a variety of uses.

Having established that the public trust provision of RSA chapter 162-C does not limit CORD’s discretion to permit development of a boat launch in some circumstances, the court will address the petitioners’ next two arguments, which suggest that CORD could not have approved the F&G proposal in this case. The petitioners assert that the LCIP understanding at the time it acquired the subject parcel was that it would not be developed. They go on to cite RSA 162-C:6, II for the proposition this understanding is binding and/or relevant to the uses CORD has now approved. Even if the court ignores the current petitioners’ lack of standing, *see* Docket No. 217-2010-CV-672 (Order of June 2, 2011 at 7), this argument fails because the record clearly reflects that the property was always intended to be a boat launch. Indeed, the petitioners implicitly concede this point when they direct their argument at the scope of the launch.

At the time it acquired the property more than 20 years ago, LCIP understood that improvements would not include any additional paving. At that time, the property had already been improved and it contained some pavement. (CR. at 169–70, 173). The property had been used as a summer cabin site and hosted more than a dozen cabins. (CR. at 169–70, 173); *see also Appeal of Lake Sunapee Protective Assoc.*, 165 N.H. 119, 124 (2013) (opinion involving this same 3.3 acre parcel, which recites that 5.6 percent of the property is already paved). Further, RSA 162-C:6, II only requires that CORD manage property consistent with the private agreements relating

to the property. It does not state that private agreements are binding on CORD in a literal sense. Here, CORD determined that the proposed boat launch is consistent with private agreements and the overarching principles of the governing statute. The petitioners have not sustained their burden of showing that this determination is unreasonable because the record reflects that the property was always intended to be a boat launch.

Finally, petitioners argue that even if some projects are permissible under RSA chapter 162-C, this one is not because the scope of the proposed project is so large. The petitioners further contend that it was unreasonable for CORD to consider other property on Lake Sunapee as a factor in its decision to approve the proposed boat launch on the subject parcel.

RSA 162-C:6, III instructs CORD to consider landscape, rural character, and life in New Hampshire generally. These are all factors that require evaluating conditions outside the boundaries of the subject property, including property that is not subject to CORD jurisdiction. Thus, CORD's governing statute mandates that it consider characteristics outside any subject property. CORD did not err when it considered property outside the 3.3 acres at issue.

When CORD considered other properties, it determined that the proposed development of this parcel of property serves the conservation objectives it is tasked with upholding by protecting other properties and public interests. The F&G proposal incorporates porous pavement that will allow rainfall to be treated and used, rather than discharged directly into the lake. (CR. at 174–75). There will be a native plant screen between the paved area and the lake, and the lighting at the site will be downcast. (CR. at 174–75). By approving the construction of a large boat launch on the subject parcel that is environmentally sensitive, CORD considered the benefit of sparing other parts of Lake Sunapee from the development of additional launches, as well as the

natural beauty of the lake, protection of natural resources, and public access. (Apr. 9, 2013 hearing disk, 33:00–48:00).

Based on the foregoing, the court concludes that the petitioners have failed to sustain their burden of showing that CORD acted outside its statutory authority, unreasonably, unlawfully, or in an abuse of discretion. The court acknowledges that the petitioners have shown that CORD has acted at the edge of its discretion by approving such a substantial project. Nevertheless, CORD has lawfully and reasonably determined that the approval of the proposed project is appropriate in this case. Accordingly, the petitioners' request for *certiorari* relief cannot be granted. The CORD decision is AFFIRMED.

**So ORDERED.**

**Date: February 19, 2014**

  
**LARRY M. SMUKLER**  
**PRESIDING JUSTICE**