

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Town of Newbury, Lake Sunapee Protective Association

v.

State of New Hampshire, Department of Fish and Game,  
and Council on Resources and Development

No. 10-CV-308

ORDER

The petitioners—the Town of Newbury and Lake Sunapee Protective Association—initiated this action seeking any of three alternative extraordinary writs to prohibit the respondents—the State of New Hampshire, the Department of Fish & Game (“F&G”), and the Council on Resources and Development (“CORD”)—from constructing a boat launch on Lake Sunapee. Before the court is the respondents’ motion to dismiss and motion for summary judgment. The respondents allege that they have fulfilled their legal duty in reviewing the proposed boat launch. Because the petitioners’ requests for a writ of mandamus and a writ of prohibition are not reasonably susceptible of a construction that would permit recovery, the respondents’ motion to dismiss is GRANTED as to those claims. Because the petitioners’ request for a writ of *certiorari* is susceptible of a construction that would permit recovery, the respondents’ motion to dismiss is DENIED as to that claim. Finally, because the petitioners correctly assert that CORD acted outside the scope of its enabling authority, the respondents have failed to sustain their burden of showing that they are entitled to *certiorari* judgment as a matter of law. Thus, the respondents’ motion for summary judgment is DENIED.

This case involves a F&G proposal 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 petitioners have engaged in litigation challenging this project for several years and, now, multiple docket numbers. See *Town of Newbury v. F&G*, Merrimack County Superior Ct. Docket No. 2010-CV-672. In that case, petitioners argued, *inter alia*, that CORD failed to fulfill its statutory obligation to balance conservation goals with public access in approving the proposed boat launch. *Id.* (Order of Feb. 8, 2012). Following this court’s decision, CORD held a further public hearing on April 2, 2012. Motion to Dismiss and for Summary Judgment (“Respondent’s Motion”) ¶ 59. At this meeting, CORD considered the specifics of the proposed boat launch project and contemplated its statutory mandate to protect conservation lands in perpetuity. *Id.* ¶¶ 60, 67, 70–74. The petitioners were given notice of this meeting and spoke at the meeting for as long as they desired to present their case against the boat launch. *Id.* ¶¶ 61–66, 69. CORD approved the project following another public session and on-the-record deliberations on April 9, 2012. In this new case, the petitioners challenge CORD’s authority to consider the project in the first place.<sup>1</sup>

The petitioners explain that the proposed boat launch would constitute a class III-a highway. They allege that new highway construction is outside the scope of CORD’s authority. See RSA 162-C. The respondents disagree, arguing the provisions of the statute cited by the petitioners pertain to conservation lands condemned by the New Hampshire Department of Transportation (“DOT”). Because the F&G boat ramp in this case is not DOT condemned conservation

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<sup>1</sup> In fairness to the respondents, the court acknowledges that the petitioners could have raised the issue of CORD’s authority in the previous proceeding. This does not, however, deprive the petitioners of the right to relief because issues of subject matter jurisdiction are never untimely. See *Daniel v. B&J Realty*, 134 N.H. 174, 176 (1991) (jurisdiction may be raised at any time).

land, the respondents argue that the petitioners are citing an inapplicable statute. The court agrees with the petitioners.

As an initial matter, the court addresses the jurisdictional basis for review. The petitioners have titled their action "Joint Petition for Extraordinary Writ or Appeal pursuant to RSA 162-C:6, V." The respondents allege that COD made no decision that is subject to appeal because it followed the proper statutory notice and approval procedure at two April 2012 public hearings. The petitioners responded with the instant petition seeking any of three extraordinary writs: *mandamus*, prohibition, or *certiorari* on the theory that the COD acted outside of its statutory authority and therefore unlawfully. The superior and supreme courts have concurrent jurisdiction to issue any one of the four extraordinary writs. *Smith v. Sampson*, 114 N.H. 638, 641 (1974); *Boody v. Watson*, 64 N.H. 162 (1886). Thus, the respondents do not assert that this court lacks jurisdiction to issue the writs, rather, they allege that neither *mandamus* nor prohibition are appropriate due to the nature of the writs and that it is entitled to summary judgment on petitioners' motion for *certiorari*. Accordingly, a brief summary of these writs should precede discussion of the substance of this petition.

*Mandamus* tells a public official to do something whereas prohibition tells the public official to stop doing something. A petitioner has a right to a writ of *mandamus* when there is no adequate remedy at law and petitioner seeks to force a public official to commit a ministerial act. *Guarracino v. Beaudry*, 118 N.H. 435, 437 (1978). Where the duty to act involves the exercise of discretion, *mandamus* will lie only to force the person to address the issue, not to perform the act. *Brouillard v. Governor and Council*, 114 N.H. 541, 544 (1974). The duty to act must be "clear and specific" both as a matter of law and of fact. *Bell v. Pike*, 53 N.H. 473, 474 (1873). "Prohibition is an extraordinary writ, the purpose of which is to prevent subordinate courts or other tribu-

nals, officers or persons from usurping or exercising jurisdiction with which they are not vested.”

*Hillsborough v. Super. Ct.*, 109 N.H. 333, 334 (1969). For prohibition, petitioner must show a clear need for and right to relief. *Id.*; see *In re McDonough*, 149 N.H. 105, 114 (2003).

A petition for a writ of certiorari provides judicial review of governmental administrative or judicial action when no statute authorizes an appeal. The appropriate standard of review on certiorari is whether the tribunal acted illegally concerning its jurisdiction, authority or observance of the law or has abused its discretion or acted arbitrarily or capriciously.

*Jaskolka v. City of Manchester*, 132 N.H. 528, 531 (1989) (citations, quotations, and ellipses omitted).

Here, the petitioners' position can best be summarized as alleging that CORD acted outside its statutory authority, as the proposed boat launch is a project that only the legislature can approve. Petitioners' Objection to Respondents' Motion ¶ 6. Specifically, the petitioners have requested “that this Honorable Court: ... Reverse the April 9, 2012 decision by CORD.”

*Mandamus* is inappropriate because CORD does have substantial discretion to determine how to manage the 3.3-acre parcel in dispute. CORD could decide to approve various types of projects on the property, but it could also decide that the only appropriate use for the parcel is as conservation land. Accordingly, CORD cannot be forced to choose either of these options; it can only be forced to address the property's uses. It has done this. Consequently, *mandamus* does not lie.

At first blush, prohibition appears to offer the petitioners the remedy they seek. Upon closer review, however, prohibition is inappropriate because “[t]he writ will not lie to direct an officer of the executive branch in the lawful performance of his duties or when it appears or may safely be assumed that an administrative agency or officer will comply with the court's announced view of the law.” GORDON J. MACDONALD, 5 WIEBUSCH ON NEW HAMPSHIRE CIVIL PRACTICE AND PROCEDURE § 38.51[2] (1984). Here, the respondents have promptly and fully

complied will all court orders issued in this case. There is no reason to believe that the respondents will move forward with the proposed project if the court rules they cannot. Accordingly, a writ of prohibition does not lie.

*Certiorari* is the only option remaining to afford petitioners extraordinary relief. It is true that RSA 162-C creates an appeal remedy for a number of COD decisions; however, the decision COD made here is not subject to statutory appeal because it was made outside the scope of COD's authority. *See* RSA 162-C:6. Thus, absent the extraordinary writ of *certiorari*, the COD's decision would be unreviewable. As such, petitioners have properly sought a writ of *certiorari*.

The court turns now to the merits. The petitioners contend that COD acted outside its statutory authority in approving the Lake Sunapee boat launch project. The court agrees. To prevail on summary judgment, the respondents 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 the context of the this case, there is no issue of material fact; thus, the issue is one of law. Specifically, the court must examine whether COD's actions were within the scope of its statutory authority. In making its determination, the court understands that COD's authority to approve a project on property within its management is governed by several provisions of New Hampshire law.

[In reviewing a statute, a court must] first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. [A court must] interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. [A court must] construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, [a court must] not consider words and phrases in isolation, but rather within the context of the statute as a whole.

*In re Athena D.*, 162 N.H. 232, 235 (2011) (citations and quotations omitted).

Here, the legislature specifically limited the scope of CORD's authority. RSA 162-C:6,

IV states:

Notwithstanding paragraphs I-III, the council shall recognize that the interest of public safety and welfare may, from time to time, require minor expansion, minor modification, or minor alteration of existing roads within the state highway system. After review and approval by the council, and notwithstanding RSA 162-C:10, the department of transportation may obtain interests in lands acquired under the former RSA 221-A adjacent to state highways. **Permissible expansion, modification, or alterations under this section shall include drainage easements, slope easements, lane widening, the addition of a passing, climbing, or turning lane, or similar adjustments, but shall not include construction of a new highway or portion thereof, construction of a bypass for an existing highway, or similar major alterations.** Approval shall not be granted if reasonable and prudent alternatives exist nor if individual or cumulative approvals are likely to materially impair the conservation purposes for which the parcel was originally protected. **Projects determined by the council to be outside of the scope permitted by this subdivision shall require approval from the general court.**

(Emphasis added). This provision clearly provides that new highway projects are outside the scope of CORD's limited authority—they must be approved by the legislature.

The proposed Lake Sunapee boat launch is a new highway proposal because boat launches are categorized as class III-a highways. RSA 229:5, III-a. The statute governing these "highways" states:

Class III-a highways shall consist of **new boating access highways from any existing highway to any public water** in this state. All class III-a highways shall be limited access facilities as defined in RSA 230:44. Class III-a highways shall be subject to the layout, design, construction, and maintenance provisions of RSA 230:45-47 and all other provisions relative to limited access facilities, except that the executive director of the fish and game department shall have the same authority for class III-a highways that is delegated to the commissioner of the department of transportation for limited access facilities.

*Id.* (emphasis added). The director of F&G thus has authority over these facilities consistent with the authority of the commissioner of the DOT over other highways. RSA 230:44-a. Indeed, by statute, F&G has been authorized to acquire interests in boat launch sites:

The fish and game department, in order to establish and improve public boat access areas, shall acquire and retain lands, easements, and interests or rights in

land needed for the statewide public boat access program by donation, gift, purchase, lease, or condemnation upon terms and conditions that are consistent with state and federal guidelines. All newly acquired or constructed service roads included in the statewide public boat access program shall be laid out as limited access facilities under the provisions of RSA 230:45-47.

RSA 233-A:7. This is exactly the procedure that has been followed in this case. F&G has acquired a management interest in property held by CORD for purposes of establishing a new public boat launch into Lake Sunapee.

The respondents claim this chapter is not applicable because it refers to the DOT as the project initiator, not F&G. The court disagrees. As discussed above, F&G has co-extensive authority with DOT in the area of limited access boat launch facilities. Thus, to the extent the proposed project contemplated here is a limited access public highway, the project initiator is F&G. Pursuant to RSA 230:44-a, F&G and DOT have the same authority. Thus, F&G must follow the same procedures as DOT.

Because this launch would be new construction, and because a boat launch is statutorily defined as a highway, CORD is not authorized by its governing statute to approve the project. Consequently, CORD's April 9, 2012 decision is void as outside its statutory authority. Should respondents wish to continue with the proposed boat launch, they must comply with the specific provisions of RSA 162-C, mandating legislative approval.

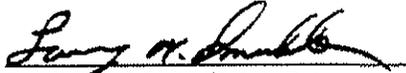
Based on the foregoing, the court concludes that the petitioners' allegations, with respect to the writs of *mandamus* and prohibition, are not "reasonably susceptible of a construction that would permit recovery" *Bohan v. Ritzo*, 141 N.H. 210, 212 (1996), quoting *Wenners v. Great State Beverages*, 140 N.H. 100, 102 (1995), cert. denied, 516 U.S. 1119 (1996). Accordingly, the respondents' motion to dismiss is GRANTED as to these writs. In contrast, the petitioners' petition for a writ of *certiorari* is susceptible to a construction that would permit recovery. *Id.* Accordingly, the respondents' motion to dismiss the petitioner's writ of *certiorari* is DENIED. Be-

cause CORD acted outside the scope of its enabling authority when it approved what is statutorily defined as a class III-a highway, the respondents have failed to sustain their burden of showing that they are entitled to judgment as a matter of law on the undisputed facts. Accordingly, the respondents' motion for summary judgment on the writ of *certiorari* is DENIED.

Finally, the petitioners seek other relief from this court; namely, a declaration that F&G's proposed project violates the public trust doctrine and RSA 162-C. Based on the summary judgment analysis, the F&G and CORD actions that are the subject of the petitioners' "appeal" must be reversed. As such, they are not final. The petitioners' requested relief is not ripe. Thus, the court *sua sponte* dismisses the petitioners' remaining claims. "A trial court has the discretion to dismiss an action *sua sponte* where the allegations contained in a writ do not state a claim upon which relief can be granted." *Kennedy v. Titcomb*, 131 N.H. 399, 401 (1989), citing *Garabedian v. William Co.*, 106 N.H. 156, 157-58, (1965).

So ORDERED.

Date: August 27, 2012

  
LARRY M. SMUKLER  
PRESIDING JUSTICE